

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

PHILLIP J. GORDON, AS A
PERSONAL REPRESENTATIVE
FOR THE ESTATE OF HARVEY
JAMES GORDON, DECEASED,

Appellant,

v.

Case No. 5D20-2732

DOS OF CRYSTAL RIVER ALF,
LLC, D/B/A CRYSTAL GEM
MANOR ASSISTED LIVING,
DOS OF CRYSTAL RIVER, LLC.,
D/B/A CRYSTAL GEM MANOR ALF,
DOS NURSING HOME GROUP, LLC, ET AL,

Appellees.

Opinion filed July 2, 2021

Nonfinal Appeal from the Circuit Court
for Citrus County,
Caroline Falvey, Judge.

David R. Best, of Best Trial Attorneys,
PA, Orlando, for Appellant.

Therese A. Savona, of Cole, Scott &
Kissane, P.A., Orlando, for Appellees.

HARRIS, J.

Appellant, Phillip Gordon, as Personal Representative for the Estate of Harvey James Gordon (the “Estate”), appeals the trial court’s order granting a motion to compel binding arbitration filed by Appellees, DOS of Crystal River, ALF, LLC, d/b/a Crystal Gem Manor Assisted Living, DOS of Crystal River, LLC, d/b/a Crystal Gem Manor ALF, DOS Nursing Home Group, LLC (“Crystal Gem”). Because the lower court did not err in concluding that a valid arbitration agreement exists, that the claims raised by the Estate are arbitrable, and that the defendants below did not waive their right to arbitration, we affirm.

The complaint filed in this case alleged that, while a resident of Crystal Gem, Harvey Gordon suffered repeated and severe physical abuse at the hands of one or more employees of Crystal Gem. This abuse caused significant physical injuries to Harvey, ultimately resulting in his death.

Upon Harvey’s admission to Crystal Gem, an admission agreement as well as an addendum to that agreement were signed by Phillip Gordon, Harvey’s authorized agent and Power of Attorney. This addendum contained an arbitration agreement, which provided that any dispute or controversy in any way related to Harvey’s stay at Crystal Gem would be resolved exclusively by binding arbitration. The agreement further provided that all

costs associated with the arbitration would be split equally and that “[t]he Parties further agree that each party shall be responsible for their own attorneys’ fees.”

Crystal Gem filed a motion to compel arbitration, alleging that the agreement to arbitrate was valid, that an arbitrable issue existed, and that it had not waived its to arbitrate. First, it is undisputed that Crystal Gem never waived its right to arbitrate in this case. As to an arbitrable issue, despite the horrific injuries alleged to have been intentionally caused to Harvey by Crystal Gem’s staff, our Court has previously held that language in an arbitration agreement can be written broadly enough to include even wrongful death claims. See Laizure v. Avante at Leesburg, Inc., 44 So. 3d 1254 (Fla. 5th DCA 2010) (Laizure I)¹ (affirming validity of arbitration agreement in wrongful death case where broad language encompassed “any claim based on . . . common law or statutory negligence, gross negligence, malpractice or claim based on any departure from accepted standards of medical or nursing care.”).

Here, the wrongful death claim is based on alleged negligence. The arbitration agreement is nearly identical to the agreement in Laizure I. It

¹ The Florida Supreme Court approved this Court’s decision in Laizure v. Avante at Leesburg, Inc., 109 So. 3d 752, 762 (Fla. 2013) (Laizure II).

encompasses claims of “breach of contract, breach of fiduciary duty, fraud or misrepresentation, common law or statutory negligence, gross negligence, malpractice or any other claim based on any departure from accepted standards of medical or nursing care.” The Estate relies on Seifert v. US Home Corp., 750 So. 2d 633 (Fla. 1999), in which the Court concluded that the plaintiff’s wrongful death claim was not arbitrable. However, as we pointed out in Laizure I, this holding was because the arbitration agreement in Seifert did not require arbitration of personal injury tort claims. Laizure I, 44 So. 3d at 1257–58. In this case, however, the arbitration agreement specifically encompassed such claims related to the care provided to Harvey. Additionally, in Laizure II, the Florida Supreme Court held that an arbitration provision in a valid contract binds the signing party’s estate and heirs in a subsequent wrongful death case. Laizure II, 109 So. 3d at 754. Accordingly, the trial court correctly determined that an arbitrable issue exists.

The final issue to be determined in deciding whether to compel arbitration is whether there is a valid agreement to arbitrate. Here, the Estate attacks the validity of the agreement in part because it contains what the Estate argues is a void provision regarding attorneys’ fees.

Florida's Adult Protective Services Act contains a provision entitling the prevailing party to recover attorneys' fees. § 415.1111, Fla. Stat. (2019). Our sister court in Hochbaum ex rel. Hochbaum v. Palm Garden of Winter Haven LLC, 201 So. 3d 218 (Fla. 2d DCA 2016), found unenforceable an identical attorneys' fees provision in an arbitration agreement. That court held that the agreement's requirement that each party pay their own fees was an improper attempt to limit the statutory remedy of prevailing party attorneys' fees. Therefore, the attorneys' fees provision contained in the arbitration agreement was found to violate public policy.

Simply finding that the provision violates public policy does not end the analysis, however. The court must then determine whether the offending provision is severable from the remainder of the agreement. The Hochbaum court determined that the attorneys' fees provision was severable from the rest of the agreement because it did not go to the essence of the agreement. See id. at 223 (citing Est. of Deresh ex rel. Schneider v. FS Tenant Pool III Tr., 95 So. 3d 296 (Fla. 4th DCA 2012)).

On very similar facts, our Court has cited the reasoning of Hochbaum approvingly. In Rockledge NH, LLC v. Miley By and Through Miley, 219 So. 3d 246 (Fla. 5th DCA 2017), we similarly concluded that the attorneys' fees provision in the arbitration agreement violated the prevailing party fees

provision of the Adult Protective Services Act. We concluded in Rockledge that because the agreement contained a severability clause, the attorneys' fees provision should have been severed from the arbitration agreement and that the agreement was otherwise enforceable. The agreement in this case similarly contains a severability clause allowing the trial court to excise the provision from the agreement. We continue to follow our previous holding in Rockledge. Therefore, we affirm the order compelling arbitration in this case but remand with instructions to strike the attorneys' fees provision from the arbitration agreement.

AFFIRMED; REMANDED.

TRAVER and NARDELLA, JJ., concur.