NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

EVONNE K. WERT, EXECUTRIX OF THE ESTATE OF ANNA E. KEPNER, DECEASED

v.

MANORCARE OF CARLISLE PA, LLC D/B/A MANORCARE HEALTH SERVICES-CARLISLE; HCR MANORCARE, INC; MANOR CARE, INC.; HCR HEALTHCARE, LLC; HCR II HEALTHCARE, LLC; HCR III HEALTHCARE, LLC; HCR IV HEALTHCARE, LLC: GGNSC GETTYSBURG, LP, D/B/A GOLDEN LIVING CENTER-GETTYSBURG; GGNSC GETTYSBURG GP, LLC; GGNSC HOLDINGS, LLC; GOLDEN GATE NATIONAL SENIOR CARE, LLC; GGNSC EQUITY HOLDINGS, LLC; GGNSC ADMINISTRATIVE SERVICES, LLC

APPEAL OF: GGNSC GETTYSBURG LP, D/B/A GOLDEN LIVING CENTER - GETTYSBURG; GGNSC GETTYSBURG GP, LLC; GGNSC HOLDINGS, LLC; GOLDEN GATE NATIONAL SENIOR CARE, LLC; GGNSC EQUITY HOLDINGS, LLC AND GGNSC ADMINISTRATIVE SERVICES, LLC

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1746 MDA 2012

Appeal from the Order Entered September 13, 2012
In the Court of Common Pleas of Cumberland County
Civil Division at No(s): 12-165 Civil

BEFORE: BOWES, J., OTT, J., and FITZGERALD, J.*

MEMORANDUM BY OTT, J.: **FILED DECEMBER 19, 2013**

Golden[1] appeals from the order entered in the Court of Common Pleas of Cumberland County overruling its preliminary objections seeking to compel arbitration.[2] Golden argues a prior relevant decision by a panel of our Court, ***Stewart v. GGNSC-Canonsburg, L.P.***, 9 A.3d 215 (Pa. Super. 2010),[3] was wrongly decided and should not be followed, and that the trial court erred in determining a relevant provision of the arbitration agreement

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* Former Justice specially assigned to the Superior Court.

[1] For ease, we will refer to the appellants in this matter collectively as "Golden".

[2] Our review of a claim that the trial court improperly denied [the] appellant's preliminary objections in the nature of a petition to compel arbitration is limited to determining whether the trial court's findings are supported by substantial evidence and whether the trial court abused its discretion in denying the petition. In the instant case, the issue presented—whether under the terms of the Agreement the parties are required to submit their dispute to arbitration—is strictly one of contract interpretation. ... Because contract interpretation is a question of law, our review of the trial court's decision is *de novo* and our scope is plenary.

Gaffer Ins. Co. Ltd., v. Discover Reinsurance Co., 936 A.2d 1109, 1112-13 (Pa. Super. 2007) (citations omitted).

[3] The defendant in ***Stewart*** was also "Golden".

was an integral part of the agreement.[4] After a thorough review of the submissions by the parties, the certified record, and relevant law, we affirm.

We adopt the following portion of the statement of facts from the September 13, 2012, Opinion and Order denying defendants' preliminary objections:

> Decedent lived at Defendant Manorcare's facility from January 13, 2010 through March 14, 2010. During this time, Plaintiff avers Defendant Manorcare knowingly sacrificed the quality of care received by all residents, including Decedent by failing to manage, care, monitor, document, chart, prevent, diagnose and treat the injuries and illnesses suffered by Decedent, which included pressure ulcers, poor wound care, mouth sores, poor hygiene, poor medication management, malnutrition, infections of the eye and urinary tract, severe pain, and death.[5]
>
> On March 24, 2010, Decedent was admitted to Defendant Golden's facility. Defendant Golden's facility provides long-term skilled nursing care. At the time, Decedent's Daughter[[6]] was very upset because of how ill Decedent had become. Stephanie Rohe served as Defendant Golden's Facility Sales and Marketing Director. Ms. Rohe observed that Decedent was slightly

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[4] Golden raises additional issues in its reply brief. Those issues were not included in the Pa.R.A.P. 1925(b) statement and will not be addressed in this decision. ***See Cassel-Hess v. Hoffer***, 44 A.3d 80 (Pa. Super. 2012) (issues not raised in 1925(b) statement are waived).

[5] Manorcare also sought to compel arbitration and its request was denied. Manorcare and Golden used different arbitration agreement forms, so there was no commonality of issues in the denial of arbitration. The Manorcare decision is not a part of this appeal.

[6] Decedent's Daughter is Evonne Wert, the executrix of the Estate of Anna Kepner, the Decedent.

confused so she asked Decedent if she felt comfortable with Decedent's Daughter signing the admission paperwork. Decedent said yes and Ms. Rohe took Decedent's Daughter to her office. Decedent's Daughter was told by Ms. Rohe that the admission paperwork needed to be signed to get Decedent in a bed, make her comfortable, help her get well, and get the process going. Ms. Rohe knew that Decedent's Daughter did not have power of attorney but considered Decedent's Daughter to be Decedent's agent. Decedent's Daughter signed the admission paperwork and the Resident and Facility Arbitration Agreement ("the Golden Agreement") included therein.

Decedent lived at Defendant Golden's facility from March 24, 2010 through August 12, 2010. Decedent died on August 12, 2010. During this time, Plaintiff avers Defendant Golden knowingly sacrificed the quality of care received by all residents, including Decedent by failing to manage, care, monitor, document, chart, prevent, diagnose and treat the injuries and illnesses suffered by Decedent, which included pressure ulcers, poor wound care, poor hygiene, severe malnutrition, severe weight loss, poor medication management, severe dehydration, contractions, several urinary tract infections, a Methicillin-resistant Staphylococcus aureus infection, a severe infection to her left hand, severe pain, and death.

Plaintiff also avers Defendant Manorcare and Defendant Golden intentionally increased the number of residents with greater health problems requiring more complex medical and custodial care. Plaintiff avers Defendant Manorcare and Defendant Golden failed to provide resources necessary, including sufficiently trained staff, to meet the needs of the residents, including Decedent. Plaintiff avers Defendant Manorcare and Defendant Golden knowingly established staffing levels that created recklessly high resident-to-nurse ratios. Plaintiff avers Defendant Manorcare and Defendant Golden knowingly disregarded patient acuity levels while making staffing decisions and knowingly disregarded the minimum time required by staff to perform essential day-to-day functions and treatment. Plaintiff avers the acts and omissions of Defendant Manorcare and Defendant Golden were motivated by a desire to increase profits by knowingly reducing expenditures for needed staffing,

> training, supervision, and care to levels that would inevitably lead to injuries, such as those suffered by Decedent.

Opinion and Order of Court, 9/13/12, at 5-7 (footnotes omitted).

In response to the Complaint, Golden filed preliminary objections seeking, in relevant part, to enforce the arbitration agreement. The trial court overruled the objections, relying on ***Stewart v. GGNSC-Canonsburg, L.P.***, 9 A.3d 215 (Pa. Super. 2010), which determined the arbitration agreement form utilized by Golden was unenforceable, based on its reliance on the National Arbitration Forum (NAF) procedures. "The problem in this case is that the designated arbitration forum, the NAF, can no longer accept arbitration cases pursuant to a consent decree it entered with the Attorney General of Minnesota." ***Id***. at 217. Further, the NAF clause was not an "ancillary, logistical but, rather, a primary purposed of the agreement itself." ***Id***. Therefore, the entire agreement was unenforceable due to the failure of that essential term.

In this appeal, Golden asks this panel to ignore the ***Stewart*** decision, claiming that case was decided in error. Golden also argues that the instant matter is distinguishable from ***Stewart*** in that here there is specific evidence that the NAF provisions were not integral to the agreement.

Initially, it is agreed that the arbitration agreement used in ***Stewart*** was identical to the agreement used instantly. Therefore, barring distinguishing facts, we are bound by the ***Stewart*** decision and we are forbidden from reconsidering the propriety of the ***Stewart*** decision. ***See***,

In re Adoption of S.E.G., 901 A.2d 1017 (Pa. 2006) (Superior Court decision may only be overturned by *en banc* panel of the Superior Court or by the Supreme Court); ***Marks v. Nationwide Ins. Co.***, 762 A.2d 1098 (Pa. Super. 2000) (as long as decision has not been overturned by Pennsylvania Supreme Court, a decision by the Superior Court remains binding in the Superior Court).

Golden has argued the instant matter is distinguishable in that the trial court improperly failed to consider evidence that the NAF provision was not an integral part of the arbitration agreement. Golden claimed that because Decedent's Daughter, Wert, admitted in her deposition the NAF provisions had nothing to do with her decision to sign, those provisions cannot be integral to the agreement. ***See*** N.T. Deposition Wert, 5/16/12, at 82-86. However, Wert testified she did not consider the NAF provisions because she did not read the arbitration agreement and signed all the documents because,

> My emotions weren't where they should be at that point, and I just - there was no other way to do it. *I had to sign the papers to get her there, so I didn't – it didn't matter what I was signing.* I just wanted her better.

Id. at 86 (emphasis added).

Golden is attempting to support its claim by quoting Wert out of context. Wert's testimony does not demonstrate she considered and then rejected the import of the NAF provisions. Rather, read in context, Wert's

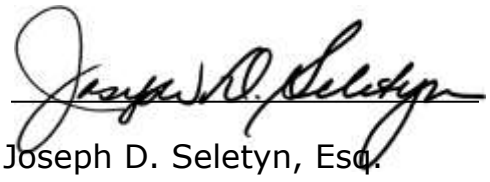
testimony was that she believed it was necessary to sign all the documents presented to her in order to obtain treatment and care for her mother. Therefore, we find that Golden's argument that the instant case is distinguishable from ***Stewart*** because Wert did not rely on the NAF provision, unavailing.

Because there are no relevant distinguishing facts between the instant matter and ***Stewart***, we are bound by that decision. Therefore, we affirm the decision of the trial court, which held the arbitration agreement in this matter was unenforceable.

Order affirmed. Appellee's motion to file supplemental brief is denied.

Fitzgerald, J., files a concurring statement.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/19/2013