

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001801-MR

KINDRED HEALTHCARE, INC;
KINDRED NURSING CENTERS LIMITED
PARTNERSHIP D/B/A HARRODSBURG
HEALTH CARE CENTER; KINDRED NURSING
CENTERS EAST, LLC; KINDRED HOSPITALS
LIMITED PARTNERSHIP;
KINDRED HEALTHCARE OPERATING, INC.;
KINDRED REHAB SERVICES, INC. D/B/A
PEOPLEFIRST REHABILITATION
N/K/A REHABCARE; AND JOHN
DOES 1 THROUGH 5, UNKNOWN DEFENDANTS

APPELLANTS

v. APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 12-CI-00227

ADRIANNE NICHOLS, ADMINISTRATRIX
OF THE ESTATE OF
CHARLIE NICHOLS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, NICKELL, AND THOMPSON, JUDGES.

COMBS, JUDGE: Kindred Healthcare, Inc.; Kindred Nursing Centers Ltd. Partnership d/b/a Harrodsburg Health Care Center; Kindred Nursing Centers East, LLC; Kindred Hospitals Limited Partnership; Kindred Healthcare Operating, Inc.; and Kindred Rehab Services, Inc. d/b/a Peoplefirst Rehabilitation n/k/a Rehabcare (collectively referred to herein as “the nursing home”), appeal from the September 27, 2012, order of the Mercer Circuit Court denying a motion to compel arbitration of the action commenced by Charlie Nichols, a resident of the nursing home, now deceased. The nursing home contends that the trial court erred by concluding that Anetha Nichols, the daughter of Charlie Nichols, lacked the necessary authority to bind her father to the terms of an alternative dispute resolution agreement that contained a provision requiring arbitration of the parties’ disputes. After our review, we affirm.

On September 15, 2010, Charlie Nichols executed a general power-of-attorney instrument granting to Anetha Nichols broad authority to handle his affairs. Anetha was given the power “[t]o exercise any . . . right . . . relating to any person, item, transaction, thing . . . or matter whatsoever. . . .” The instrument was made effective as of December 15, 2010.

On August 9, 2011, Charlie Nichols was admitted to the nursing home. As his attorney-in-fact, Anetha signed an alternative dispute resolution (ADR) agreement presented to her by the nursing home. The agreement provided that the parties would submit to binding arbitration any and all unresolved causes

of action arising out of or in any way relating to the resident's stay at the nursing home. In bold print, the front page of the agreement provided that "the parties are waiving their right to a trial, including their right to a jury trial, their right to trial by a Judge and their right to appeal the decision of the arbitrator(s)." The agreement declared that its execution was optional.

On June 25, 2012, Charlie Nichols commenced a civil action against the nursing home in Mercer Circuit Court. He alleged that he had sustained personal injuries as a result of the negligence of the nursing home.

On August 15, 2012, based upon the terms of the ADR agreement, the nursing home filed a motion seeking to compel arbitration. Citing the decision of the Supreme Court of Kentucky in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), *cert. denied*, ___ U.S. ___, 133 S.Ct. 1996, 185 L.Ed.2d 879 (2013), the trial court denied the motion by order entered on September 27, 2012. The trial court concluded that the broad authority granted to Anetha to act as Charlie Nichols's power of attorney did *not* encompass the authority to enter into an arbitration agreement that waived his right to a jury trial.

Since an order denying a motion to compel arbitration is immediately appealable pursuant to the provisions of KRS¹ 417.220(1), the nursing home filed its notice of appeal on October 19, 2012. A few days later, Charlie Nichols passed away. Anetha Nichols was appointed administratrix of the estate and was ordered to substitute as the appellee in this appeal. Anetha passed away in October 2013.

¹ Kentucky Revised Statutes.

Adrienne Nichols, the successor administratrix of the estate of Charlie Nichols, was then ordered to substitute as the appellee.

If enforceable, the terms of the ADR agreement would govern the claims asserted against the nursing home in this action and would prohibit the underlying litigation. On appeal, the nursing home contends that the terms of the ADR agreement are wholly enforceable and that the trial court erred by concluding that the provisions of the power-of-attorney instrument did not authorize Anetha to execute the agreement. Based upon the holding of the Supreme Court of Kentucky in *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015), we disagree and affirm the order of the circuit court.

“To create a valid, enforceable contract, there must be a voluntary, complete assent by the parties having capacity to contract.” *Id.* at 321, *citing Connors v. Eble*, 269 S.W.2d 716, 717-18 (Ky. 1954). One’s assent to a contract can be provided by an agent acting as an attorney-in-fact “if the authority to do so was duly conferred upon the attorney-in-fact by the power-of-attorney instrument.” *Id.* Whether the principal’s assent to the contractual agreement to arbitrate disputes was validly obtained is a question of law that “depends entirely upon the scope of authority set forth in the written power-of-attorney instrument.” *Whisman, supra, citing Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), *cert. denied*, ___ U.S. ___, 133 S.Ct. 1996, 185 L.Ed.2d 879 (2013).

The nursing home claims that the parties' ADR agreement is valid and enforceable since Anetha was authorized by the power of attorney instrument to perform any act necessary

to sue for . . . property and property rights, and demands whatsoever . . . and take all lawful means and equitable and legal remedies, procedures . . . [on behalf of Charlie Nichols] for the collection and recovery thereof; and to . . . compromise, and agree for the same, and to make, execute, and deliver for [Charlie Nichols] . . . all . . . releases, receipts, or other sufficient discharges for the same.

However, the *Whisman* Court unequivocally rejected a similar contention.

In *Whisman*, the Supreme Court held that an instrument granting an attorney-in-fact the power to “institute or defend suits concerning [the principal’s] property rights” **did not** authorize execution of a pre-dispute arbitration agreement because arbitration is not a “suit” or legal action but instead a process designed to avoid litigation. *Id.* at 323. Additionally, it concluded that an agreement to arbitrate is not settlement of a claim. It is instead an alternative forum in which to pursue the controversy. “Settling a claim ends the controversy, whereas arbitrating a claim means fighting it out before an arbitrator rather than a judge and jury.” *Id.* Based upon the analysis of the Supreme Court of Kentucky in *Whisman*, we must conclude that the authority that Charlie Nichols granted to Anetha to sue and to compromise claims for settlement did not include the authority to execute an ADR agreement that provided for binding arbitration.

After concluding that authority to litigate does not encompass the authority to agree to arbitrate, the Supreme Court of Kentucky also addressed a provision granting even broader authority. The *Whisman* Court considered a power-of-attorney provision granting the attorney-in-fact authority “to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way” and “[g]enerally to do and perform for me in my name all that I might if present. . . .” The Court concluded that even this extraordinarily broad grant of power did not authorize the attorney-in-fact to enter into an arbitration agreement. The Court focused on the fact that an agreement to arbitrate controversies or disputes effectively constitutes a waiver of fundamental constitutional rights.

The *Whisman* Court emphasized that the Kentucky Constitution guarantees the right of access to the courts (Ky. Const. § 14), the right of appeal to a higher court (Ky. Const. § 115), and the right of trial by jury (Ky. Const. § 7). *Id.* at 328. An agreement to settle disputes through binding arbitration waives each of these rights. It held that “the power to waive generally such fundamental constitutional rights **must be unambiguously expressed in the power-of-attorney document** in order for that authority to be vested in the attorney-in-fact.” *Id.* (Emphases added.) The Court continued to emphasize the need for absolute and clearly articulated specificity:

We will not . . . infer from the principal’s silence or from a vague and general delegation of authority to ‘do whatever I might do,’ that an attorney-in-fact is authorized to bargain away his principal’s rights of access to the courts and to a jury trial in future matters as

yet not anticipated or even contemplated. . . . [T]o cloak the agent with authority to waive the fundamental right to an adjudication by judge or jury, the power-of-attorney document **must expressly so provide.**

Id. at 329. (Emphasis added.)

Anetha was empowered by the provisions of Charlie Nichols’s power-of-attorney instrument “[t]o conduct, engage in, and transact any and all lawful business of whatever nature or kind for me, on my behalf, and in my name . . .” and “[t]o exercise any . . . right . . . relating to any person, item, transaction, thing . . . or matter whatsoever . . .” However, since the authority to waive Nichols’s constitutional rights of access to the courts, to a decision by judge or jury, and to appeal to a higher court were not specifically and explicitly set out in the power-of-attorney instrument **in so many words**, we cannot conclude that Anetha was authorized to bind Nichols to an agreement to arbitrate disputes under the reasoning of *Whisman*. Consequently, the arbitration agreement signed by Anetha cannot be enforced.

We affirm the order of the Mercer Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

J. Peter Cassidy Jr.
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BRIEF FOR APPELLEE:

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