RENDERED: JULY 26, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000885-MR

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, D/B/A OAKVIEW NURSING & REHABILITATION CENTER; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; AND KINDRED HEALTHCARE OPERATING, INC. — APPELLANTS

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2017-SC-000051-DG

APPEAL FROM MARSHALL CIRCUIT COURT
v. HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 13-CI-00005

TERRELL POWELL, AS ADMINISTRATOR OF THE ESTATE OF VIRGINIA WELLS, DECEASED; AND TERRELL POWELL, ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF VIRGINIA WELLS — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: MAZE, TAYLOR AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: This case concerns the authority of an attorney-in-fact under a power-of-attorney (POA) to enter into an arbitration agreement on his principal's behalf. We first considered the question after Kindred Nursing Centers Limited Partnership d/b/a Oakview Nursing & Rehabilitation Center (Kindred) and its affiliated entities[1] appealed from an order of the Marshall Circuit Court denying a motion to compel arbitration resulting in our opinion in *Kindred Nursing Centers Limited Partnership v. Powell*, 2013-CA-000885-MR. The matter is again before this Court after our Supreme Court remanded to us for reconsideration of our prior opinion in light of *Kindred Nursing Centers Limited Partnership v. Clark*, ____ U.S. ____, 137 S.Ct. 1421, 197 L.Ed.2d 806 (2017) and *Kindred Nursing Centers Limited Partnership v. Wellner*, 533 S.W.3d 189 (Ky. 2017). Having done so, we affirm in part, reverse in part and remand.

On April 2, 2007, Virginia executed a POA appointing Terrell Powell as her attorney-in-fact and conferring power to "make contracts, lease, sell or convey any real or personal property," and "to institute or defend suits concerning (Virginia's) property or rights, and generally to do and perform for (Virginia) and in (Virginia's) name all that (Virginia) might do if present[.]"

[1] Kindred Nursing Centers East, LLC; Kindred Hospitals Limited Partnership; Kindred Healthcare, Inc.; and Kindred Healthcare Operating, Inc.

Virginia was admitted to Oakview Nursing & Rehabilitation Center on April 18, 2011. On April 20, 2011, Terrell signed a document entitled "Alternative Dispute Resolution Agreement." The optional agreement requires that the parties submit any claims arising out of or related to Virginia's care at the Kindred facility to arbitration.

In bold print the agreement states:

> **The parties to this Agreement understand that the Dispute Resolution Process contains provisions for 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).**

Virginia resided at Oakview until her death on June 13, 2012. After Terrell was appointed as administrator of Virginia's estate, he filed this action in the Marshall Circuit Court claiming personal injuries to Virginia caused by Kindred's negligence, violation of Kentucky's long-term care resident's rights statute, Kentucky Revised Statutes (KRS) 216.515, and wrongful death. Kindred filed a motion to compel arbitration and stay or dismiss the pending lawsuit based upon the arbitration agreement. The circuit court denied Kindred's motion. Kindred appealed.

In our original opinion, we held that the arbitration agreement did not preclude Terrell's wrongful death action. We relied upon *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), where the Court rejected the notion that a similar arbitration agreement executed by an attorney-in-fact could bind the beneficiaries of a wrongful death claim. As the *Ping* Court held, the statutory wrongful death claim, "does not derive from any claim on behalf of the decedent," and, therefore, the decedent could not directly or through an attorney-in-fact bind the wrongful death beneficiaries to an arbitration agreement. *Id*. at 600. That part of our decision is not at issue on remand.

The issue is whether the personal injury and statutory claims that belonged to Virginia and to which the estate succeeded must be submitted to arbitration. In our initial opinion, we resolved this issue unfavorably to Kindred in reliance on *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015). With the benefit of the United States Supreme Court's decision in *Clark* and the Kentucky Supreme Court's decision in *Wellner*, we hold those claims must be submitted to arbitration.

The issue of whether an attorney-in-fact had authority to enter into an arbitration agreement upon admission of the principal to a nursing home has been a recurring issue. In fact, *Wellner* was initially before the Supreme Court of Kentucky with two other cases—*Extendicare Homes, Inc. v. Whisman* and *Kindred*

Nursing Centers Ltd. Partnership v. Clark—which were consolidated into a single opinion. *Whisman*, 478 S.W.3d 306. Extendicare Homes, Inc. did not seek review by the United States Supreme Court and its case became final. Kindred sought review of the Kentucky Supreme Court's decisions in *Clark* and *Wellner* in the United States Supreme Court. The United States Supreme Court issued a consolidated opinion and reversed the Supreme Court of Kentucky in *Clark* but remanded *Wellner*. To avoid confusion, we clarify that in this opinion, *Whisman* refers to our Supreme Court's initial decision, *Clark* refers to the United States Supreme Court's decision, and *Wellner* refers to our Supreme Court's decision on remand.

KRS 417.050 provides that a written agreement to submit any existing controversy to arbitration between the parties "is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract." The Federal Arbitration Act (FAA) contains the identical provision. 9 United States Code §2. The United States Supreme Court has warned that states may not apply legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 1746, 179 L.Ed.2d 742 (2011). That warning was not, in the United States Supreme Court's view, heeded in *Whisman*.

As noted in *Whisman,* the Kentucky Supreme Court considered two POA documents. The Clark POA stated that the attorney-in-fact had the authority "to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way" and "**to do and perform for me and in my name all that I might do if present**." *Whisman*, 478 S.W.3d 317-18. The Kentucky Supreme Court held that "[g]iven this extremely broad, universal delegation of authority, it would be impossible to say that entering into a pre-dispute arbitration agreement was not covered." *Id*. at 327. However, our Supreme Court held that was not enough to authorize the attorney-in fact to enter into an arbitration agreement. The Court observed that by executing the arbitration agreement, the attorney-in-fact waived Clarks's constitutional rights to access the court and for a trial by jury. *Id*. at 329. It held that "the power to waive generally such fundamental constitutional rights must be unambiguously expressed in the text of the [POA] in order for that authority to be vested in the attorney-in-fact." *Id*. at 328.

The United States Supreme Court reversed. It held that a rule requiring a clear statement conferring on the attorney-in-fact the power to waive constitutional rights, where the attorney-in-fact possessed the power to enter into pre-dispute arbitration agreements was a prohibited rule "hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to

the court and receive a jury trial." *Clark*, 137 S.Ct. at 1427. The United States Supreme Court explained:

> As noted earlier, the state court held that the Clark [POA] was sufficiently broad to cover executing an arbitration agreement. The court invalidated the agreement with Kindred only because the [POA] did not specifically authorize Janis to enter into it on Olive's behalf. In other words, the decision below was based exclusively on the clear-statement rule that we have held violates the FAA. So the court must now enforce the Clark-Kindred arbitration agreement.

Id. at 1429.

The Wellner POA contained different language from the Clark POA. In contrast to its conclusion that the Clark POA was broad enough to give the attorney-in-fact authority to enter into pre-dispute arbitration agreements, the Kentucky Supreme Court decided that the Wellner POA was insufficiently broad to give the attorney-in-fact authority to execute a pre-dispute arbitration agreement on the principal's behalf. *Whisman*, 478 S.W.3d at 325-26. In *Clark*, the United States Supreme Court concluded that "[i]f that interpretation of the document is wholly independent of the court's clear-statement rule, then nothing we have said disturbs it. But if that rule at all influenced the construction of the Wellner [POA], then the court must evaluate the document's meaning anew." *Clark*, 137 S.Ct. at 1429. The *Wellner* case was remanded to the Kentucky Supreme Court to determine whether its opinion was tainted by the clear-statement rule. *Id*.

On remand, the Kentucky Supreme Court emphasized that Kindred did not rely on as broad a provision as that in the Clark POA. As stated by the Court, Kindred relied on two provisions:

> 1) 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;)" and, 2) the power "to 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."[2]

Wellner, 533 S.W.3d at 193 (quoting *Whisman*, 478 S.W.3d at 325). Ultimately, the Court reaffirmed its original decision that neither provision was sufficiently broad to include the authority to execute an arbitration agreement. Its decision was made independent of and untainted by the clear-statement rule denounced in *Clark*. *Id*. at 194.

The Kentucky Supreme Court reiterated its original conclusion that the powers to "demand, sue for, collect, recover and receive all . . . demands whatsoever" and "to institute legal proceedings," do confer the authority to bind existing claims to arbitration. *Id.* at 193. However, as the Court observed, the Kindred arbitration agreement was not executed in the context of a lawsuit or claim

[2] The Court declined to consider whether other provisions in the Wellner POA that were not pursued on appeal would support Kindred's position. *Wellner*, 533 S.W.3d at 193 n. 5.

but in the context of admitting the principal to a nursing home. For that reason, it did not confer the authority to sign the arbitration agreement. *Id*.

Our Supreme Court also reaffirmed its original holding that the power to make contracts "in relation to both real and personal property" did not confer the power to execute a pre-dispute arbitration agreement because it did not relate to the principal's property rights. *Id*. at 194. As the Court explained, its decision did not turn on the clear-statement rule.

> [O]ur decision with respect to this provision of the POA was based exclusively upon the clear fact that Kindred's pre-dispute arbitration contract did not relate to any property rights of Joe Wellner. It did not buy, sell, give, trade, alter, repair, destroy, divide, or otherwise affect or dispose of in any way any of Joe Wellner's personal property. By executing Kindred's pre-dispute arbitration agreement, Beverly did not "make, execute and deliver deeds, releases, conveyances and contracts of [any] nature in relation to [Joe's] property." The only "thing" of Joe Wellner's affected by the pre-dispute arbitration agreement was his constitutional rights, which no one contends to be his real or personal property.

Id. The Court concluded:

> Kindred's agreement failed, not because the Wellner POA lacked a clear statement referencing the authority to waive Joe's fundamental constitutional rights; it failed because, by its own specific terms it was not executed in relation to any of Joe Wellner's property, and it was not a document pertaining to the enforcement of any of Joe's existing claims.

Id.

The POA in this case contains the same broad language as in the Clark POA. Although Kindred relied on this provision in its appeal, this Court rejected its argument based on the Kentucky Supreme Court's opinion in *Whisman*. We did so in reliance on the following language.

> The need for specificity is all the more important when the affected fundamental rights include 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, which incidentally is the *only* thing that our Constitution commands us to hold sacred.

Whisman, 478 S.W.3d at 328 (footnotes and internal quotation marks omitted). This same language led the United States Supreme Court to conclude that the Kentucky Supreme Court's decision in *Whisman* was wrong as it pertained to the Clark POA. The United States Supreme Court was candidly critical of such reasoning stating:

> In ringing terms, the [Kentucky Supreme Court] affirmed the jury right's unsurpassed standing in the State Constitution: The framers, the court explained, recognized "that right and that right alone as a divine God-given right" when they made it "the *only* thing" that must be "'held sacred'" and "'inviolate.'" So it was that the court required an explicit statement before an attorney-in-fact, even if possessing broad delegated powers, could relinquish that right on another's behalf. And so it was that the court did exactly what *Concepcion* barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial. Such a rule is too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to

> uncommon barriers—to survive the FAA's edict against singling out those contracts for disfavored treatment.

Clark, 137 S.Ct. at 1427 (internal citations and parenthetical information omitted).

We have reconsidered our prior decision and conclude that the POA conferred on Terrell the authority to enter into the arbitration agreement with Kindred. The order of the Marshall Circuit Court is affirmed to the extent that it holds the wrongful death claim is not subject to arbitration. It is reversed to the extent it holds the remaining claims are not subject to arbitration and the case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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