RENDERED: OCTOBER 21, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002074-MR

KINDRED HEALTHCARE, INC.,
KINDRED NURSING CENTERS LIMITED
PARTNERSIP, D/B/A HILLCREST 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, INC. APPELLANTS

ON REMAND FROM KENTUCKY SUPREME COURT
ACTION NO. 2013-SC-00759-DG
APPEAL FROM DAVIESS CIRCUIT COURT
v. HONORABLE JOSEPH W. CASTLEN III, JUDGE
ACTION NOS. 12-CI-00903

ARTIE CHEROLIS, AS EXECUTRIX OF THE ESTATE
OF THELMA FUQUA, DECEASED APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

MAZE, JUDGE: This matter comes before the Court on remand from an order of the Kentucky Supreme Court vacating our prior opinion and remanding for re-consideration in light of *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015) ("*Whisman"*). Kindred Healthcare, Inc. and associated entities (collectively, "Kindred") appeals from an order of the Daviess Circuit Court denying its motion to compel arbitration of claims brought by Artie Cherolis, as Executrix of the Estate of Thelma Fuqua, Deceased. Based on the holding in *Whisman*, we find that the power of attorney did not specifically and explicitly authorize Cherlois to execute an arbitration agreement on her mother's behalf. In the absence of such a specific authorization, Cherlois could not bind her mother or her mother's estate to arbitrate personal injury, negligence, or statutory claims. We have also previously found that Cherlois could not bind the wrongful death beneficiaries to arbitrate wrongful death claims, and that conclusion remains applicable. Consequently, the trial court properly denied Kindred's motion to compel arbitration of these claims. Hence, we affirm.

In this Court's prior opinion, we set out the undisputed facts of this matter. On October 23, 2009, Thelma Fuqua executed a document, styled "Power of Attorney," which provided as follows:

> I, Thelma Lee Fuqua, …, hereby constitute and appoint my daughter, Artie Joan Cherolis, …, and my son, Luther Burk Fuqua, …, or either of them, my true and lawful attorneys in fact, acting either jointly or independently, with full power for me and in my name, place, and stead, in their sole discretion, to transact, handle, and dispose of

all matters affecting me and/or my estate in any possible way.
Without limiting or derogating from this general power, I specifically authorize my attorneys in fact for me and in my name, place, and stead, in their sole discretion:
To make contracts;
To lease, sell, or convey any real or personal property that I many now or hereafter own;
To make gifts of any real or personal property that I may now or hereafter own to my attorneys in fact and to others;
To receive and receipt for any money which may now or hereafter be due to me;
To draw, make, and sign in my name any and all checks, promissory notes, contracts, or agreements;
To invest or reinvest my money for me;
To institute or defend suits concerning my property or rights;
To file all tax returns (including, without limitation, state and federal income tax returns;
To enter all safe deposit boxes;
To transfer assets of mine to any trust created for me for addition to trust principal; and
Generally to do and perform for me and in my name all that I might do if present.
Also, without limiting or derogating from this general power, I authorize my attorneys in fact to make all decisions regarding my healthcare and medical treatment. This power of attorney shall not be affected by my disability as principal.
The rights, power, and authority of my attorneys in fact shall commence upon execution of this instrument and shall remain in full force and effect until revoked in writing or death of principal.
I hereby adopt and ratify all of the acts of my said attorneys in fact done in pursuance of the power hereby granted as fully as if I were acting in my own proper person.

Thereafter, on November 23, 2009, Thelma Fuqua was admitted to the Hillcrest Health Care Center, a residential nursing home facility in Owensboro,

Kentucky. The Hillcrest facility is owned and operated by Kindred. As part of the admission process, Cherolis executed a number of documents on her mother's behalf. One of these documents was styled "Alternative Dispute Resolution Agreement Between Resident and Facility (Optional)," ("ADR Agreement") and provided, in pertinent part, as follows:

> Any 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.

Thelma Fuqua was a resident of Hillcrest until December 15, 2010, and died the following day at Owensboro Medical Health System. After her death, Cherolis was appointed as executrix of the estate and instituted this action. The complaint asserted claims for negligence, medical negligence, personal injury, wrongful death, and violation of the long-term care resident's rights statute, KRS 216.515. Kindred moved to compel arbitration based upon the terms of the ADR Agreement.

After considering the motion and the estate's response, the trial court denied Kindred's motion on November 5, 2012. The trial court relied on the then-recent decision of the Kentucky Supreme Court in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), which held that a general power of attorney was insufficient to bind the principal or her estate to an optional arbitration agreement. The trial court found no circumstances which distinguished the facts of this case from those in *Ping*. The trial court further found no evidence Cherolis misrepresented her authority to bind successors in interest to arbitration, or that Kindred had acted in reliance on her apparent authority.

Kindred appealed from the trial court's order denying its motion to compel arbitration. This Court discussed the holding of the Kentucky Supreme Court in *Ping* and analyzed its application to the power of attorney at issue in this case. We first noted that, under *Ping*, neither the principal nor an agent has the authority to bind the wrongful death beneficiaries to arbitrate that claim.

But with respect to the personal injury and negligence claims, we concluded that the power of attorney which Thelma Fuqua granted to her children broadly authorized them to execute contracts and agreements, to "[i]nstitute or defend suits concerning my property or rights," and to "[g]enerally do and perform for me and in my name all that I might do if present." Given this expansive grant of authority, we concluded that the power of attorney granted Cherolis the authority to execute the optional ADR Agreement, even under the high standard established in *Ping*. Consequently, this Court reversed the trial court's order and

remanded for entry of an order granting Kindred's motion to compel arbitration of the negligence, personal injury and statutory claims. *Kindred Healthcare, Inc. v. Cherolis*, No. 2012-CA-002074-MR, 2013 WL 5583587 (Ky. App. 2013).

Cherolis filed a motion for discretionary review of our decision to the Kentucky Supreme Court. The Supreme Court held the motion in abeyance pending final disposition of three pending appeals involving the same issue.[1] Thereafter, the Supreme Court issued its opinion in *Whisman*, addressing the issues presented in all three appeals. Following entry of finality of that opinion, the Kentucky Supreme Court vacated our prior opinion in this case and remanded for further consideration in light of the holding of *Whisman*. Upon remand, this Court directed the parties to submit supplemental briefs, and the matter now stands submitted for our review.

In *Whisman*, our Supreme Court addressed the same issue presented in the present case: the extent of an agent's authority under a power of attorney to enter into an agreement binding her principal to arbitrate wrongful death, personal injury, negligence, and statutory claims. As an initial matter, the Court re-emphasized that a wrongful death claim is a distinct interest in a property right that belongs only to the statutorily-designated beneficiaries. Consequently, neither a decedent, acting as a principal, nor her agent, have any authority to bind the

[1] *Kindred Nursing Centers Ltd. v. Clark*, 2013-SC-430; *Kindred Nursing Centers Ltd. P'ship v. Wellner*, 2013-SC-431; and *Extendicare Homes, Inc. v. Whisman*, 2013-SC-426.

wrongful death beneficiaries to an arbitration agreement. *Whisman*, 478 S.W.3d at 314.

On the other hand, the Court also recognized that a principal does have the authority to enter into a contract requiring arbitration of personal injury and statutory claims. However, the Court went on to clarify the holding in *Ping* concerning when an agent, such as a power of attorney, has the authority to select arbitration and its concomitant waiver of the constitutional right of access to the courts. In *Ping*, our Supreme Court held that "[a]bsent 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." 376 S.W.3d at 593.

In *Whisman*, the Supreme Court emphasized that that the rights to access to the courts, a jury trial, and appeal to a higher court are "fundamental" and "sacred," and "involate" under the Kentucky Constitution. *Whisman*, 478 S.W.3d at 328-29, citing *Ky. Const.* §§ 7, 14, and 115. Therefore, the Court held that "the power to waive generally such fundamental constitutional rights must be unambiguously expressed in the text of the power-of-attorney document in order for that authority to be vested in the attorney-in-fact." *Id.* Such powers will not be inferred from a broad or even comprehensive grant of authority unless the document explicitly endows the attorney-in-fact to enter into an arbitration agreement. *Id.* at 328-30.

The dissent in *Whisman* noted that this requirement, applied only to arbitration agreements, improperly disfavors arbitration and likely violates the precedent of the United States Supreme Court interpreting the Federal Arbitration Act. *Id.* at 343-44 (Abramson, J., dissenting). Likewise, several Federal courts, applying Kentucky law, have declined to apply the holding in *Whisman*, concluding that it is pre-empted by controlling Federal precedent. *See Riney v. GGNSC Louisville St. Matthews, LLC*, No. 3:16CV-00122-JHM, 2016 WL 2853568 (W.D. Ky. 2016) and *Preferred Care of Delaware, Inc. v. Crocker*, No. 5:15-CV-177-TBR, 2016 WL 1181786 (W.D. Ky. 2016). Kindred also requests that we hold this appeal in abeyance, noting a petition for a writ of certiorari was filed in the United States Supreme Court, seeking review of *Whisman*. Finally, Kindred suggests that the holding of *Whisman* cannot be applied retroactively to arbitration agreements entered before that case was rendered.

But as an intermediate appellate court, this Court is bound by published decisions of the Kentucky Supreme Court. SCR[2] 1.030(8)(a). The Court of Appeals cannot overrule the established precedent set by the Supreme Court or its predecessor Court. *Smith v. Vilvarajah*, 57 S.W.3d 839, 841 (Ky. App. 2000). Moreover, the Kentucky Supreme Court expressly remanded this matter for an application of its decision in *Whisman*. We are not at liberty to depart from that mandate.

[2] Kentucky Rules of the Supreme Court.

Of the three different power-of-attorney instruments at issue in *Whisman*, our Supreme Court held that only one of the three contained broad enough language to empower the attorney-in-fact to execute an arbitration agreement. In the Whisman and Wellner instruments, the Supreme Court found that the principals' delegation of authority to enter into contracts, execute instruments, or to institute or defend suits did not confer the authority upon the attorney-in-fact to enter into a pre-dispute arbitration agreement. *Whisman*, 478 S.W.3d at 323-26. The Court also found that similar language in the Clark instrument, by itself, did not authorize the attorney-in-fact to bind the principal to arbitrate future personal injury claims. *Id.* at 326.

However, the Clark power of attorney also authorized the attorney-in-fact "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." While the Court questioned whether the principal may have consciously intended to forfeit her right of access to the courts and to a jury trial, the Court concluded that this broad, universal delegation of authority could only be interpreted as allowing the attorney-in-fact to enter into a pre-dispute arbitration agreement. *Id.* at 326.

But notwithstanding this "extraordinarily broad grant of authority," *Id.* at 327, the Court in *Whisman* ultimately found that the instrument must explicitly and specifically authorize the attorney-in-fact to waive the principal's fundamental constitutional rights. *Id.* at 328–29. The language used in the Fuqua

power of attorney is nearly identical to that in the Clark instrument discussed in *Whisman*. Nevertheless, the majority in *Whisman* held that the authority to waive the principal's right of access to the courts may not be inferred lightly in the absence of an explicit grant of such authority.

We find no meaningful distinction between the Clark power of attorney addressed in *Whisman*, and the power of attorney which Fuqua granted to Cherolis. Based on the holding in *Whisman*, we must conclude that Cherlois lacked the authority to execute the ADR Agreement. Therefore, the trial court properly denied Kindred's motion to compel arbitration.

Accordingly, we affirm the order of the Daviess Circuit Court denying Kindred's motion to compel arbitration, and we remand this matter for further proceedings on the merits of the action.

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