

RENDERED: AUGUST 4, 2017; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2015-CA-000651-MR

DIVERSICARE HEALTHCARE  
SERVICES, INC.; DIVERSICARE  
CLINTON, LLC; DIVERSICARE  
LEASING CORP.; DIVERSICARE  
MANAGEMENT SERVICES, CO.;  
AND TRELLA WILSON, IN HER  
CAPACITY AS ADMINISTRATOR OF  
ARBOR PLACE OF CLINTON

APPELLANTS

v. APPEAL FROM HICKMAN CIRCUIT COURT  
HONORABLE TIMOTHY A. LANGFORD, JUDGE  
ACTION NO. 14-CI-00046

MICHAEL RILEY,  
as Executor of the Estate of  
THOMAS RILEY, SR., Deceased

APPELLEE

OPINION  
AFFIRMING IN PART, REVERSING IN PART,  
AND REMANDING

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BEFORE: KRAMER, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

KRAMER, CHIEF JUDGE: On November 21, 2014, Michael Riley, as executor and on behalf of the estate of Thomas Riley, Sr., filed a complaint in Hickman Circuit Court against the above-captioned appellants asserting various claims of negligence, statutory violations, and wrongful death regarding their care and treatment of his decedent. Shortly thereafter, the appellants filed a motion to enforce an agreement to arbitrate the matter because the plain language of the agreement encompassed all of the claims asserted. Michael opposed their motion and the circuit court ultimately denied it.

As to why, the circuit court noted the arbitration agreement had been executed by Michael on behalf of Thomas by virtue of his authority as Thomas's power of attorney. The circuit court noted the document describing the power of attorney provided in relevant part that Thomas gave Michael "power, in his name, to do all things that [Thomas] could do, including, but not limited to" various acts described in a non-exhaustive list. Nevertheless, the circuit court reasoned, because the power to enter into an arbitration agreement was not specifically listed in the non-exhaustive list of various acts described in the power of attorney document, Michael simply was not authorized to enter into the arbitration agreement on Thomas's behalf and Thomas never effectively assented to the

agreement.<sup>1</sup> This appeal followed. For the reasons discussed below, we reverse in part and affirm in part.

In one of the cases comprising the consolidated matter of *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015), the Kentucky Supreme Court interpreted a power of attorney document that was substantially similar to the one at bar, and it did so under similar circumstances (*i.e.*, another nursing home operator, Kindred, relied upon it as granting authority to assent to an arbitration agreement). The decedent, Olive G. Clark, authorized her daughter, Janis, “[the] full power for me and in my name, place, and stead, in her sole discretion, to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way,” and “[w]ithout limiting or derogating from this general power” further provided a non-exhaustive list of various acts Janis was specifically authorized to do in her sole discretion. *Id.* at 317.

This language, the Kentucky Supreme Court held, requires no inference about what the scope of authority encompassed within the expressed power. One might entertain considerable doubt about whether Olive consciously intended to forfeit her right of access to the courts and to a jury trial, but the language of her POA encompasses that result regardless of Olive’s actual intent. Given this extremely broad, universal delegation of authority, it would be impossible to say that entering into a pre-dispute arbitration agreement was not covered.

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<sup>1</sup> The circuit court also rejected an alternative argument from the appellants based upon a third-party beneficiary theory which assumed Michael lacked authority to execute the arbitration agreement on behalf of Thomas. In light of our disposition of this matter, it is unnecessary to discuss the particulars of that argument or the circuit court’s reasons for rejecting it.

*Id.* at 327.

Nevertheless, the Kentucky Supreme Court, similarly to the circuit court in this matter, determined that because the power to enter into an arbitration agreement was not specifically listed in the non-exhaustive list of various acts described in the power of attorney document, Janis simply had not been authorized to enter into the arbitration agreement on behalf of Olive, and Olive therefore never effectively assented to the agreement. *Id.* at 328-31.

*Whisman* is dispositive of this appeal for two reasons. First, *Whisman* observed that the Clark power of attorney—which is not meaningfully different from the one at bar—is an example of a grant of authority broad enough to encompass the authority to enter into an arbitration agreement. Second, to the extent that *Whisman* provided that a power of attorney needs something *more specific* than such a broad grant of authority to effectively include the authority to enter into an enforceable arbitration agreement, *Whisman* was reversed in this respect by the United States Supreme Court. *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S.Ct. 1421, 1429 (2017). To the contrary, nothing more is required. *Id.* In short, the circuit court erred in this matter. The power of attorney herein provided Michael with the authority to enter the arbitration agreement with the above-captioned appellants on behalf of Thomas.

Michael alternatively argues that the arbitration agreements should not be enforceable with respect to the wrongful death claims he has asserted. It is unnecessary to address the merits of this argument because the appellants have set forth in their reply brief that they agree with this point and do not contest it.

For the reasons expressed herein, we AFFIRM IN PART, REVERSE IN PART, and REMAND for further proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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