RENDERED: AUGUST 2, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000245-MR

GGNSC FRANKFORT, LLC D/B/A
GOLDEN LIVINGCENTER – FRANKFORT;
GGNSC ADMINISTRATIVE SERVICES, LLC
D/B/A GOLDEN VENTURES;
GGNSC HOLDINGS, LLC
D/B/A GOLDEN HORIZONS;
GGNSC EQUITY HOLDINGS, LLC;
GOLDEN GATE NATIONAL SENIOR
CARE, LLC D/B/A GOLDEN LIVING;
GOLDEN GATE ANCILLARY, LLC
D/B/A GOLDEN INNOVATIONS;
GPH FRANKFORT, LLC;
ROBERT DURHAM AND ANN PHILLIPS APPELLANTS

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2016-SC-000564-D

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE O. REED RHORER, JUDGE
ACTION NO. 11-CI-00572

JAMES L. RICHARDSON, AS EXECUTOR OF
THE ESTATE OF FANNIE H. LYON, DECEASED;
AND JAMES L. RICHARDSON, ON BEHALF OF THE
WRONGFUL DEATH BENEFICIARIES OF
FANNIE H. LYON APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: ACREE, COMBS, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: This matter is before this Court on remand pursuant to an order of the Kentucky Supreme Court instructing this Court to reconsider its 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 conclude that our prior opinion, while correctly decided when rendered, must be reversed in part.

On February 23, 2006, Fannie H. Lyon executed a durable power-of-attorney (POA) appointing her son, James Richardson, as her attorney-in-fact. The POA conferred various decision-making powers regarding her financial affairs, health care, and real and personal property. James was given the authority to "operate and manage" Fannie's "farm, rental or other business or commercial interest or activity" and, in the same sentence, was given the power "to commence or defend administrative and legal proceedings concerning [Fannie's] property and rights[.]" Additionally, in capitalized bold print and in a separate paragraph the POA provided:

AND TO GENERALLY DO AND PERFORM FOR ME ALL THAT I MAY DO IF ACTING IN MY OWN PERSON. THIS POWER/DESIGNATION IS DURABLE. BY MAKING THIS POWER/DESIGNATION I AM NOT HEREBY DISQUALIFYING MYSELF FROM TRANSACTING IN MY OWN PROPER PERSON.

Fannie was admitted to the Golden Living Center on September 2, 2009, and except when hospitalized, remained a resident until her death on April 5, 2010. On the date of her admission, James signed documents on Fannie's behalf, including an optional arbitration agreement providing that the parties submit any claims arising out of or related to Fannie's care at the facility to arbitration. The agreement instructs that by agreeing to arbitrate any disputes, the parties waived their constitutional rights to have a claim decided in a court of law.

After James was appointed administrator of Fannie's estate, he filed this action in the Franklin Circuit Court alleging negligence, medical negligence, corporate negligence, violation of Kentucky's long-term care resident's rights statute, Kentucky Revised Statues (KRS) 216.515, and wrongful death. GGNSC filed a motion to compel arbitration and dismiss the pending lawsuit or stay the lawsuit pending arbitration. The circuit court denied GGNSC's motion ruling that the POA does not encompass the power to execute an arbitration agreement. GGNSC appealed, arguing that the POA gave James actual and apparent authority to execute the arbitration agreement. GGNSC also argued: (1) federal and state

law favor enforcement of an agreement to arbitrate and arbitration is a constitutional right; (2) James failed to present adequate grounds for revocation of the agreement; and (3) there are no other grounds for the revocation of the agreement.

In our original opinion, we held that the arbitration agreement did not preclude James'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 Fannie and to which the estate succeeded must be submitted to arbitration. 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 a 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 styled *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015). 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 in the *Clark* and the *Wellner* cases in the United States Supreme Court. The United States Supreme Court issued a consolidated opinion and reversed the Supreme Court of Kentucky in the *Clark* case but remanded the *Wellner* case. 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 POAs. 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 at 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 a pre-dispute arbitration agreement. The Court observed that by executing the arbitration agreement, the attorney-in-fact waived the principal'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 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 than 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 a pre-dispute arbitration agreement, 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."[1]

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 a pre-dispute 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 with respect to the powers to "demand, sue for, collect, recover and receive all . . . demands whatsoever" and "to institute legal proceedings," the POA only confers

---

[1] 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.

the authority to bind existing claims to arbitration. *Id.* at 193. The Kindred arbitration agreement was not executed in the context of a lawsuit or claim 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, if not broader, than that in the Clark POA. The authority to "do and perform for me all that I may do if acting in my own person" is set forth in a separate paragraph in bold capital letters. Although GGNSC 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. 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 (citations and parenthetical information omitted).

We have reconsidered our prior decision and conclude that the POA conferred on James the authority to enter into the arbitration agreement with GGNSC. The order of the Franklin 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.

BRIEFS FOR APPELLANTS:

Marcia L. Pearson
Louisville, Kentucky

BRIEF FOR APPELLEES:

Robert E. Salyer
Richard E. Circeo
Lexington, Kentucky