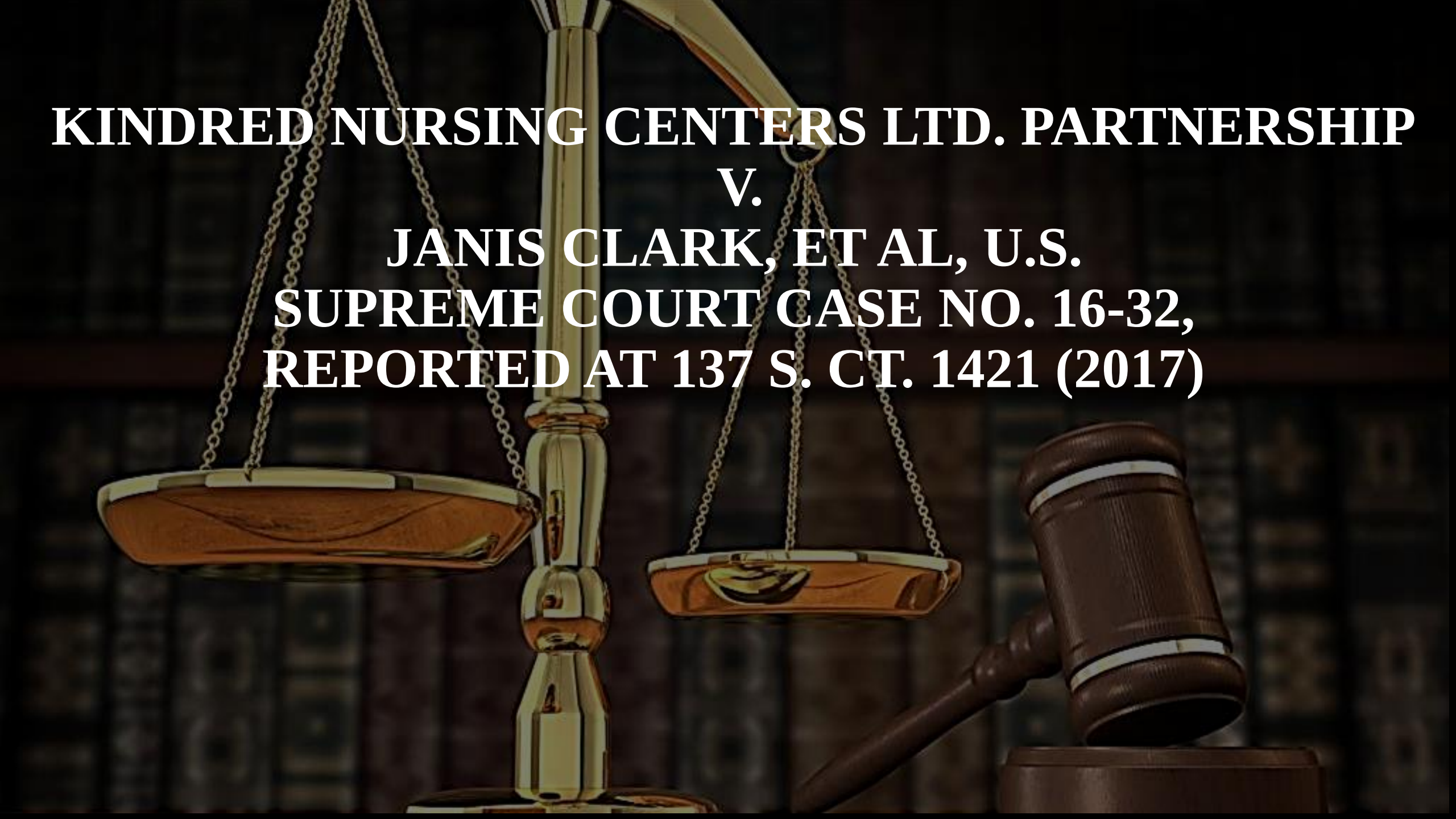

KINDRED NURSING CENTERS LTD. PARTNERSHIP V. JANIS CLARK, ET AL, U.S. SUPREME COURT CASE NO. 16-32, REPORTED AT 137 S. CT. 1421 (2017)

FACTUAL BACKGROUND

3 cases consolidated

Attorneys-in-Fact signed voluntary, predispute Arbitration Agreements for principals Clark, Wellner and Whisman upon nursing home admissions

Wellner and Clark Powers of Attorney

Wellner: "in my name, place and stead," to "institute legal proceedings" and "make contracts of every nature in relation to both real and personal property."

Clark: "full power…to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way," and to "draw, make and sign in my name any and all …contracts, … or agreements."

FEDERAL ARBITRATION ACT, 9 U.S.C. § 2

A written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction,… shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

PROCEDURAL HISTORY

Trial Court - originally enforced arbitration. Soon after, Kentucky Supreme Court rendered *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012).

Ping restrictively interpreted its specific POA: limited to actions "requisite and necessary" to her POA's specific grant of powers over her "health care and finances," only.

Trial court granted Estates' motions to vacate arbitration order, interpreting *Ping* as requiring POA express power "to arbitrate."

Kentucky Court of Appeals – affirmed

THE *WHISMAN* OPINION

***Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2016)**

HELD: Kentucky Supreme Court affirmed and refused to enforce arbitration contracts.

Wellner POA: power "**to make contracts of every nature** in relation to real and personal property" did **not** provide AOF with power to sign ***arbitration*** contract. Arbitration contract is "different," than other contract, concerns "constitutional right to access courts, and to trial by jury," not covered by power to sign contracts for personal property.

THE *WHISMAN* OPINION (CONT.)

Clark POA: power "to transact, handle and dispose of all matters affecting me and/or my estate in any possible way," was so broad "**it would be *impossible* to say that entering into a pre-dispute arbitration agreement was not covered**."

***But* …** "We must also consider the extent to which the authority of an agent to waive his principal's fundamental constitutional rights to access the courts, to trial by jury, and to appeal to a higher court, can be inferred from a less-than-explicit grant of authority."

> "It bears emphasis that the drafters of our Constitution deemed **the right to a jury trial** to be inviolate, a right that cannot be taken away; and, indeed a right that is sacred, thus denoting that right and that right alone as a **divine God-given right**." *Id*. at 329.

WHISMAN MAJORITY CONCLUDED

Held: POA must include "**explicit**" **grant of authority** "to waive constitutional rights" of principal, or to enter into arbitration agreement, thus articulating "**clear statement rule**."

Justice Hughes authored *Ping* Opinion, but dissented from *Whisman:*

1) *Ping's* POA did not contain the provisions found in Clark's and Wellner's POAs

2) *Ping* never intended express statement where POA (like Clark, Wellner) contained "power to contract" and "power to settle claims" or similar language

- **Kindred then petitioned U.S. Supreme Court for Writ of Certiorari**

CLARK ARGUMENTS IN U.S. SUPREME COURT

- **<u>Kindred argued:</u>**
- FAA preempted "clear statement rule," a state contract rule that singled out arbitration contracts for suspect status.
  - POA authorizing agent to "enter into contracts" authorized entering any kind of contract **except *arbitration* contracts**.
- Upholding *Whisman* would enable states to impose numerous discriminatory burdens on enforcement of arbitration agreements
- **<u>Clark/Wellner Estates argued:</u>**
- FAA did not apply to "contract formation issues" and only applied after valid contract was formed under state law.

THE *CLARK* OPINION

HELD:

"The Kentucky Supreme Court specially impeded the ability of attorneys-in-fact to enter into arbitration agreements. The court thus flouted the FAA's command to place those agreements on an equal footing with all other contracts." *Clark*, 137 S. Ct. at 1429.

Denounced *Whisman* holding:

> *Whisman*'s "clear-statement rule was 'clearly not… applicable to 'any contract' but [instead] single[d] out arbitration agreements for disfavored treatment."

THE *CLARK* OPINION (CONT.)

"Clear statement rule" failed to put arbitration agreements on an equal plane with all other contracts:

Whisman did exactly what Supreme Court precedent 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." 137 S. Ct. at 1427

Rejected Estates' argument:

"Adopting the respondents' view would make it "trivially easy for States to undermine the Act – indeed, to wholly defeat it." *Id*. at 1428

Clark's Rulings and Results

Reversed *Clark*. Vacated *Wellner* and remanded:

- **Clark Estate:** *Clark* reversed Kentucky Supreme Ct's judgment, directed enforcement of arbitration agreement.
- **Wellner Estate:** *Clark* "uncertain" whether *Wellner* decision relied on "clear-statement rule" to deny enforcement. *Clark* vacated state court *Wellner* opinion and remanded for further consideration in light of holding that clear statement rule violates FAA.

***Wellner* is still pending in Kentucky Supreme Court**

Supreme Court of the United States
February 22, 2017