

SUPREME COURT OF PENNSYLVANIA

Wert v. Manorcare of Carlisle

Wert · No. 62 MAP 2014 · Decided October 27, 2015

SUMMARY

This is a concurring opinion by Chief Justice Saylor of the Supreme Court of Pennsylvania in an appeal concerning the enforceability of an arbitration agreement that designated the National Arbitration Forum after that forum had ceased administering consumer arbitrations. The concurrence supports the result based on the agreement's terms, the drafting party's responsibility for the failed forum designation, and concerns surrounding the National Arbitration Forum's withdrawal from consumer arbitration.

OPINION

Wert v. Manorcare of Carlisle

PER CURIAM.

[J-24-2015][M.O. – Stevens, J.]

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

EVONNE K. WERT, EXECUTRIX OF THE : No. 62 MAP 2014

ESTATE OF ANNA E. KEPNER, : DECEASED : Appeal from the Order of the Superior : Court
at No. 1746 MDA 2012 dated v. : 12/19/13 affirming the order of the : Cumberland County Court
of Common MANORCARE OF CARLISLE PA, LLC : Pleas, Civil Division, at No. 12-165 Civil
D/B/A MANORCARE HEALTH : dated 9/13/12

SERVICES-CARLISLE; HCR

MANORCARE, INC; MANOR CARE, INC.; : ARGUED: April 7, 2015

HCR HEALTHCARE, LLC; HCR II : HEALTHCARE, LLC; HCR III : HEALT CARE, 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 :

CONCURRING OPINION

MR. CHIEF JUSTICE SAYLOR DECIDED: October 27, 2015 Although I have differences with

the rationale set forth in the Opinion Announcing the Judgment of the Court, I support the result for many of the reasons articulated by Judge Hamilton of the United States Court of Appeals for the Seventh Circuit in his dissenting opinion in *Green v. U.S. Cash Advance Illinois, LLC*, 724 F.3d 787 (7th Cir. 2013). In addition to agreeing with Judge Hamilton’s analysis of Rules 1(A) and 48(D) of the National Arbitration Forum (“NAF”) Code, see *id.* at 795-96 (Hamilton, J., dissenting), I am aligned with his position that it is not the courts’ role to compensate for the negligence of an entity presenting a form contract in a consumer-oriented setting which this entity knew or should have known could not be enforced on its own terms. See *id.* at 793. See generally Majority Opinion, slip op. at 11 (explaining that the arbitration agreement at issue in the present case was executed eight months after the NAF’s decision to withdraw from the field of consumer arbitrations). To the extent that unwanted consequences must attend such a patent drafting error, from my point of view these are more justly visited upon the more sophisticated party to which such mistake is most fairly attributable. Finally, although I certainly recognize the federal and state policies favoring arbitration, I also believe it is important to acknowledge the inauspicious circumstances surrounding the NAF’s decision to forego administering consumer arbitrations, in that the organization entered into a consent decree with a state attorney general after having been sued on the allegation that it colluded with businesses relative to their disputes with consumers. See *id.* at 794. See generally Note, Nicole Wanlass, No Longer Available: Critiquing the Contradictory Way Courts Treat Exclusive Arbitration Forum Clauses When the Forum Can No Longer Arbitrate, 99 MINN. L. REV. 2005, 2009 (2015). To the degree that such allegations cannot be discounted, reflexive adherence to the [J-24-2015][M.O. – Stevens, J.] - 2 courts’ self-protective preferences for arbitration -- particularly relative to agreements which are incapable of enforcement according to their own terms -- would be problematic. [J-24-2015][M.O. – Stevens, J.] - 3