RENDERED: MARCH 15, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000541-MR

GENESIS ELDERCARE REHABILITATION SERVICES, INC. — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 16-CI-001563

MICHAEL O. MORTON, POWER OF ATTORNEY FOR HILDA MORTON — APPELLEE

and

NO. 2017-CA-000574-MR

AHF/KENTUCKY-IOWA, INC., D/B/A GEORGETOWN MANOR — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 16-CI-1563

MICHAEL O. MORTON, POWER OF ATTORNEY FOR HILDA MORTON; and GENESIS ELDERCARE REHABILITATION SERVICES, INC. — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND K. THOMPSON, JUDGES.

COMBS, JUDGE: AHF/Kentucky-Iowa, Inc., d/b/a Georgetown Manor, and Genesis Eldercare Rehabilitation Services, Inc., ("Genesis Eldercare") appeal from the denial of their motion to compel arbitration. Based in part upon the opinion of the Supreme Court of the United States in *Kindred Nursing Centers Ltd. Partnership v. Clark*, 581 U.S. ___, 137 S.Ct. 1421, 197 L.Ed.2d 806 (2017), we are compelled to reverse and remand for an order dismissing the lawsuit.

Hilda Morton was a resident at Georgetown Manor in Louisville from March 17, 2015, until April 16, 2015, and again from July 18, 2015, until her death in March 2017. On January 13, 2004, before Hilda became a resident of Georgetown Manor, she executed a durable power of attorney in which she appointed her son, Michael Owen Morton, as her attorney-in-fact. Among other powers, this durable power of attorney (POA) expressly granted Morton generalized authority to act "[i]n [Hilda's] name, place and stead, in any way which [she] could do if [she] was personally present with respect to the following matters and to the extent that [she was] permitted by law to act through an agent."

Additionally, Morton was specifically authorized to act for Hilda in "making contracts, in [her] name, concerning any personal property owned by [her], for such consideration and on such terms as my attorney in fact may consider advisable;" "making collections and settling claims, including demanding and collecting money due and payable to [her] from any source;" "to institute and prosecute legal proceedings necessary for the collection of money, and appear, in [her] name, in any such proceeding;" and "to compromise and settle disputed matters." The POA expressly provided that it was Hilda's intention to grant to Morton power to act for her in "all other matters, which [she, herself] would have the power to tend to" and to "execute instruments on her behalf." The POA was properly notarized.

Pursuant to his authority under the POA, Morton executed paperwork for Hilda upon her admission to Georgetown Manor on March 17, 2015, and again on July 18, 2015. Among the documents Morton executed each time, was one entitled "Voluntary Arbitration and Limitation of Liability Agreement" ("the ADR agreement"). The ADR agreement provided that the parties were agreeing to submit to binding arbitration all disputes that might arise out of or related to the resident's stay. By executing the ADR agreement, Morton specifically agreed -- on Hilda's behalf -- to resolve any "medical claim or negligence claim or both that seek to recover monetary damages in civil court for injury, death, or loss to person

or property" through arbitration. Morton was allotted thirty days in which to withdraw his consent to submit disputes between the parties to binding arbitration.

On April 4, 2016, Morton, acting as Hilda's attorney-in-fact, filed this negligence injury action against Georgetown Manor and Genesis Eldercare in Jefferson Circuit Court. Genesis Eldercare provides therapy services at Georgetown Manor and provided services to Hilda as part of her care and treatment at Georgetown Manor. Morton alleged that Georgetown Manor and Genesis Eldercare had been negligent in their care and treatment of Hilda.

On May 25, 2016, Georgetown Manor filed a motion to dismiss the case, arguing that the arbitration agreement that Morton had executed prohibited the legal action. Genesis Eldercare joined in the motion. Relying on the decision of the Supreme Court of Kentucky in *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015), the Jefferson Circuit Court denied the motion in an order entered March 13, 2017.[1] These separate appeals followed. We elect to hear them together.

On appeal, Georgetown Manor and Genesis Eldercare argue that the trial court's refusal to dismiss the action and to compel arbitration instead cannot be affirmed on the basis of the *Whisman* decision since the rationale underlying its

[1] Hilda Morton died on March 9, 2017. Morton filed the notice of death with this court on May 1, 2017. Pursuant to our order entered June 2, 2017, the appeals were held in abeyance for ninety days. The circuit court ordered the action revived on June 6, 2017.

holding was rejected by the Supreme Court of the United States in the subsequent case of *Kindred Nursing Centers v. Clark, supra.* We agree.

In *Whisman,* the Supreme Court of Kentucky examined the power-of-attorney documents in each of three consolidated cases. The court stated that "without a clear and convincing manifestation of the principal's intention to do so, we will not infer the delegation to an agent of the authority to waive a fundamental personal right so constitutionally revered as the 'ancient mode of trial by jury.'" *Id.* at 313 (quoting KY. CONST. § 7). The *Whisman* Court concluded that an attorney-in-fact has authority to execute an arbitration agreement **only** where the power-of-attorney document explicitly grants that specific authority -- the "clear-statement rule."

Upon its review, the Supreme Court of the United States noted that the Federal Arbitration Act (the FAA) preempts any state rule discriminating on its face against arbitration. 9 U.S.C. § 2 The Court rejected our "clear-statement rule" because it singled out arbitration agreements for disfavored treatment in derogation and in violation of the FAA. It concluded that in *Whisman, supra,* the Kentucky Supreme Court had "specially impeded the ability of attorneys-in-fact to enter into arbitration agreements" and "flouted the FAA's command to place those agreements on an equal footing with all other contracts." 581 U.S. at ___, 137 S.Ct. at 1429.

In denying Appellants' joint motion to compel arbitration, the Jefferson Circuit Court reasoned that the language of the POA, while comprehensive, did not **explicitly** grant Morton authority to agree to arbitration. However, the broad language of Hilda's POA was a universal delegation of authority to her son and was expansive enough to encompass the power to enter into a binding arbitration agreement on his mother's behalf. The circuit court's decision wholly harmonized with precedent binding upon it at the time it was rendered. However, the *Clark* decision has been superseded and rejected the *Whisman* holding upon which the trial court had relied.

Therefore, we are compelled to reverse the order of the Jefferson Circuit Court and to remand for an order dismissing.

CLAYTON, CHIEF JUDGE, CONCURS.

THOMPSON, K., JUDGE, CONCURS IN RESULT ONLY.

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