

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MARY K. LITMAN, INDIVIDUALLY
AND ON BEHALF OF THE
WRONGFUL DEATH BENEFICIARIES
OF MARY ALICE CARTER

Plaintiff-Appellee

-vs-

HCR MANORCARE, INC., ET AL.

Defendants-Appellants

JUDGES:

Hon. William B. Hoffman, P.J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2014CA00224

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common
Pleas, Case No. 2014CV01552

JUDGMENT:

Reversed

DATE OF JUDGMENT:

June 29, 2015

APPEARANCES:

For Plaintiff-Appellee

MICHAEL J. FULLER, JR.
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For Defendants-Appellants

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Farmer, J.

{¶1} The decedent, Mary Alice Carter, lived in Manor Care Belden Village nursing home, appellant herein, from November 2, 2009 until July 15, 2012. The decedent died on July 17, 2012.

{¶2} On July 1, 2014, appellee, Mary K. Litman, individually and on behalf of the wrongful death beneficiaries of Mary Alice Carter, filed a complaint against appellant and several other entities and individuals, claiming eight causes of action: 1) corporate negligence, 2) individual negligence, 3) nursing home violations, 4) medical malpractice, 5) malice and/or gross negligence, 6) fraud, 7) breach of fiduciary duty, and 8) premises liability.

{¶3} On July 28, 2014, appellants moved to stay the proceedings pending arbitration. By judgment entry filed November 19, 2014, the trial court stayed the non-wrongful death claims only and elected to proceed on the wrongful death claims.

{¶4} Appellants filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶5} "THE TRIAL COURT ERRED BY NOT STAYING CLAIMS IT DEEMED TO BE NON-ARBITRABLE, PENDING THE ARBITRATION OF ARBITRABLE CLAIMS."

I

{¶6} Appellants claim the trial court erred in not staying the wrongful death claims while the non-wrongful death claims were referred to arbitration. We agree.

{¶7} We review the trial court's decision to stay proceedings and compel arbitration in this case under an abuse of discretion standard. *Eagle v. Fred Martin Motor Company*, 157 Ohio App.3d 150, 2004-Ohio-829. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983).

{¶8} R.C. 2711.02(B) and (C) provide the following:

(B) If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

(C) Except as provided in division (D) of this section, an order under division (B) of this section that grants or denies a stay of a trial of any action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of

Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.

{¶9} The single issue of this appeal is whether appellee's wrongful death claims not subject to arbitration must be stayed while the arbitrable claims are resolved. It is undisputed that there exist arbitrable claims for injuries to the decedent that occurred prior to her death. The wrongful death claims of the beneficiaries are for their injuries as a result of the decedent's death from her falls.

{¶10} Appellee argues R.C. 2711.02 requires only a stay of arbitrable claims and does not mandate a stay of non-arbitrable claims. In her complaint filed July 1, 2014, appellee alleged eight causes of action and identified the facts relative to the causes of action as follows:

26. Defendants failed to discharge their obligations of care to Mary Alice Carter. As a consequence thereof, Mary Alice Carter suffered catastrophic injuries, extreme pain, suffering, and mental anguish. The scope and severity of the recurrent wrongs inflicted upon Mary Alice Carter while under the care of the facility accelerated the deterioration of her health and physical condition beyond that caused by the normal aging process and resulted in physical and emotional trauma which includes, but is not limited to:

- a. Falls;
- b. Fractures; and

c. Death.

27. All of the above identified injuries, as well as the conduct specified below, caused Mary Alice Carter to lose her personal dignity and extreme and unnecessary pain, degradation, anguish, and emotional trauma.

{¶11} In *Garber v. Buckeye Chrysler-Jeep-Dodge of Shelby, L.L.C.*, 5th Dist. Richland No. 2007-CA-0121, 2008-Ohio-3533, ¶ 18, this court found "[w]here an action involves both arbitrable and non-arbitrable claims, the entire proceeding must be stayed until the issues subject to arbitration are resolved."

{¶12} In *Grady v. Winchester Place Nursing & Rehabilitation Center*, 5th Dist. Fairfield No. 08 CA 59, 2009-Ohio-3660, ¶ 28, this court cited to the case of *Peters v. Columbus Steel Castings Company*, 115 Ohio St.3d 134, 2007-Ohio-4787 and found pursuant to the nature of the survivor claims vis-à-vis the wrongful death claims, the "decedent's beneficiaries were not parties to the arbitration agreement and that any wrongful death claims they may have are therefore not subject to arbitration." This court concluded at ¶ 29: "Consequently, we find that the trial court erred in not staying the survivor claims pending arbitration pursuant to the subject agreement but find that the trial court correctly denied Appellant's motion to stay as it applies to the wrongful death claims."

{¶13} Most recently, our brethren from the Eighth District, in reviewing a survivor/wrongful death action in *Maclin v. Greens Nursing and Assisted Living, L.L.C.*,

8th Dist. Cuyahoga No. 101085, 2014-Ohio-2538, ¶ 9, held both arbitrable and non-arbitrable claims should be stayed pending arbitration:

As is apparent from the language of the statute, when a trial court determines that certain claims are subject to arbitration, it must stay the entire proceeding until those claims have been arbitrated, even though the action may involve both arbitrable and non-arbitrable claims. *Cheney v. Sears, Roebuck & Co.*, 10th Dist. Franklin No. 04AP-1354, 2005-Ohio-3283, ¶ 12 ("[W]hen an action involves both arbitrable and non-arbitrable claims, the entire proceeding must be stayed until the issues that are subject to arbitration are resolved."); *Murray v. David Moore Bldrs., Inc.*, 177 Ohio App.3d 62, 2008-Ohio-2960, 893 N.E.2d 897, ¶ 11 (9th Dist.) (to the extent there were claims subject to a valid arbitration provision, the trial court erred by denying a stay due to the presence of non-arbitrable claims and parties not subject to the arbitration agreement); *Pyle v. Wells Fargo Financial*, 10th Dist. Franklin No. 05AP-644, 2005-Ohio-6478, ¶ 12 (a presumption favoring arbitration over litigation applies even when the case involves some arbitrable and some non-arbitrable claims, with non-arbitrable claims being determined by a court after completion of arbitration); *Marquez* at ¶ 11 ("[T]he presence of non-arbitrable claims and parties not subject to an arbitration agreement does not justify the denial of appellants' motion to stay").

{¶14} The complaint sub judice is drafted to include falls, fractures, and death, all of which resulted in personal injuries to the decedent and the beneficiaries for her wrongful death.

{¶15} Upon review, we find the trial court erred in not staying the entire case because the complaint alleged a course of continuing conduct which accelerated the deterioration of the decedent's health and physical condition beyond the normal aging process.

{¶16} The sole assignment of error is granted.

{¶17} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby reversed. The wrongful death claims are stayed pending the completion of arbitration.

By Farmer, J.

Wise, J. concur and

Hoffman, P. J. concurs separately.

Hoffman, P.J., concurring

{¶18} I concur in the majority's decision to reverse the trial court's decision. I do so based upon this Court's decision in *Garber*, as well as the Eighth District's decision in *Maclin* (and the cases cited therein). I do so regardless of whether the complaint alleged a continuing course of conduct accelerating Appellee's death.