RENDERED: JUNE 17, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002089-MR

KINDRED NURSING CENTERS LIMITED PARTNERSHIP D/B/A KINDRED NURSING AND REHABILITATION – DANVILLE (DANVILLE CENTRE); KINDRED HEALTHCARE, INC.; 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 — APPELLANTS

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 13-CI-00005

BILL LEE KLECKNER, AS EXECUTOR OF THE ESTATE OF NANCY ROBERTA HOFFMAN KLECKNER, DECEASED — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

NICKELL, JUDGE: Kindred Nursing Centers Limited Partnership d/b/a Kindred Nursing and Rehabilitation – Danville (Danville Centre); Kindred Healthcare, Inc.; 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 (Kindred), challenge the Boyle Circuit Court's denial of its motion to compel arbitration of claims related to the late Nancy Hoffman Kleckner's stay in its Danville facility. Having read the briefs, the record and the law, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Kindred operates a nursing home in Danville, Kentucky. Nancy resided in that facility in January 2011 and again in July 2012.[1] Before being admitted to the Kindred facility, Nancy executed a power of attorney (POA), naming her son, Bill Lee Kleckner, her attorney-in-fact. The single-page POA read as follows:

> I, NANCY HOFFMAN KLECKNER, of 451 Coldstream, Danville, Kentucky 40422, hereby constitute and appoint my son, BILL LEE KLECKNER, of 613 North Buell, Perryville, Kentucky 40468, my true and lawful Attorney-in-Fact, with full power for me and in my name and stead, to make contracts, lease, sell or convey any real or personal property that I may now or hereafter own; to receive and receipt for any money which may now or hereafter be due to me; to make deposits in banking institutions, building and loan

[1] Nancy lived at Kindred on two separate occasions. First from January 18 through May 23, 2011, and again from July 26, 2012, through September 12, 2012.

> associations or brokerage houses; to draw, make and sign any and all checks, contracts or agreements; to invest or reinvest my money for me; to enter any safe deposit box in my name in any bank and to remove therefrom any part or all of the contents of said box or boxes without accounting to any person for authority to do so; to institute or defend suits concerning my property or rights and generally do and perform for me and in my name all that I might do if present, provided, however, that my said attorney is not to bind me as surety, guarantor or endorser for accommodation. This Power of Attorney shall not be affected by the disability of the principal.

When Bill completed the admissions packet provided by Kindred to admit his mother to its facility, he was asked to sign a four-page optional alternative dispute resolution (ADR) agreement purporting to direct any and all claims that could not be informally settled arising from his mother's stay in Kindred to mediation and then to binding arbitration, thereby waiving all right to trial and appeal. Exercising his mother's POA, Bill signed the ADR agreement. When Nancy died on December 1, 2012, Bill was appointed executor of her estate. Despite having signed the ADR agreement—requiring mediation followed by binding arbitration of any claim against Kindred related to Nancy's stay in the facility—Bill filed a civil complaint in Boyle Circuit Court seeking damages for personal injury; violations of the long-term care resident's rights statute;[2] and wrongful death, all as a result of Kindred providing negligent care.

Kindred moved the court to compel arbitration and either stay or dismiss the complaint. That motion was denied in a three-sentence order stating:

[2] Kentucky Revised Statutes (KRS) 216.515, *et seq.*

> This matter is before the Court on Defendants' *Motion to Compel Arbitration and to Dismiss or Stay Pending Lawsuit.* 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.,* 376 SW3d (sic) 581 (Ky. 2012), the arbitration agreement at issue is unenforceable. Defendants' Motion to Compel Arbitration and to Dismiss or Stay Pending Lawsuit is HEREBY DENIED.

It is from this order that Kindred now appeals, claiming *Ping* is inapplicable.

We placed the appeal in abeyance pending resolution of *Overstreet v. Kindred Nursing Centers Limited Partnership*, --- S.W.3d --- (Ky. 2015) and *Extendicare Homes, Inc. v. Whisman*,[3] --- S.W.3d --- (Ky. 2015), both of which became final on February 18, 2016. Soon thereafter, we removed the appeal from abeyance and returned it to the active docket. Based upon *Whisman*, we now affirm.

[3] *Whisman* consolidated three cases.

ANALYSIS

Kindred designed its brief to convince us *Ping* is not dispositive of the matter at hand. However, under the current state of the law in Kentucky, the question is not whether *Ping* controls, but whether *Whisman* controls, and we conclude it does. The premise of Kindred's argument is Nancy executed a POA naming her son as her attorney-in-fact and in that capacity, Bill signed the ADR agreement which directed in relevant part:

> [a]ny and all claims or controversies arising out of or in any way relating to this ADR Agreement ("Agreement") or the Resident's stay at the Facility including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties (including, without limitation, any claim based on violation of rights, negligence, medical malpractice, any other departure from the accepted standards of health care or safety or the Code of Federal Regulations or unpaid nursing home charges), irrespective of the basis for the duty or of the legal theories upon which the claim is asserted, shall be submitted to alternative dispute resolution in the Commonwealth of Kentucky as described in this Agreement. Only disputes that would constitute a legally cognizable cause of action in a court of law may be submitted to alternative dispute resolution. **The parties to this Agreement understand that the Dispute Resolution Process contains provisions for both mediation and binding arbitration. If the parties are unable to reach settlement informally, or through mediation, the dispute shall proceed to binding arbitration. Binding arbitration means 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).** Except as expressly set forth herein, the provisions of the Uniform Arbitration Act, KRS 417.045 et. seq., shall govern the Arbitration. This Agreement includes claims against the Facility, its employees and/or its medical director in his capacity as medical director.

(Emphasis in original). Kindred bases its appellate argument on language from both the POA and the ADR agreement.

Kindred maintains Nancy's use of two phrases in the POA she executed gave Bill "ample" authority to relinquish Nancy's right to a jury trial and appeal and to require submission of all claims related to her stay at Kindred to binding arbitration. The language on which Kindred relies is:

> **full power** . . . **to draw, make and sign any and all** checks, **contracts or agreements**; . . . **to institute or defend suits concerning my property or rights**[.]

(Emphasis added). Our Supreme Court rejected similar language found in the three POA's reviewed in *Whisman*, two of which involved facilities operated by Kindred. Being bound by *Whisman,* we follow suit herein and affirm the trial court's denial of the motion to compel arbitration. *Smith v. Vilvarajah,* 57 S.W.3d 839, 841 (Ky. App. 2000) (Court of Appeals bound by Supreme Court of Kentucky opinions).

Moreover, we may affirm a trial court "for any reason in the record." *Mark D. Dean, P.S.C. v. Commonwealth Bank & Trust Co.*, 434 S.W.3d 489, 495-96 (Ky. 2014) (quoting *Fischer v. Fischer*, 348 S.W.3d 582, 591 (Ky. 2011)). Thus, it matters not that the trial court dismissed Kindred's motion to compel solely on the basis of *Ping*. *Whisman,* a newer opinion which had not been decided

when the trial court entered its ruling, and which reinforces many aspects of *Ping*, is definitive of the issues presented herein.

As specified in *Whisman,* our analysis concerns not the actual language used in the ADR agreement, but a more fundamental question—whether an arbitration agreement was ever validly formed. In other words, did Bill have authority to sign the ADR agreement presented to him by Kindred? As we will explain, the answer is no, he was not so authorized, and therefore, Kindred's motion to compel was properly denied.

> There is no dispute that *if* the arbitration agreements were validly formed, they are enforceable as written under both the Kentucky Uniform Arbitration Act (KUAA). KRS 417.050 *et seq.,* and the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.,* at least with respect to the decedents' claims for personal injury and statutory violations.

Whisman, at *8. Thus, we reject Kindred's argument that Kentucky disparately treats and is hostile towards arbitration agreements. Nancy could have authorized Bill to agree to arbitration of any personal injury or statutory violations, but the language in the POA she executed she did not convey such authority, and we will not add provisions Nancy, as the principal, did not include herself.

Wrongful death actions are addressed separately from personal injury claims and statutory violations because such claims belong to the beneficiary, not the decedent. *Pete v. Anderson,* 413 S.W.3d 291, 299 (Ky. 2013); *Ping,* 376 S.W.3d at 597-600. Therefore, Nancy's POA could not, and did not, authorize Bill

to agree to submit to binding arbitration a wrongful death action on Nancy's behalf.

Nancy could have authorized Bill to agree to arbitrate claims related to her stay in the Kindred facility if there existed "a voluntary, complete assent by the parties having capacity to contract." *Whisman*, at *9. Because a POA must be strictly construed, *Harding v. Kentucky River Hardwood Co.*, 205 Ky. 1, 265 S.W. 429, 431 (1924), unless Nancy's POA specifically authorized her son to "settle claims and disputes or some such express authorization addressing dispute resolution," we will not infer such authority lightly. *Ping*, at 593.

> Citing *Ping,* in *Whisman,* at *12, our Supreme Court wrote:
>
> [t]he power "to draw, make and sign any and all checks, contracts, notes, mortgages, agreements, or any other document including state and Federal tax returns" does not confer the authority to enter in a pre-dispute arbitration agreement.

The Court reached this conclusion because power expressly geared toward "the principal's property and financial affairs, and to health-care decisions" will not be construed as universal authority to take other action. *Whisman,* at *12. As stated in *Whisman,* the cited language "relates to the conduct of [the principal's] financial and banking affairs, and not to the vindication of unanticipated causes of action that might arise in the future." *Id.* Nancy's POA used similar phrasing, granting her son the power "to draw, make and sign any and all checks, contracts or agreements . . . ." However, because Nancy did not specifically authorize Bill to agree to arbitration, Nancy did not assent to Kindred's arbitration agreement, and

without such assent, there could be no valid arbitration agreement of which the circuit court could compel enforcement. *Id.*

Similarly, *Whisman*, at *10-11, held the phrase, "to institute or defend suits concerning my property or rights," did not confer authority on an attorney-in-fact to agree to pre-dispute arbitration. Nancy's POA contained the same wording. When Bill executed the arbitration agreement, no suit regarding Nancy's property or rights was pending or even contemplated. Furthermore, arbitrating a claim is the "antithesis" of filing suit; a far cry from instituting or defending a lawsuit. *Whisman*, at *11. "Instituting a suit is not the same thing as initiating a claim in arbitration; the two are mutually exclusive actions." *Id*. As with the arbitration agreement rejected in *Whisman*, Kindred's agreement "expressly prohibits [Bill] from doing the very thing that [Nancy's] POA unequivocally authorized [him] to do." *Id*. While the particular phrase under review

> would authorize the attorney-in-fact to do what is reasonably necessary in the management of an actual claim or lawsuit, including the authority to settle or compromise the claim, . . . an agreement to submit a dispute to arbitration is the diametrical opposite of 'settling' a claim. Settling a claim ends the controversy, whereas arbitrating a claim means fighting it out before an arbitrator rather than a judge and jury.

Id. Hence, the phrase, "to institute or defend suits concerning my property or rights," is not the specific authorization needed for Bill to be able to agree to arbitration.

For the reasons set forth above, we affirm the Boyle Circuit Court's denial of Kindred's motion to compel arbitration and to dismiss or stay the pending lawsuit.

ALL CONCUR.

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