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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2014-CA-000065-MR

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, D/B/A WOODLAND TERRACE HEALTH CARE FACILITY; KINDRED NURSING CENTERS LIMITED PARTNERSHIP, D/B/A KINDRED NURSING AND REHABILITATION-WOODLAND; WOODLAND TERRACE HEALTH CARE FACILITY; KINDRED REHAB SERVICES, INC., D/B/A REHABCARE; KINDRED REHAB SERVICES, INC., D/B/A PEOPLEFIRST REHABILITATION; KINDRED HEALTHCARE, INC.; KINDRED HOSPITALS LIMITED PARTNERSHIP, D/B/A WOODLAND TERRACE HEALTH CARE FACILITY; KINDRED HOSPITALS LIMITED PARTNERSHIP, D/B/A KINDRED NURSING AND REHABILITATION-WOODLAND; AND KINDRED HEALTHCARE OPERATING, INC. APPELLANTS

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 12-CI-00863

DEPHINE WITHERS, AS ADMINISTRATRIX OF THE ESTATE OF MARIAN S. WITHERS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, THOMPSON AND VANMETER,[1] JUDGES.

THOMPSON, JUDGE: Kindred Nursing Centers Limited Partnership d/b/a Woodland Terrace Heath Care Facility (Kindred) and its affiliated entities appeal from an order of the Hardin Circuit Court denying its motion to compel arbitration. The question presented is whether a power-of-attorney document executed by Marian S. Withers authorized her attorney-in-fact to enter into an agreement to arbitrate any claims arising from Kindred's alleged negligence while Marian was a Kindred resident. Based on our Supreme Court's decision in *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2016), *cert. granted*, 137 S.Ct. 368 (2016), we conclude the power-of-attorney document did not confer such authority and, therefore, the arbitration agreement is not enforceable.

On May 10, 2011, Marian executed a durable power-of-attorney document appointing her daughter, Dephine Withers, as her attorney-in-fact. The document expressly conferred the power "to make, execute and deliver deeds, releases, conveyances, and contract of every nature in relation to both real and personal property, including stocks, bonds, contracts of indemnity and insurance." It further provided that Dephine had the power to "demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now or due

[1] Judge Laurence B. VanMeter concurred in this opinion prior to being elected to the Kentucky Supreme Court. Release of this opinion was delayed by administrative handling.

that may hereafter be or become due to [Marian] (including the right to institute legal proceedings therefor)." Dephine was granted these powers with "full power in and concerning the above premises and to do any and all acts as set forth above" as Marian could do if personally present.

Marian was admitted to Woodland Terrace Health Care on May 10, 2011. On that same date, Dephine signed an optional "Alternative Dispute Resolution Agreement," referred to herein as the ADR agreement. The agreement provides that the parties submit any claims arising out of or related to Marian's care at the facility to arbitration.

Marian resided at Woodland Terrace until her death on May 21, 2011. After Dephine was appointed administrator of Marian's estate, she filed this action in the Hardin Circuit Court claiming personal injuries to Marian caused by Kindred's negligence, violation of Kentucky's long-term care resident's rights statute, Kentucky Revised Statues (KRS) 216.515, and wrongful death. Kindred filed a motion to compel arbitration and stay or dismiss the pending lawsuit based upon the ADR agreement. The circuit court denied Kindred's motion. Kindred appealed.

Although an order denying arbitration is interlocutory, "an ordinary appeal at the close of litigation will not often provide an adequate remedy for the wrongful denial of a right to arbitrate[.]" *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky.App. 2001). Consequently, KRS 417.220(1)(a) provides that an appeal may be taken from "[a]n order denying an application to compel

arbitration made under KRS 417.060[.]" Having stated our basis for exercising jurisdiction, we address whether the wrongful death, negligence and statutory claims must be submitted to arbitration.

This case involves not only personal injury and statutory claims arising under KRS 216.510 *et seq.*, but also a wrongful death claim. The distinction between the causes of action is important. Reaffirming its decision in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), in *Whisman*, the Court rejected the notion that a similar ADR agreement executed by an attorney-in-fact could bind the beneficiaries of a wrongful death claim. As the Court stated:

> Under Kentucky law, a wrongful death claim is a distinct interest in a property right that belongs *only* to the statutorily-designated beneficiaries. Decedents, having no cognizable legal rights in the wrongful death claims arising upon their demise, have no authority to make contracts disposing of, encumbering, settling, or otherwise affecting claims that belong to others. The rightful owners of a wrongful death claim, the beneficiaries identified in KRS 411.130(2), cannot be bound to the contractual arrangements purportedly made by the decedent with respect to those claims. A decedent has no more authority to bind the wrongful death beneficiaries to an arbitration agreement than he has to bind them to a settlement agreement fixing or limiting the damages to be recovered from the wrongful death action, limiting the persons against whom a claim could be pursued, or an agreement on how and to whom to allocate the damages recovered in a wrongful death claim.

*Whisman,* 478 S.W.3d at 314 (footnotes omitted). Marian "had no authority during [her] lifetime, directly or through the actions of [her] attorney-in-fact, to prospectively bind the beneficiaries of the wrongful death claim to an arbitration

agreement." *Id*. at 313. There was no error in the circuit court's denial of Kindred's motion to compel arbitration of the wrongful death claims arising from Marian's death.

The personal injury and the statutory claims belonged to Marian. Marian's estate "succeeded to those claims, at least to the extent that such claims survive the decedent's death pursuant to KRS 411.140 and 216.515(26)." *Id*. at 314 (footnotes omitted). Therefore, the question is whether the power-of-attorney document authorized Dephine to execute the ADR agreement.

With certain exceptions not applicable here, KRS 417.050 provides that a written agreement to submit any controversy to arbitration "is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract." "To create a valid, enforceable contract, there must be a voluntary, complete assent by the parties having capacity to contract." *Conners v. Eble*, 269 S.W.2d 716, 717-18 (Ky. 1954). Assent to a contract can be provided "by an agent acting as an attorney-in-fact, *if* the authority to do so was duly conferred upon the attorney-in-fact by the power-of-attorney instrument." *Whisman*, 478 S.W.3d at 321. Whether the principal's assent to the contractual agreement to arbitrate a dispute was validly obtained is "a question of law that depends entirely upon the scope of authority set forth in the written power-of-attorney instrument." *Id.*

Kindred argues the provisions of the power-of-attorney document conferring authority upon Dephine the powers to "execute . . . contracts of every

nature in relations to both real and personal property" and "to demand, sue for, collect, recover, and receive all debts, monies interest and demands whatsoever now due or that hereafter become due to [Marian] (including the right to institute legal proceedings therefor)" include the power to enter into the ADR agreement. In *Whisman*, our Supreme Court held to the contrary.

The Court held that the power to arbitrate "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.* at 328. The Court concluded that to hold otherwise and infer such authority when it is not expressly provided for in the power-of-attorney document would be repugnant to basic constitutional principles. It explained:

> 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.

*Id*. (internal footnotes and quotations omitted). Because an agreement to arbitrate is a waiver of those fundamental constitutional rights, such power will not be inferred even from broad powers such as to do "whatever I might do if present." *Id*.

In *Whisman*, two provisions in a power-of-attorney document similar to those relied on by Kindred were specifically addressed. The Court rejected the contention that an attorney-in-fact was authorized to assent to an arbitration

agreement pursuant to the power to make contracts in relation to real and personal property. Quoting *Ping*, the Court held "that powers granted expressly in relation to the management of the principal's property and financial affairs, and to health-care decisions, [do] not give the attorney-in-fact a sort of universal authority beyond those express provisions." *Id.* at 324 (internal quotations and brackets omitted).

The power-of-attorney document conferred the power upon Dephine only to execute contracts on Marian's behalf relating to her real or personal property and financial affairs. There is no express provision authorizing Dephine to execute an ADR agreement and, therefore, waive Marian's right to a jury trial.

In *Whisman,* the Court also rejected the argument that the grant of specific authority to "institute or defend suits concerning my property rights" is an express authorization for the attorney-in-fact to choose arbitration as the mode for resolving disputes. *Id*. at 322-23. It pointed out that arbitration is not a suit or legal action that occurs in a court of law. *Id*. at 323. The "very purpose and design [of arbitration] is intended to *avoid* suits in a court of law; it is the antithesis of a suit in a court of law." *Id*. It also differs from a settlement of litigation. "[A]n 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*. at 324.

The provisions in the power-of-attorney document

The provisions relied on by Kindred are, in all significant ways, identical to those considered in *Whisman*. Pursuant to Kentucky Supreme Court Rule 1.030(8)(a), this Court "is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court." Nevertheless, Kindred argues we should not follow *Whisman*.[2] Instead, it argues that we should follow a string of federal district court decisions declining to apply *Whisman* on the basis that the Court's holding violates the Federal Arbitration Act (FAA). *See e.g.*, *Preferred Care of Delaware, Inc. v. Crocker*, No. 5:15-CV-177-TBR, 2016 WL 1181786 (W.D. Ky. 2016). Its urging is not based on solid grounds.

Our Supreme Court specifically addressed whether its opinion conflicted with the FAA and held its reasoning was not in conflict. Although the Court recognized that arbitration agreements are favored under federal and state law, it emphasized the distinction between enforcement of an arbitration agreement and the threshold question of whether an agreement was formed. *Whisman*, 478 S.W.3d at 320. "Questions concerning the formation of an arbitration agreement are resolved in accordance with the applicable state law governing contract formation." *Id*.

Whether the federal cases cited by Kindred are well reasoned is not a proper issue for this Court to address. Unless the United States Supreme Court

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[2] *Whisman* was decided after the parties filed their briefs. We permitted the parties to file supplemental briefs.

holds to the contrary, *Whisman* is the law in this state and this Court is bound to follow that law.

Kindred also argues that because an arbitration agreement is a contract, its terms implicitly include the law as existing at the time and place the parties executed the contract. *Leslie County v. Maggard*, 212 Ky. 354, 279 S.W. 335, 338 (1926). This argument is equally unpersuasive. While *Whisman* provides a more thorough analysis of the law and is our Supreme Court's latest word on the subject, it was not its first word. The same result could be reached by reliance on *Ping*.

Finally, Kindred requests that this Court exercise its discretion under Kentucky Rules of Civil Procedure 76.44 and stay this action pending the U.S. Supreme Court's decision in *Whisman*. While that is a course this Court could take, we see no reason to further delay this case when Kentucky law is clear both before and after *Whisman*.

We conclude that the provisions in the power-of-attorney document do not constitute a clear manifestation of Marian's intent to confer the right to enter into an arbitration agreement. Consequently, the trial court did not err when it denied Kindred's motion to compel arbitration.

For the foregoing reasons, the order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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