

[Cite as *Kolosai v. Azem*, 2016-Ohio-394.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102920

**PAULETTE KOLOSAI, ADMINISTRATOR
OF THE ESTATE OF NICHOLAS GIANCOLA**

PLAINTIFF-APPELLANT

vs.

HAITHAM MOUAID AZEM, M.D., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-806065

BEFORE: Laster Mays, J., Kilbane, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: February 4, 2016

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ANITA LASTER MAYS, J.:

{¶1} Paulette Kolosai (“Kolosai”), administrator of the estate of Nicholas Giancola (“Nicholas”), is the plaintiff-appellant in this nursing home negligence and wrongful death case against defendants-appellees Cleveland Healthcare Group, Inc., Walton Manor Health Care Center, Saber Healthcare Group, L.L.C., Saber Healthcare Holdings, L.L.C., and Saber Healthcare Foundation (collectively “Walton Manor”) and Haitham Mouaid Azem, M.D. (“Azem”). Kolosai appeals the trial court’s grant, upon remand, of Walton Manor’s renewed motion to stay/compel pending arbitration. We vacate the judgment, finding that the law of the case doctrine controls.

I. BACKGROUND AND FACTS

{¶2} Kolosai filed this action on April 29, 2013, as amended on July 11, 2013, claiming: (1) corporate negligence; (2) corporate recklessness/willfulness; (3) medical negligence; (4) gross negligence; (5) resident rights violations; (6) wrongful death; and (7) survivorship damages. Walton Manor responded to the complaint by filing an answer on July 23, 2013. The answer included a number of affirmative defenses; however, there was no defense referencing an arbitration agreement or lack of jurisdiction though there was a reference to failure to comply with the admission agreement.

{¶3} On August 27, 2013, Walton Manor filed a motion to stay the proceedings pending arbitration, asserting that Nicholas signed a Resident and Facility Arbitration Agreement (“Arbitration Agreement”). Kolosai argued that the deposition testimony of Walton Manor’s witness and former employee, Stephanie Lewis McCaulley (“Lewis”), who admitted Nicholas to the nursing home and signed the Arbitration Agreement as the facility representative, established

that Nicholas's mother, Rose Giancola ("Rose") executed the Arbitration Agreement on Nicholas's behalf.

{¶4} Though Rose was admitted to the same nursing home just a few weeks after Nicholas,¹ no admissions documents containing Rose's signature were presented to the court evidencing Walton Manor's argument that Nicholas signed the agreement. Instead, Walton Manor relied on the copy of the Arbitration Agreement containing a signature above the name of Nicholas. Walton Manor also argued that Lewis's testimony was vague and was not based on actual knowledge.

{¶5} The trial court granted the stay as to counts 1 through 5 and 7, finding that Rose signed Nicholas's Arbitration Agreement, but also held that Rose had apparent authority to bind Nicholas to the Arbitration Agreement. The court retained the wrongful death claim set forth in Count 6 for further proceedings on the ground that a decedent cannot bind beneficiaries to arbitration in a wrongful death claim. *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787, 873 N.E.2d 1258, ¶ 19.

{¶6} On January 15, 2014, Kolosai appealed the trial court's order in *Kolosai v. Azem*, 8th Dist. Cuyahoga No. 100890, 2014-Ohio-4474 ("*Kolosai I.*") Kolosai argued that the trial court erred in granting the stay on the counts referred to arbitration by finding that Rose had apparent authority to sign the Arbitration Agreement where neither party presented that legal theory to the trial court. Kolosai continued to maintain that Rose signed the Arbitration Agreement without authority so the Arbitration Agreement was not binding. Walton Manor continued to maintain that Nicholas signed the Arbitration Agreement.

¹ Nicholas was admitted on October 28, 2011. Rose was admitted on November 21, 2011. Both Rose and Nicholas are now deceased.

{¶7} Walton Manor proffered copies of Rose’s admissions documents to the appellate court, documents that were not part of the record. Walton Manor claimed those documents, “were not available due to the lack of discovery prior to the Motion to Stay.” Appellee’s Brief at 2. *Kolosai I* at ¶ 4.

{¶8} We noted that, while the new evidence could not be entertained by this court, the submission of the additional documentation to support the premise that Nicholas signed the Arbitration Agreement effectively confirmed Kolosai’s position that the trial court’s finding of apparent authority was erroneous. This court rejected Walton Manor’s fall back position that the trial court correctly determined that a stay was appropriate based on the doctrine of apparent authority because the position was in direct conflict with their argument that Nicholas signed the Arbitration Agreement. *Id.* at ¶ 9-10. We sustained Kolosai’s first assignment of error and the case was reversed and remanded “for further proceedings consistent with the opinion.” *Id.* at ¶11.

{¶9} On remand, Walton Manor filed a renewed motion to stay arbitration on December 12, 2014. Attached to the motion were copies of documents, the majority of which were not a part of the record, from the files of Nicholas and Rose containing their signatures. Also attached was a document dated December 4, 2014, on Speckin Forensic Laboratories letterhead, and signed by Robert D. Kullman (“Kullman”), Forensic Document Analyst.² Kullman opined that, based on his review of machine copies of documents known to contain the signatures of Nicholas and Rose, (1) the signatures on the machine copies of Nicholas’s admission and arbitration agreements were probably written by the same person, to a reasonable degree of

² The document also states that a Curriculum Vitae with Kullman’s last four years of testimony is attached, but it is not a part of the court filing.

scientific certainty; and (2) the signatures on those agreements, compared with documents containing Rose's signature, were, to a reasonable degree of scientific certainty, not written by the same person.

{¶10} Kolosai replied on December 19, 2014, arguing that the law of the case applied because the impact of the reversal was to reverse the judgment granting a stay pending arbitration and remand it to the trial court to move forward with the case. She also argued that: (1) Walton Manor failed to submit Rose's information during the initial proceedings though they had it in their possession since November 2011; (2) due to the law of the case, the motion should have been made under Civ.R. 60(B); (3) Walton Manor waived the right to a stay by conducting the depositions of Nathan and Vanessa Giancola on the merits of the case; and (4) Kullman's report was unreliable because it failed to meet the *Daubert*³ test for expert qualifications and reliability under Evid.R. 702 as set forth in *Walker v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 100759, 2014-Ohio-4208.

{¶11} Walton Manor countered on January 5, 2014. The trial court held an evidentiary hearing that was held on the matter on February 27, 2015. Prior to the hearing, Walton Manor filed a document entitled Notice of Filing of Affidavit of Robert Kullman containing an affidavit by Kullman setting forth his findings, a copy of the report submitted with Walton's Manor's initial motion, except that the missing Curriculum Vitae was included, and copies of the documents that Kullman relied on in forming his opinion. Kolosai stated the document was handed to Kolosai's counsel two hours before the hearing.

{¶12} At the hearing, Walton Manor's counsel explained that the law firms had been in discussions since 2013 regarding obtaining a release for Rose's forms, and that conversations and

³ *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

email exchanges during 2013 and 2014 documented these discussions. Counsel stated the information could not be provided to the trial court or to Kolosai until Kolosai's legal firm provided a signed release on April 23, 2014. Counsel reiterated that Walton Manor's position has always been that Nicholas signed the documents.

{¶13} Kolosai's counsel responded that an agreement had been reached with Walton Manor's counsel via telephone on September 9, 2013, to conduct limited discovery, which was confirmed via email. The email stated that Walton Manor would produce all documents signed during Nicholas's admission and all medical records, and allow a short deposition of Lewis.

{¶14} Kolosai's counsel stated the medical records were received, but not the admissions records despite emails and phone calls up to the night before the October 29, 2013 deposition. Twenty minutes before the deposition, Kolosai's counsel was handed Nicholas's admission documents, which included a checklist form that stated Rose signed Nicholas's documents. Counsel showed the documents to Lewis who said she had never presented the documents to Nicholas.

{¶15} Kolosai's counsel also stated he had asked Walton Manor to withdraw the motion to compel or stay pending arbitration based on the checklist information as confirmed by Lewis's testimony. The response was an email stating the motion would not be withdrawn because Walton Manor's counsel did not think that Rose signed it.

{¶16} Kolosai's counsel also said that Walton Manor never requested a release or tried to introduce any information about Rose's signature until *Kolosai I*. Counsel denied that HIPAA covered Rose's documents and argued that the whole basis for the renewed motion was Kullman's report analyzing documents that had been available since Rose's admission to rebut the testimony of their own witness, Lewis.

{¶17} Kolosai’s co-counsel added that Walton Manor had not produced any documents substantiating requests for a release. Counsel further stated that Walton Manor failed to provide any evidence of requests for a release in spite of a motion filed with the court in November 2013, asking for the documents. As a result, Kolosai’s firm hired an IT firm to check the in-house server for documents from or to Walton Manor’s counsel. The testimony was that the only related document located was the April 2014 cover letter to counsel sending a release for Rose’s documents in response to a request.

{¶18} Walton Manor concluded with an argument that Lewis’s deposition demonstrated no independent recollection of Rose signing the document and that Nicholas signed his own documents. Kolosai’s counsel added he would be filing affidavits by the two other attorneys substantiating that there were never prior requests made for a release for Rose.

{¶19} The parties submitted post-hearing briefs. Kolosai reiterated that the Rose evidence had been in Walton Manor’s position since her admission in 2011, so it was not new, disputed the efficacy of Kullman’s affidavit, and argued that she had no opportunity to conduct discovery, secure a rebuttal expert, or cross-examine Kullman, a paid biased witness.

{¶20} Kolosai also reminded the trial court of Lewis’s deposition testimony that Rose signed the document, not Nicholas, and pointed out that, on the admission checklist in Nicholas’s file, the name “Rose Giancola” is typewritten in the box under “who signed resident admission paperwork?” The argument was also made that Rose’s documents were not HIPAA protected so Walton Manor’s argument that the delay in producing the documents was due to the inability to obtain a release was not accurate.⁴

⁴ In *Kolosai I*, Walton Manor argued the documents were not available until the appellate proceedings due to the lack of discovery during the motion to stay.

{¶21} The trial court determined that, based on the opinion of the expert, as well as exhibits, Nicholas signed the Arbitration Agreement and granted the stay. The judgment entry stated that Kolosai failed to rebut the Kullman report and exhibits submitted by Walton Manor.

The court's entry also stated:

Plaintiffs' post-hearing brief includes a motion to strike Kullman's affidavit, because, in part, "he ignores the plain [fact] that * * * this court has already ruled that Rose Giancola signed the arbitration agreement." However, as stated, that ruling was reversed by the Court of Appeals. Accordingly, plaintiffs' motion to strike is denied. Upon remand, defendants' renewed motion to stay proceedings and compel/enforce arbitration is granted.

{¶22} This appeal ensued.

II. ASSIGNMENTS OF ERROR

I. The trial court abused its discretion by ruling against the clear manifest weight of the evidence.

II. It was error for the trial court to consider the affidavit of defendants' expert, previously undisclosed, in ruling on defendants' renewed motion to compel arbitration.

III. The trial court erred by reversing its earlier ruling finding that Rose Giancola signed the arbitration agreement.

III. LAW AND ANALYSIS

{¶23} We are prevented from addressing Kolosai's assignments of error by our determination that the law of the case doctrine controls. Where a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. *Arizona v. California*, 460 U.S. 605, 681, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983), citing *1B J. Moore & T. Currier*, Moore's Federal Practice (1982).

{¶24} The law of the case doctrine provides that the legal issues involved have been decided with finality and the trial court, on remand, is to apply the law as decided. *State ex rel. Sharif v. McDonnell*, 91 Ohio St.3d 46, 47-48, 2001- Ohio-240, 741 N.E.2d 127; *Nolan v. Nolan*,

11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). “The law of the case doctrine is ‘necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution’.” *Nolan* at ¶ 3. *Novy v. Ferrara*, 11th Dist. Portage No. 2014-P-0064, 2015-Ohio-4428, ¶ 22.

{¶25} The doctrine “is rooted in principles of res judicata and issue preclusion.” *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 35. It “precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued,” in a first appeal. *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404-405, 1996-Ohio-174, 659 N.E.2d 781.

{¶26} In *Kolosai I*, “the [trial] court found that the mother had apparent authority to bind Giancola based on the testimony of a representative from Walton Manor who said that Giancola was present *when his mother signed the agreement.*” *Id.* at ¶ 1. Based on that determination, the trial court found the Arbitration Agreement to be enforceable and ordered that the case be stayed pending arbitration. *Id.* (Emphasis added.)

{¶27} *Kolosai*’s assigned error on appeal did not challenge the trial court’s finding that the mother signed the Arbitration Agreement. *Kolosai* argued that the trial court erred in determining that: (1) Nicholas was present when Rose signed Nicholas’s Arbitration Agreement; and (2) because he was present, the doctrine of apparent authority applied, an argument that was never before the court. Walton Manor responded that “it did not argue the theory of apparent authority below.” *Kolosai I* at ¶ 7. Thus, the parties were in agreement on the issue.

{¶28} We sustained *Kolosai*’s assignment of error, noting that a “Walton Manor employee testified at deposition that she personally witnessed the mother sign the arbitration

agreement on Giancola's behalf." *Id.* Walton Manor stated in *Kolosai I* that it did not argue that the mother signed the Arbitration Agreement, however, they did not file a cross-appeal challenging the trial court's finding on that issue. Thus, we held that "[w]e are left with no other choice but to conclude that Walton Manor allowed error to occur by its acquiescence to the court's finding that the mother signed the Arbitration Agreement on Giancola's behalf, and that she had apparent authority to do so." *Id.*

{¶29} Accordingly, we also determined that Walton Manor had "withdrawn any argument that the court did not err by finding that the mother had apparent authority to bind Giancola to arbitrate any disputes arising from his care and treatment as a patient at the nursing home." *Id.* at ¶ 10. The case was "reversed and remanded to the trial court for further proceedings consistent with this opinion." *Id.* at ¶ 11.

{¶30} Therefore, the law of the case was established in *Kolosai I* that the doctrine of apparent authority did not apply to the mother's signature of the Arbitration Agreement, constituting a reversal of the trial court's grant of a motion to stay pending arbitration. On remand, the matter should have been placed on the court's regular docket and proceeded accordingly. *See State ex rel. Keith v. Gaul*, 8th Dist. Cuyahoga No. 102875, 2015-Ohio-3480.

{¶31} Walton Manor is attempting to relitigate matters already decided. *State v. Larkins*, 8th Dist. Cuyahoga No. 85877, 2006-Ohio-90, ¶ 30, citing *McDonnell*, 91 Ohio St. 3d 46, at 47-48, 2001-Ohio-240, 741 N.E.2d 127. We reiterate that the law of the case doctrine "precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal." (Emphasis added.) *Hubbard, supra.* The trial court lacked authority to proceed in contravention of this court's mandate.

{¶32} The trial court’s judgment is vacated and the case is reversed and remanded for proceedings on the regular docket consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANITA LASTER MAYS, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS;
MELODY J. STEWART, J., DISSENTS WITH SEPARATE OPINION

MELODY J. STEWART, J., DISSENTING:

{¶33} In *State v. Tate*, 140 Ohio St.3d 442, 2014-Ohio-3667, 19 N.E.3d 888, the Ohio Supreme Court stated that “appellate courts should not decide cases on the basis of a new, unbriefed issue without ‘giv[ing] the parties notice of its intention and an opportunity to brief the issue.’” *Id.* at ¶ 21, quoting *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170, 522 N.E.2d 524 (1988). The majority opinion violates this principle. Although Kolosai did raise the law of the case doctrine in opposition to Walton Manor’s renewed motion to stay proceedings and compel arbitration, she does not raise it as an issue on appeal.

{¶34} What Kolosai argues on appeal is that the trial court, on remand, vacated a final appealable order on its own, without a motion seeking relief from judgment as required by Civ.R. 60(B). Appellant’s brief at 10. The court did no such thing — *we* reversed the initial order to

compel arbitration and remanded for further proceedings because Walton Manor had agreed in that appeal that the basis for the first order compelling arbitration was wrong.

{¶35} The first appeal involved the court’s finding that Giancola’s mother had apparent authority to sign the arbitration agreement on his behalf. After the notice of appeal had been filed, Walton Manor came forward claiming to be in possession of evidence to prove that Giancola himself signed the arbitration agreement. That evidence was admittedly not in the record on appeal so we could not consider it as a basis for deciding the appeal. Nevertheless, we viewed Walton Manor’s claim of new evidence as showing that it agreed with Kolosai that the court erred by compelling arbitration on a theory of apparent authority. That concession resulted because, although Walton Manor never argued the theory of apparent authority and had always asserted that Giancola signed the arbitration agreement, Walton Manor now had an expert opinion to that effect that was fundamentally at odds with the court’s original finding that the mother signed the arbitration clause under apparent authority from Giancola. We thus reversed the court’s order compelling arbitration on the basis of apparent authority and remanded for further proceedings. After the case had been returned to the court’s docket on remand, Walton Manor filed a “renewed” motion to stay proceedings and compel arbitration that incorporated the report of a forensic document analyst who concluded that Giancola signed the arbitration agreement. The court granted the renewed motion to stay and compel arbitration.

{¶36} The procedural history of this case shows that the court did not improperly reverse its position and vacate its own judgment — this court reversed the court’s initial order to compel arbitration. Kolosai’s appeal, premised on the court improperly vacating its own judgment on remand, is meritless. In addition, this is not a case where the trial court violated the terms of our mandate on appeal. *See, e.g., Hawley v. Ritley*, 8th Dist. Cuyahoga Nos. 50856 and 50875, 1986

Ohio App. LEXIS 8740 (Oct. 16, 1986). Our mandate in *Kolosai I* called only for “further proceedings consistent with this opinion.” It would have been *inconsistent* with the remand for the trial court to continue to rely on a theory of apparent authority. That did not happen. By the majority’s own reckoning, no error has occurred.

{¶37} The majority asserts that Walton Manor is “attempting to relitigate matters already decided,” *ante* at ¶ 31, in violation of the law of the case doctrine. It is unclear, in fact, what the majority finds objectionable about the proceedings on remand. The majority concludes that following reversal, “the matter should have been placed on the court’s regular docket and proceeded accordingly.” *Ante* at ¶ 30. That is exactly what happened. The reversal of the court’s first order staying the case and compelling arbitration and the remand for “further proceedings” returned the case to the court’s docket and left the parties in the same position they were in before any stay for arbitration had been issued. On remand, “further proceedings” ensued in the form of a second motion to stay proceedings, which the trial court granted on a different legal theory, leading to this second appeal.

{¶38} It should also be noted in the context of a discussion on the law of the case that there was nothing in the disposition of the first appeal to prevent Walton Manor from offering the expert’s opinion on remand. The law of the case doctrine “does not apply when subsequent proceedings involve an expanded record or different legal issues.” *Berlekamp Plastics, Inc. v. Buckeye Union Ins. Co.*, 6th Dist. Sandusky No. S-98-036, 1999 Ohio App. LEXIS 1024 (Mar. 19, 1999), citing *Johnson v. Morris*, 108 Ohio App.3d 343, 349, 670 N.E.2d 1023 (4th Dist.1995), and *Stemen v. Shibley*, 11 Ohio App.3d 263, 265, 465 N.E.2d 460 (6th Dist.1982). Walton Manor’s first motion to stay and compel arbitration did not rely on a theory of apparent authority — it stated that Giancola entered into the arbitration agreement with Walton Manor. It

was Kolosai who raised the issue of apparent authority by way of deposition testimony from a Walton Manor employee to the effect that the mother signed the arbitration agreement for Giancola. The court's ruling on the first motion was undeniably based on a theory of apparent authority, so the court did not consider whether Giancola actually signed the document. No law of the case had been established with respect to whether Giancola signed the arbitration agreement. With our remand explicitly calling for "further proceedings," Walton Manor was entitled to offer additional evidentiary support for the second motion to stay and compel arbitration.

{¶39} Apart from there being no error with the trial court's decision to consider Walton Manor's second motion to stay and compel arbitration and the new evidence offered in support of that motion, Kolosai's substantive arguments on appeal likewise show no error. Kolosai argues that the trial court's decision to stay the proceedings and refer the matter to arbitration on the basis that Giancola signed the arbitration agreement is against the manifest weight of the evidence. This trial court ruled in favor of Walton Manor, finding persuasive the opinion of a handwriting expert that Giancola signed the arbitration agreement. Kolosai argues that the court abused its discretion by allowing the expert to testify on grounds that the expert had been found "unreliable" in a Michigan court case. *See Berry v. V.*, 2012 Mich. App. LEXIS 2487, 2012 WL 6178157 (Mich.Ct.App. Dec. 11, 2012). It is unclear how the Michigan court reached that conclusion — it claimed that the expert's opinions were not credible because he had been paid to testify. That is an unremarkable proposition — one typically pays for an expert's expertise. In any event, the estate makes no specific argument as to why the expert was not credible in this case.

{¶40} Kolosai also argues that the trial court should not have considered the expert's report because she was given no opportunity to conduct discovery relating to the basis for the expert's opinion and no opportunity to find and prepare a rebuttal expert witness. Kolosai did not raise these objections below — apart from questioning the expert's credibility, Kolosai only complained that the expert lacked credibility because he failed to attach a curriculum vitae to his report. In any event, Kolosai did not ask the trial court for an extension of time in which to respond to the expert's report, so she cannot now complain that she lacked the time to prepare an adequate response.

{¶41} I therefore dissent from the decision reached by the majority.