FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1444

GREGORY BAILEY, M.D.,

Appellant,

v.

WOMEN'S PELVIC HEALTH, LLC,
a Florida limited liability
company,

Appellee.

On appeal from the Circuit Court for Alachua County.
Monica J. Brasington, Judge.

November 18, 2020

OSTERHAUS, J.

Dr. Gregory Bailey appeals an order denying his objection to arbitration involving a claim brought by his employer Women's Pelvic Health, LLC (WPH). He argues that WPH's claim is not an arbitrable issue under the parties' employment agreements. We disagree and affirm because the arbitration provisions in the agreements cover the employer's claim.

I.

Dr. Bailey is a physician practicing gynecology and urogynecology, who entered into two employment agreements with WPH to provide medical care to its patients. Both agreements

contained arbitration provisions requiring that "any controversy or claim arising out of or related to th[e] Agreement, or any breach thereof, shall be settled by arbitration."

In 2018, WPH and FWC Urogynecology, LLC (FWCU)—a company owned by the same parent company as WPH—filed an arbitration claim statement against Dr. Bailey. Both WPH and FWCU sought to have Dr. Bailey indemnify them for losses stemming from a United States Department of Justice (the Department) investigation into improper billing practices under the False Claims Act, 31 U.S.C. §§ 3729-3733. FWCU subsequently settled the matter with the Department. According to the claim statement, Dr. Bailey and others billed under a FWCU provider number and managed care contracts while working directly for WPH. FWCU subsequently dropped its arbitration claim against Dr. Bailey because it lacked an agreement with him. But WPH continues in arbitration seeking indemnification from Dr. Bailey "for the claims, action, demand, loss, liability, costs, damages and expenses it incurred" due to Dr. Bailey's billing-related misdeeds.

After engaging in arbitration-related discovery, Dr. Bailey filed a circuit court action challenging the arbitrator's jurisdiction and seeking to stay the arbitration. At the motion hearing, Dr. Bailey argued that WPH had not identified an arbitrable issue because WPH incurred no losses, etc. owing to Dr. Bailey's actions related to the settlement agreement. WPH countered that its claims against Dr. Bailey were subject to the indemnification provisions in their employment agreements and thus arbitrable. WPH also argued that Dr. Bailey waived any objection to arbitration by engaging in discovery and filing an answer and counterclaim in the arbitration proceeding.

The trial court entered an order denying Dr. Bailey's motion to stay arbitration. The court determined that a valid arbitration agreement existed and that WPH's claim related directly to that agreement, making it an arbitrable issue. The court further found that Dr. Bailey had waived his right to object to the arbitration due to his active participation in the arbitration proceeding.

II.

This appeal involves an order affirming an arbitrator's jurisdiction. Under Florida's Arbitration Code, a court must consider three elements when deciding whether to enforce an arbitration agreement: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." *All S. Subcontractors, Inc. v. Amerigas Propane, Inc.*, 206 So. 3d 77, 81 (Fla. 1st DCA 2016) (quoting *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999)). Only the second prong—the existence of an arbitrable issue—is at issue in this case.

Determining whether an arbitrable issue exists requires the court to examine the plain language of the parties' arbitration agreement. *See Lake City Fire & Rescue Ass'n, Local 2288 v. City of Lake City*, 240 So. 3d 128, 130 (Fla. 1st DCA 2018). "Contracts with arbitration clauses create a presumption of arbitrability." *Robertson Grp., P.A. v. Robertson*, 67 So. 3d 1112, 1114 (Fla. 1st DCA 2011) (citing *Beaver Coaches, Inc. v. Revels Nationwide R.V. Sales, Inc.*, 543 So. 2d 359 (Fla. 1st DCA 1989)). "Any doubt in the scope of an arbitration agreement should be resolved in favor of arbitration." *Id.* (citing *Murphy v. Courtesy Ford, L.L.C.*, 944 So. 2d 1131 (Fla. 3d DCA 2006)). Here, the arbitration provisions used in WPH's employment agreements with Dr. Bailey provide that "any controversy or claim arising out of or related to th[e] Agreement, or any breach thereof, shall be settled by arbitration." According to the Florida Supreme Court, this type of arbitration provision should be broadly interpreted:

> An arbitration provision that is considered to be *narrow in scope* typically requires arbitration for claims or controversies "arising out of" the subject contract. This type of provision limits arbitration to those claims that have a direct relationship to a contract's terms and provisions. In contrast, an arbitration provision that is considered to be *broad in scope* typically requires arbitration for claims or controversies "arising out of *or relating to*" the subject contract. The addition of the words "relating to" broadens the scope of an arbitration provision to include those claims that are described as

> having a "significant relationship" to the contract—regardless of whether the claim is founded in tort or contract law.

Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 593 (Fla. 2013) (emphasis added) (citations omitted) (citing *Seifert*, 750 So. 2d at 636–38). Because the parties' employment agreements use broad "arising out of or related to" language, claims subject to arbitration include not only those arising out of the parties' employment agreements, but those claims with a significant relationship to the agreements. "[A] significant relationship is described to exist between an arbitration provision and a claim if there is a 'contractual nexus' between the claim and the contract." *Baker v. Econ. Research Servs., Inc.*, 242 So. 3d 450, 455 (Fla. 1st DCA 2018) (quoting *Jackson*, 108 So. 3d at 593). And "[a] contractual nexus exists between a claim and a contract if the claim presents circumstances in which the resolution of the disputed issue requires either reference to, or construction of, a portion of the contract." *Id.* (quoting *Jackson*, 108 So. 3d at 593).

WPH argues that arbitration was correctly compelled here for the single reason that "the Claim asserted by WPH relating to indemnification by Dr. Bailey is arbitrable." Turning to WPH's arbitration claim statement, the factual allegations made there primarily involve the settlement agreement between FWCU and the Department. The claim statement alleges that the Department's investigation of FWCU led to information incriminating FWCU's providers for their billing practices, including Dr. Bailey. In turn, Dr. Bailey's billing practices led to losses and liabilities stemming from the settlement of the investigation that flowed to WPH. And so, WPH argues that its arbitrable claim against Dr. Bailey arises under the indemnification provision of the parties' employment agreement: "Pursuant to both the Employment Agreement and Pivoting Agreement, [WPH] seeks to have Dr. Bailey indemnify it for the claims, action, demand, loss, liability, costs, damages and expenses it incurred by result of the actions of Dr. Bailey."

We agree with WPH's argument that a contractual nexus exists between the claim and employment agreements in this case. The parties' employment agreements set forth Dr. Bailey's

obligation to comply with applicable professional practice standards and laws, as well as an agreement that Dr. Bailey would indemnify WPH for "claims, actions, causes of action, demands, losses, liabilities, costs, damages, and expenses of any nature" incurred as a result of his "action or failure to act, negligence or omission." Because WPH's claim arises squarely from the parties' agreement and indemnification provision, we find no error in the trial court's findings that an arbitrable issue exists and that WPH's claims are "directly related to the parties' enforceable agreement to arbitrate."

In reaching this conclusion, we understand Dr. Bailey's argument that he should prevail because WPH did not incur any losses under the settlement agreement. But this argument goes to the merits of the parties' dispute. If Dr. Bailey is right that WPH had no relevant losses, etc., then he can prevail at arbitration. His view of the facts, however, provides no cause for scuttling the parties' agreement to arbitrate any claims "arising out of or related to" their agreements. We conclude that the trial court correctly limited itself to deciding only whether WPH's claim was subject to arbitration, without deciding the merits of Dr. Bailey's claim. *See* § 682.03(4), Fla. Stat. ("The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.").

Finally, because we affirm the trial court's decision that WPH's claim is arbitrable, we need not reach the merits of WPH's argument that Dr. Bailey waived his right to challenge arbitrability by participating in arbitration.

III.

The trial court's order is AFFIRMED.

JAY, J., concurs; TANENBAUM, J., concurs with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

TANENBAUM, J., concurring.

The claim of Women's Pelvic Health, LLC ("WPH") must be submitted to arbitration. While I agree with the majority that the broad form of arbitration clause that we have here certainly captures the claim, I still want to highlight how this case can be resolved without reference to the more expansive term ("related to") in the clause. I question whether, even under that more expansive term, a claim could be forced into arbitration based on a mere generalized reference to an indemnity clause co-located in a contract with an arbitration clause—absent any factual assertion keyed to a substantive duty or obligation within the agreement. Maybe so, WPH seems to suggest. But that question can wait for another case. The narrower term in the clause, "arising out of," and the facts alleged in this claim, suffice to require affirmance.

The term "arising out of" subjects claims to arbitration "that have a direct relationship to a contract's terms and provisions." *Jackson v. Shakespeare Found., Inc.*, 108 So. 3d 587, 593 (Fla. 2013) (citing *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999)). That is to say, "[i]f the contract places the parties in a unique relationship that creates new duties not otherwise imposed by law, then a dispute regarding a breach of a contractually [] imposed duty is one that arises from the contract." *Seifert*, 750 So. 2d at 640 (internal quotation and citation omitted). The majority ably treats the more expansive meaning typically given to the term "related to." One example of a claim that might implicate that term is one "sounding in tort," in which case we would consider whether WPH's allegations "bear[] such a significant relationship to the contract between the parties as to mandate application of the arbitration clause." *Id.* Another example, as I suggested at the beginning, is a claim that sought indemnity generally as a remedy;

then, the broader term might come into play. That is not what we have here. This case is much more straightforward and focused.

The contract between Dr. Gregory Bailey and WPH dealt extensively with Dr. Bailey's obligations and promises relating to the billing for medical services he would provide. Dr. Bailey agreed that all fees and other compensation "received or realized as a result of the rendering of medical services by [Dr. Bailey under the contract] shall belong to and be paid and delivered to [WPH]." He agreed that he would, as requested by WPH, "participate in Medicare, Medicaid, workers compensation, [and] other federal and state reimbursement programs" and that he would do the following:

> [K]eep and maintain (or cause to be kept and maintained) appropriate records, consistent with prevailing standards of medical practice in his[] relevant community, relating to all professional services rendered by him[] under this Agreement and shall prepare and attend to, in connection with such services, all reports, claims and correspondence necessary or appropriate in the circumstances, as determined mutually by [WPH and Dr. Bailey].

Moreover, in the contract, Dr. Bailey appointed WPH as his attorney in fact "to execute, deliver or endorse checks, applications for payment, insurance claim forms or other instruments required or convenient . . . to fully collect, secure or realize all sums lawfully due to [WPH] for services rendered by [Dr. Bailey]" under the contract. Finally, Dr. Bailey "irrevocably" assigned and granted to WPH "the right to bill and collect from patients or third party payers for all services rendered by" Dr. Bailey; and he agreed that "all billing and collection activities shall be conducted as part of the regular business operations" and that "[s]uch procedures shall include but not be limited to sending bills, filing insurance claims, and making phone calls."

Specifically in relation to billing matters, Dr. Bailey agreed to indemnify WPH "from and against any demands, claims, actions or causes of actions, assessments, losses, damages, liabilities, costs and expenses . . . asserted against, related to, or resulting

from . . . liabilities and obligations of, and claims" against WPH, for the following:

> [P]rofessional services provided, or alleged to have been provided, by [Dr. Bailey], which relates to any *violations*, *investigations*, audits, inspections, third party payer offsets or chargebacks, *billing matters* or any other inquiry *by any federal* or state *agency* or board, or any third party payer, claims administrator or patient.

(emphasis added).

Under the provisions of the contract between Dr. Bailey and WPH, then, Dr. Bailey agreed to various undertakings regarding billing for his medical services. He agreed to participate in federal reimbursement programs; to keep appropriate records related to the medical services he provided; to attend to insurance claims on those services; to appoint WPH as his attorney in fact for the purpose of submitting insurance claims; and to assign to WPH the right to collect on any claims from third-party payers. Dr. Bailey also agreed to hold WPH harmless regarding demands and claims against it related to violations and investigations as to billing matters stemming from medical services rendered by Dr. Bailey.

The arbitration claim statement, then, directly implicated duties of Dr. Bailey under the contract, such that we easily can conclude that the claim arises out of the contract and that it must be arbitrated. *See Seifert*, 750 So. 2d at 640. The claim explained that FWC Urogynecology, LLC ("FWC") was the parent of WPH, and during the relevant time period, the professional services of Dr. Bailey and other physicians were billed out "under the provider number and managed care contracts" held by FWC. The U.S. Department of Justice ("DOJ") "initiated an investigation of [FWC] and its providers for" alleged False Claims Act violations, and the investigation uncovered evidence that "incriminated several of [FWC's] providers, including [Dr. Bailey], with [sic] engaging in actions that violated the [False Claims Act]." FWC settled with DOJ to "resolve [that] investigation and any claims DOJ may have pursued against [FWC] or its providers."

WPH's claim sought contractual indemnity from Dr. Bailey with regard to what appears to have been his alleged fraudulent billing in conjunction with his employment. A reasonable inference could be made from the claim that WPH submitted those bills through FWC to a federal third-party payer program, as Dr. Bailey and WPH contemplated in their contract. The direct connection between the specific allegations in the claim and the terms of the contract implicates the "arising out of" part of the arbitration clause, so the claim must be arbitrated.

* * *

Before concluding, I do want to say a word about WPH's argument that Dr. Bailey waived his opposition to arbitration by taking some limited discovery within the arbitration proceeding. The trial court's order did find, as an alternative basis for refusing the stay, that Dr. Bailey "actively participated in the arbitration proceeding and, therefore, [] waived any rights to object to arbitration." This conclusion, however, is problematic.

The Revised Florida Arbitration Code *categorically* disallows waiver by a party of the "availability of proceedings to compel or stay arbitration under" section 682.03. § 682.014(3)(b), Fla. Stat.; *cf.* § 682.014(2) (proscribing certain waivers by a party to an arbitration agreement, but only *before* the arbitrable controversy arises). In turn, when one proceeds under section 682.03 to seek a judicial determination of the arbitrability of a controversy, the court "*shall* proceed summarily to decide the issue." § 682.03(2), Fla. Stat. It may be, then, that there is no waiver defense to a motion to stay arbitration at all.

Putting that aside, it remains that there was no evidence to support the trial court's waiver finding. There was no evidentiary hearing conducted regarding Dr. Bailey's motion to stay, and WPH did not try to submit any evidence on the question of waiver. All that was in the record before the trial court was an excerpt from a deposition that Dr. Bailey took in the arbitration proceeding, and answers to some interrogatories that Dr. Bailey had propounded in the same proceeding. Both of those attachments accompanied Dr. Bailey's memorandum opposing arbitration. Counsel for WPH

made some representations at the final hearing on the stay motion, but that was not evidence.

Waiver is no passing matter in Florida. It has significant consequences. Waiver "is the *intentional* relinquishment of a known right," and even though it may be inferred from conduct, that conduct still must have put the opposing party "off his guard and [led] him to believe" that the first party waived the very right that he seeks to enforce. *Davis v. Davis*, 123 So. 2d 377, 381 (Fla. 1st DCA 1960) (emphasis added) (internal citation omitted). It typically is a question of fact to be determined at trial. *See id.*; *Rutig v. Lake Jem Land Co.*, 20 So. 2d 497, 499 (Fla. 1945); *cf. Se. Grove Mgmt. Inc. v. McKiness*, 578 So. 2d 883, 886 (Fla. 1st DCA 1991) (reversing finding of waiver because it was determined as a matter of law).

The bare indications in the record of Dr. Bailey's participation in the arbitration proceeding, without more, could not support a finding of waiver. *Cf. First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 946 (1995) (noting that "merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue" and that "forcefully objecting to the arbitrators deciding" a dispute naturally would indicate a party "did *not* want the arbitrators to have binding authority over them"); *City of Miami v. Fraternal Order of Police Lodge #20*, 248 So. 3d 273, 279 (Fla. 3d DCA 2018) (holding that the city did not waive its objection to arbitration by participating in arbitration when it did so while "consistently and repeatedly rais[ing] the issue of arbitrability").

Dr. Bailey, not WPH, submitted the only two documents indicating his participation in arbitration at all, and he submitted those documents to *oppose* arbitration. There was no evidence that Dr. Bailey took discovery in the arbitration proceeding in a manner that led WPH to believe that Dr. Bailey intentionally had given up his right to challenge arbitrability of the claim. We ordinarily reverse a trial court's decision that depends on a factual finding that is unsupported by competent, substantial evidence. *See Hill v. Ray Carter Auto Sales, Inc.*, 745 So. 2d 1136, 1138 (Fla. 1st DCA 1999). That could have been the case here. But we affirm because the trial court's primary reason for denying the stay—that WPH's

claim is "directly related" to the parties' contract containing the arbitration provision—was eminently correct.

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