RENDERED: JUNE 21, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001220-MR

NEW HERITAGE HALL HEALTH &
REHABILITATION CENTER, LLC,
D/B/A HERITAGE HALL HEALTH AND
REHABILITATION CENTER;
SENIOR CARE, INC; SENIOR CARE
OPERATIONS HOLDINGS, LLC;
SENIOR CARE HOLDINGS, INC.;
SENIOR CARE US HOLDINGS, INC;
RIVERWOOD CAPITAL, LLC; AND
DANA GRAVITT, IN HER CAPACITY AS
ADMINISTRATOR OF NEW HERITAGE
HALL HEALTH & REHABILITATION
CENTER, LLC — APPELLANTS

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2016-SC-000698-D

APPEAL FROM ANDERSON CIRCUIT COURT
v. HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 14-CI-00302

KENNETH COFFMAN, AS ADMINISTRATOR OF
THE ESTATE OF CHARLES COFFMAN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, TAYLOR 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 the United States Supreme Court's decision in *Kindred Nursing Centers Limited Partnership v Clark*, 581 U.S. __, 137 S.Ct. 1421, 197 L.Ed.2d 806, (2017), and the Kentucky Supreme Court's decision in *Kindred Nursing Centers Limited Partnership v. Wellner*, 533 S.W.3d 189 (Ky. 2017). Having done so, we affirm.

Charles Coffman executed a power of attorney (POA) naming his brother, Kenneth, as his attorney-in-fact. However, it provided that if Kenneth was "unable or unwilling" to serve as attorney-in-fact, his nephew, Danny Coffman, was designated to serve as attorney-in fact. As relevant here, the POA states as follows:

> In addition to the above enumerated powers, my attorney-in-fact is specifically authorized to sign on my behalf any contract or contracts of sale, or any deed or deed required in order to convey real estate owned by me and to sign any documents necessary to grant or release mortgage liens or other incidences to the purchase and sale of real estate, including the execution of a mortgage or mortgages. I also give and grant unto my said attorney-in-fact full power and authority to do and perform all and every act and thing whatsoever requisite, necessary and proper to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of

> substantiation and revocation, hereby ratifying and confirming all that my said attorney-in-fact, or his or her substitute, shall lawfully do or cause to be done by virtue hereof.

Charles was admitted to Heritage Hall Health and Rehabilitation Center. Kenneth requested Danny to handle Charles's admission paperwork because Kenneth was unable to comprehend the information. However, Kenneth was present when the admission forms were signed. Danny signed all the admission paperwork and signed on Charles's behalf as his attorney-in-fact.

Charles's admission paperwork included an optional arbitration agreement, stating "[t]his Agreement provides for the mediation and arbitration of any disputes that might arise out of or relate in any way to the resident's stay(s) at the Facility." The arbitration agreement also provides:

> Any and all controversies or claims arising out of or relating in any way to the Resident's stay(s) at the Facility or relating to this Agreement, where the amount in controversy exceeds $25,000, shall be submitted to alternative dispute resolution, including but not limited to claims for statutory, compensatory, or punitive damages, and irrespective of the legal theories upon which the claim is asserted whether arising in the future or presently existing.

The agreement further stated that "[b]y agreeing to arbitration, both parties to this Agreement are waiving the right to a trial before a judge or jury." Just prior to signatures of the parties to the agreement, in bold print and capitol letters, the agreement stated:

THE UNDERSIGNED HEREBY ACKNOWLEDGE THAT WE HAVE READ THIS ENTIRE AGREEMENT AND VOLUNTARILY CONSENT TO ALL THE TERMS OF THE AGREEMENT AND FURTHER ACKNOWLEDGE THAT WE HAVE WAIVED OUR RIGHTS TO A TRIAL BEFORE A JUDGE OR JURY BY AGREEING TO BINDING ARBITRATION.

Following Charles's death, his estate filed this action against Heritage Hall Health relating to the care Charles received while a resident at its facility.[1] Heritage Hall Health filed a motion to dismiss and compel arbitration based on Danny's execution of the arbitration agreement on Charles's behalf. The trial court denied the motion finding that although Danny had authority to act as attorney-in-fact because Kenneth was "unable or unwilling" to act as attorney-in-fact, the authority to execute an arbitration agreement on Charles's behalf was not included within the scope of authority granted by the POA.

Heritage Hall Health appealed. We held that while the POA provided a broad grant of power, it was not specific enough to grant an attorney-in-fact the authority to waive Charles's right to a trial by jury. We have reconsidered our opinion as directed by the Kentucky Supreme Court and affirm.

[1] The Appellants, referred to collectively as "Heritage Hall Health" are as follows: New Heritage Hall Health & Rehabilitation Center, LLC, d/b/a Heritage Hall Health and Rehabilitation Center; Senior Care, Inc.; Senior Care Operations Holdings, LLC; Senior Care Holdings, Inc.; Senior Care US Holdings, Inc.; Riverwood Capital, LLC; and Dana Gravitt, in her capacity as administrator of New Heritage Health & Rehabilitation Center, LLC.

The *Wellner* case was initially considered by the Kentucky Supreme Court along 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's decisions in the *Clark* and *Wellner* cases in the United States Supreme Court. In *Clark*, 137 S.Ct. 1421, the United States Supreme Court issued a consolidated opinion and reversed 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* 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 in my name all that I might if present[.]" *Whisman,* 478 S.W.3d 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, the Kentucky Supreme Court held that was not enough to authorize the attorney-in-fact to enter into an 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 328-29. 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 Kentucky's 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 the 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. 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 an 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 of 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."[2]

Wellner, 533 S.W.3d at 193. Ultimately, the Court reaffirmed its original decision that neither provision was sufficiently broad to include the authority to execute an 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," confers the authority to bind existing claims to arbitration. *Id*. at 193. However, the Kindred arbitration

[2] 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.

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, the POA 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. *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 held:

> 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 question before us is whether the powers conferred under the Coffman POA are sufficiently broad to include the power to enter into pre-dispute arbitration agreements. We conclude they are not.

In *Clark*, the United States Supreme Court held that if a POA conferred the authority to execute an arbitration agreement, Kentucky could not require an additional clear-statement that the attorney-in-fact had the authority to waive the principal's constitutional rights to access to the courts and a jury trial. After all, the Court reasoned, the waiver of those rights is inherently characteristic of arbitration. *Clark*, 137 S.Ct. at 1427. However, the United States Supreme Court did not disturb Kentucky law pertaining to the interpretation of all POAs. Regardless of the nature of the power conferred, POAs will be given a strict and narrow interpretation. *Clinton v. Hibbs' Ex'x*, 202 Ky. 304, 259 S.W. 356 (1924), aptly illustrates the application of the rule.

The Court considered L.C. Hibbs's general POA to his wife, Lula Hibbs. The POA stated:

> I, L. C. Hibbs, being now infirm in health, and for that reason not being able to attend to my business affairs, do hereby appoint my wife, Lula Hibbs, as my agent and attorney in fact, and give her full authority to attend to all of my affairs, to sign checks and also execute any notes that she may deem necessary in the conducting of my affairs, and to transact all of my business during my illness, also to collect all moneys that may be due me, and to represent me in the partnership business in which I may be interested. This June 6, 1920. L. C. Hibbs.

Id. at 356. As her husband's attorney-in-fact, Ms. Hibbs signed a note as attorney-in-fact between two unrelated parties, Nelson and Clinton. *Id.* at 357. After Nelson defaulted, Clinton sued Ms. Hibbs, as executrix of her husband's estate. Ms. Hibbs denied her husband's liability on various grounds including that as her husband's attorney-in-fact, she had no authority under the POA to sign the note. *Id.* The trial court entered a directed verdict in the estate's favor and Clinton appealed.

The *Hibbs' Ex'x* Court analyzed the POA noting that it contained words of limitation observing that the POA "by its express terms gave to the wife 'authority to attend to all of my [the principal's] affairs, to sign checks, and also execute any notes that she may **deem necessary** in the conducting of my [his] affairs, and to transact all of my business during my illness[.]'" *Id*. (emphasis added). The word "necessary" the Court held, limited Ms. Hibbs's authority "to the doing of such things and the performance of such acts as were necessary to the conducting of the business affairs of her husband, and manifestly did not include the signing of his name as surety for another." *Id*. at 357-58. The Court refused to extend Ms. Hibbs's authority beyond the "fair meaning of the words conferring it[.]" *Id*. at 358.

> Even when there is express authority for the agent to bind his principal as surety, it is the policy of the law to construe it strictly, and to hold the principal not bound

> unless the authority is exercised within the undoubted limits prescribed by the principal.

Id. The *Hibbs' Ex'x* Court also noted that it was significant how the surety was signed thereby giving Clinton notice of the limitations on her authority. By her signature, Ms. Hibbs articulated in writing she was signing in the context of her husband's agency. *Id*. at 359.

Applying the rule of strict and narrow construction to the Coffman POA, we conclude it did not confer the power upon the attorney-in-fact to enter into a pre-dispute arbitration agreement. Heritage Hall Health's reliance on the power to "sign any contract" ignores that the POA limits the type of contract to "any contract or contracts of sale, or any deed or deeds required in order to convey real estate[.]" The signing of an arbitration agreement upon admission to Coffman to Heritage Hall Health was not a contract for the sale or conveyance of real estate.

Moreover, the POA limited the attorney-in-fact's powers to those that were "requisite, necessary and proper to be done[.]" The arbitration agreement was optional, which meant it was not requisite, necessary and proper to Coffman's admission to Heritage Hall Health's facility. In short, Danny chose to sign the agreement on Coffman's behalf and did so without his authority.

As the Kentucky Supreme Court pointed out in its detailed analysis in *Wellner*, although no clear-statement that the attorney-in-fact has the power to bind the principal to an arbitration agreement is required, such power will not be

inferred unless it is "reasonably consistent with the principal's expressed grant of authority[.]" *Wellner*, 533 S.W.3d at 194. The express grant of authority and the express limitations on that authority renders the Coffman POA insufficiently broad to confer the power on Danny to bind Coffman to an arbitration agreement. By Danny's signature as Coffman's attorney-in-fact, Heritage Hall Health had notice of the limitations on Danny's authority.

For the reasons stated, the order of the Anderson Circuit Court is affirmed.

ALL CONCUR.

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