

COURT OF APPEALS  
FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

DEBRA (NELSON) GRADY,  
Individually and as Administratrix for the  
Estate of JUDY MAE HILLES

Plaintiff-Appellee

-vs-

WINCHESTER PLACE NURSING &  
REHABILITATION CENTER, et al.

Defendants-Appellants :

JUDGES:

Hon. John W. Wise, P.J.

Hon. Julie A. Edwards, J

Hon. Patricia A. Delaney, J.

Case No. 08 CA 59

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common  
Pleas, Case 08 CV 762

JUDGMENT:

Reversed and remanded

DATE OF JUDGMENT ENTRY:

July 20, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant Winchester

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Wise, P.J.

{¶1} Defendant-Appellant Kindred Nursing Centers East, LLC, appeals the August 19, 2008, decision of the Fairfield County Court of Common Pleas refusing to stay Plaintiff-Appellee's survivor claims pending arbitration proceedings.

#### STATEMENTS OF FACTS AND CASE

{¶2} On June 12, 2008, Plaintiff-Appellee, Debra (Nelson) Grady, individually and as Administratrix for the Estate of Judy Mae Hilles, commenced this action in the Fairfield County Court of Common Pleas against Defendant-Appellant Kindred Nursing Centers East, LLC dba Winchester Place Nursing & Rehabilitation Center ("Kindred"), and other medical Defendants alleging medical negligence survivor and wrongful death claims. Specifically, the complaint alleged that decedent, Judy Mae Hilles, had endured pain and suffering and had eventually passed away, as a result of substandard nursing home care and treatment that was furnished by Defendant-Appellant, Winchester Place Nursing & Rehabilitation Center, and others.

{¶3} On July 29, 2008, Defendant-Appellant filed a Motion to Stay Proceedings pursuant to R.C. §2711.02, arguing that the parties' entire dispute was subject to binding arbitration. Defendant-Appellant moved for a stay of all the claims which had been brought against the nursing home.

{¶4} Plaintiff-Appellee filed a Brief in Opposition on August 18, 2008.

{¶5} The following day, the trial court issued an Entry analyzing the issue and ultimately denying the Motion to Stay largely on the basis of *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787, 873 N.E.2d 1258.

{¶6} In said Entry, the trial court stated:

{¶7} “However, arbitration is nonetheless a matter of contract, and despite the strong policy in its favor, a party cannot be compelled to arbitrate any dispute that he has not agreed to submit. Further, a decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims. *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 873 N.E.2d 1258, 2007-Ohio-4787 (Ohio Sept. 20, 2007).

{¶8} “Here, although Plaintiff’s decedent, Judy May Hilles, signed an agreement to arbitrate any dispute with Defendant Winchester Place, she was the only party bound by her signed agreement with Defendant Winchester Place. The beneficiaries of Ms. Hilles did not specifically agree to arbitrate their wrongful death claims. Thus, while any survival claim Ms. Hines may have had against Defendant Winchester Place would have been subject to her agreement to arbitrate, pursuant to *Peters*, supra, her beneficiaries are not bound by that agreement to arbitrate.

{¶9} “Upon consideration of the parties’ respective Motion and Brief in Opposition, and reviewing the pertinent law, the court finds that the issues raised in Plaintiff’s Complaint are not referable to arbitration pursuant to *Peters*, supra. Defendant Kindred Nursing Center’s Motion to Stay Proceedings pursuant to R.C. 2711.02 is DENIED. This matter shall proceed accordingly.

{¶10} “It is so ORDERED.”

{¶11} On September 2, 2008, Defendant-Appellant responded with a Motion for Reconsideration asserting that just the "survivor" claims should be stayed.

{¶12} Prior to any ruling on said motion to reconsider, on September 17, 2008, Defendant-Appellant commenced the instant appeal, setting forth the following assignment of error:

**ASSIGNMENT OF ERROR**

**{¶13}** “I. THE TRIAL COURT ERRED IN REFUSING TO STAY PLAINTIFF'S SURVIVOR CLAIMS IN THIS MATTER PENDING ARBITRATION PURSUANT TO OHIO REVISED §2711.02.”

**I.**

**{¶14}** Appellant argues that the trial court should have stayed the survivor claims in this action. We agree.

**{¶15}** We review a trial court's judgment on a motion to stay proceedings and compel arbitration using the abuse of discretion standard, *Eagle v. Fred Martin Motor Company*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161. An abuse of discretion implies the trial court's attitude is unreasonable, arbitrary, or unconscionable, see, e.g., *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. A decision is unreasonable if there is no sound reasoning process that would support the decision, *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corporation* (1990), 50 Ohio St.3d 157 at 161, 553 N.E.2d 597.

**{¶16}** Under R.C. §2711.02, when a court is presented with a motion to stay the proceedings pending arbitration, the court must as an initial matter determine that it is satisfied that the issue involved in the action is referable to arbitration under a written agreement that calls for arbitration. *Cross v. Carnes* (1998), 132 Ohio App.3d 157, 164, 724 N.E.2d 828, 833; *McGuffey v. LensCrafters, Inc.* (2001), 141 Ohio App.3d 44, 51, 749 N.E.2d 825, 831.

**{¶17}** Revised Code §2711.02(B) provides:

**{¶18}** “If an 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 agreement provided the applicant for stay is not in default in proceeding with arbitration.”

**{¶19}** Ohio public policy favors the enforcement of private arbitration agreements. *Kelm v. Kelm* (1993), 68 Ohio St.3d 26, 623 N.E.2d 39. See also, *N. Ohio Sewer Contrs., Inc. v. Bradley Dev. Co.* (2005), 159 Ohio App.3d 794, 2005-Ohio-1014, 825 N.E.2d 650; *Junkins v. Spinnaker Bay Condominium Ass'n.*, Ottawa App. No. OT-01-007, 2002-Ohio-872. Any uncertainty that exists with regard to the applicability of an arbitration clause should be resolved in favor of coverage. *Id.* An arbitration clause should not be denied effect unless it can be determined to a high degree of certainty that the clause does not cover the asserted dispute. *Owens Flooring Co. v. Hummel Constr. Co.* (2000), 140 Ohio App.3d 825, 749 N.E.2d 782. See also *Willis v. Linnen*, Summit App. No. 20775, 2002-Ohio-2000. The law favors and encourages arbitration. *Brennan v. Brennan* (1955), 164 Ohio St. 29, 128 N.E.2d 89. However, arbitration is a matter of contract and, despite the strong policy in its favor, a party cannot be compelled to arbitrate any dispute that he has not agreed to submit. *Teramar Corp. v. Rodier Corp.* (1987), 40 Ohio App.3d 39, 531 N.E.2d 721.

**{¶20}** In the case sub judice, upon entering the nursing home, the decedent Judy Hilles entered into an “Alternative Dispute Resolution Agreement Between Residents and Facility” with Defendant-Appellant Kindred Nursing Home, which provided

that any potential medical claims be resolved through arbitration pursuant to R.C. Chapter 2711. Any survivor claims would therefore be subject to arbitration pursuant to said agreement.

{¶21} However, upon review, we find Plaintiff-Appellee's complaint contains both survivor claims and wrongful death claims.

{¶22} In *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787, the Ohio Supreme Court was presented with an arbitration agreement in a case which had both survivor and wrongful death claims. The Court in *Peters* held that the wife's wrongful death claim against the Columbus Steel Castings, which was filed after her husband fell to his death while working with the company, was not subject to arbitration, even though the husband had signed an agreement with the company that required him to arbitrate all claims. The Court found that the husband was the only party bound by his signed agreement with company and that his beneficiaries did not specifically agree to arbitrate their wrongful death claims. The Court found that the wife's wrongful death claim was separate from any survival claim husband may have had against the company.

{¶23} In so finding, the *Peters* court addressed the separate nature of survival claims and wrongful-death claims, stating:

{¶24} "Although there is no common-law action for wrongful death, R.C. 2125.01 establishes such a claim in Ohio. Under this provision, "[w]hen the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued \* \* \* shall be liable to an action for damages."

{¶25} “As opposed to a survival claim, through which a decedent's estate may recover for the injuries suffered by the decedent before his death, a wrongful-death claim belongs to the decedent's beneficiaries. Compare R.C. 2125.02(A)(1) \*137 with R.C. 2305.21. “Except as provided in this division, a civil action for wrongful death shall be brought in the name of the personal representative of the decedent *for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent \* \* \** and *for the exclusive benefit of the other next of kin of the decedent.*” (Emphasis added.) R.C. 2125.02(A)(1). In evaluating such a claim, the trier of fact may award damages for “the injury and loss resulting to the beneficiaries \* \* \* by reason of the wrongful death.” R.C. 2125.02(A)(2). The personal representative is involved to prevent multiplicity of suits and facilitate distribution of any sums received from wrongful-death claims to the various beneficiaries. See R.C. 2125.03.

{¶26} “Thus, when an individual is killed by the wrongful act of another, the personal representative of the decedent's estate may bring a survival action *for the decedent's own injuries* leading to his or her death as well as a wrongful-death action *for the injuries suffered by the beneficiaries of the decedent* as a result of the death. Although they are pursued by the same nominal party, we have long recognized the separate nature of these claims in Ohio.

{¶27} “In 1908, we stated that survival actions and wrongful-death actions “are not the same,” even though they both relate to the defendant's alleged negligence. *Mahoning Valley Ry. Co. v. Van Alstine* (1908), 77 Ohio St. 395, 414, 83 N.E. 601. Thus, the fact that the representative of an estate fully litigates a survival action against a

defendant does not prevent the representative from also bringing a wrongful-death action against the same defendant. Id. at paragraph three of the syllabus.”

{¶28} In applying this analysis to the instant case, we find 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.

{¶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.

{¶30} Appellant’s sole assignment of error is sustained.

{¶31} For the foregoing reasons, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is reversed and remanded for further proceedings consistent with the law and this opinion.

By: Wise, P.J.

Edwards, J., and

Delaney, J., concur.

/S/ JOHN W. WISE

/S/ JULIE A. EDWARDS

/S/ PATRICIA A. DELANEY

JUDGES

