REVERSE and REMAND; and Opinion Filed May 7, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00849-CV

LAW OFFICE OF THOMAS J. HENRY, Appellant
V.
JONATHAN CAVANAUGH, Appellee

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-02977

MEMORANDUM OPINION

Before Justices Lang-Miers, Fillmore, and Stoddart
Opinion by Justice Fillmore

The Law Office of Thomas J. Henry (the Firm) brings this interlocutory appeal from the trial court's order staying an arbitration between the Firm and its former client, Jonathan Cavanaugh. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(2) (West 2011). The Firm argues the trial court erred by staying the arbitration because there was an agreement to arbitrate, the Firm did not waive its right to arbitrate, and the arbitration provision is not subject to the provisions of section 171.002(a)(3) of the civil practice and remedies code.[1] We reverse the trial court's order staying arbitration and remand this case to the trial court.

[1] As relevant to this appeal, section 171.002(a)(3) exempts a claim for personal injury from the Texas Arbitration Act unless (1) each party to the claim, on the advice of counsel, agrees in writing to arbitrate; and (2) the agreement is signed by each party and each party's attorney. TEX. CIV. PRAC. & REM. CODE ANN. § 171.002(a)(3), (c) (West 2011).

Background

Cavanaugh was involved in a traffic accident on June 8, 2015. The next day, Cavanaugh electronically signed a "Power of Attorney and Contingent Fee Contract" (the Contract) with the Firm. The Contract identified Cavanaugh as the "Client" and the Firm as "Attorneys."

On the first page of the Contract, above the title, is the statement, "THIS CONTRACT IS SUBJECT TO ARBITRATION." Section ten of the Contract provides:

> ARBITRATION
>
> Any and all disputes, controversies, claims or demands arising out of or relating to this Agreement or any provision hereof, the providing of services by Attorneys to Client, or in any way relating to the relationship between Attorneys and Client, whether in contract, tort or otherwise, at law or in equity, for damages or any other relief, shall be resolved by binding arbitration pursuant to the Federal Arbitration Act in accordance with the Commercial Arbitration Rules then in affect with the American Arbitration Association. Any such arbitration proceeding shall be conducted in Nueces County, Texas. This arbitration provision shall be enforceable in either federal or state court in Nueces County, Texas, pursuant to the substantive federal laws established by the Federal Arbitration Act. Any party to any award rendered in such arbitration proceeding may seek a judgment upon the award and that judgment may be entered by any federal or state court in Nueces County, Texas, having jurisdiction.

Immediately before the signature line for Cavanaugh is the statement, "THIS CONTRACT IS SUBJECT TO ARBITRATION UNDER THE TEXAS GENERAL ARBITRATION STATUTE." Finally, the Contract stated it would be governed by the laws of the State of Texas.

On July 9, 2015, the Firm filed suit on behalf of Cavanaugh in the 116th Judicial District Court of Dallas County. Cavanaugh terminated the Firm's representation in December 2016. The Firm filed a petition in intervention in Cavanaugh's lawsuit on January 4, 2017, asserting the representation was terminated without good cause and that it maintained "its contractual attorney fee and expense interest in this cause of action." In its petition, the Firm requested the trial court enforce the arbitration provision in the Contract. The trial court severed the petition in intervention from the underlying lawsuit.

The Firm filed a demand for arbitration with the American Arbitration Association (AAA). Cavanaugh filed a motion to stay the arbitration on grounds (1) there was no agreement to arbitrate because the Firm did not sign the Contract; (2) the Firm materially breached the arbitration provision by filing the petition in intervention in Dallas County, excusing Cavanaugh from complying with "any forum selection obligations"; and (3) the arbitration agreement is not enforceable because Cavanaugh was not represented by separate counsel at the time he signed the Contract. In support of the motion, Cavanaugh presented evidence that he signed the Contract on June 9, 2015; he was not represented by separate counsel at the time he signed the Contract; he never received a copy of the Contract that was signed by the Firm; the Firm had a policy of not signing contingent fee agreements with clients; and he terminated the Contract for "many reasons" that he considered to be "good cause," including the Firm's failure to sign the Contract. The trial court granted Cavanaugh's motion and stayed the arbitration without specifying the basis for its ruling.

Applicable Law

The Contract inconsistently states any arbitration between the parties shall be conducted pursuant to the Federal Arbitration Act, *see* 9 U.S.C.A. §§ 1–16 (West 2009) (the FAA), and that it is subject to arbitration under the "Texas General Arbitration statute," *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001–.098 (West 2011) (the TAA). The FAA generally governs arbitration provisions in contracts involving interstate commerce. *Henry v. Cash Biz, LP*, No. 16-0854, 2018 WL 1022838, at *2 (Tex. Feb. 23, 2018). The FAA preempts state statutes that are inconsistent with the federal law. *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 780 (Tex. 2006) (orig. proceeding). The FAA, therefore, preempts the TAA if the state law precludes enforcement of an arbitration agreement enforceable under the FAA by either (1) expressly exempting the

agreement from coverage, or (2) imposing an enforceability requirement not found in the FAA. *Id.*

Nothing in the appellate record indicates the Contract involves interstate commerce. Further, the Contract stated it would be governed by the laws of the State of Texas; Cavanaugh moved to stay the arbitration under the TAA; and in the trial court and this Court, both parties relied on the TAA as the law applicable to the trial court's decision to grant the motion to stay. Therefore, we presume the TAA governs. *See G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 519 n.14 (Tex. 2015); *Signature Pharms., L.L.C. v. Ranbaxy, Inc.*, No. 05-17-00412-CV, 2018 WL 1250006, at *4 n.2 (Tex. App.—Dallas Mar. 12, 2018, no pet. filed) (mem. op.). However, we cite cases decided under both acts, as they share the same core substantive principles. *See Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 56 n.10 (Tex. 2008) (noting similarities between FAA and predecessor statute to TAA and, where appropriate, relying interchangeably on cases that discuss both acts); *see also G.T. Leach Builders, LLC*, 458 S.W.3d at 519 n.14.

Under the TAA, if an arbitration has been commenced, the trial court may stay the arbitration on a showing there is not an agreement to arbitrate. TEX. CIV. PRAC. & REM. CODE ANN. § 171.023(a). A party who seeks to stay arbitration pursuant to section 171.023(a) has the burden to prove there is not an agreement to arbitrate. *See id*.; *Valerus Compression Servs., LP v. Austin*, 417 S.W.3d 202, 212 (Tex. App.—Austin 2013, no pet.).

Agreement to Arbitrate

In its first issue, the Firm argues the trial court erred by granting Cavanaugh's motion to stay because Cavanaugh failed to establish there was not an agreement to arbitrate. It is undisputed

the Contract was signed by Cavanaugh and contained an agreement to arbitrate.[2] Cavanaugh, however, asserted in his motion to stay that the arbitration agreement was not valid because (1) section 82.065 of the government code requires a contingent fee agreement for legal services to be in writing and signed by the attorney and client, and (2) the Firm's failure to sign the Contract prior to the termination of the representation established there was neither a meeting of minds regarding the terms of the Contract nor delivery of the Contract.[3]

Standard of Review

When reviewing an order granting a motion to stay arbitration, we apply a no-evidence standard to the trial court's factual determinations and a de novo standard to legal determinations. *Valerus Compression Servs., LP*, 417 S.W.3d at 213; *ODL Servs., Inc. v. ConocoPhillips Co.*, 264 S.W.3d 399, 417 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *see also Henry*, 2018 WL 1022838, at *3 (addressing standard of review applicable to order denying motion to compel arbitration). Whether a valid arbitration agreement exists is a legal question that we review de novo. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003); *Gables Cent. Constr., Inc. v Atrium Cos., Inc.*, No. 05-07-00438-CV, 2009 WL 824732, at *2 (Tex. App.—Dallas Mar. 31, 2009, pet. abated).

[2] The arbitration provision in the Contract incorporated the Commercial Arbitration Rules (CARs) of the AAA. Rule R-7(a) of the CARs provides the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objection with respect to the existence, scope or validity of the arbitration agreement[.]" AMERICAN ARBITRATION ASSOCIATION, *Commercial Arbitration Rules and Mediation Practice*, http://www.adr.org/sites//default/filed/Commercial%220Rules.pdf (last visited April 3, 2018). This Court has concluded a broad arbitration agreement that incorporates rules empowering an arbitrator to decide issues of arbitrability indicates a clear intent by the parties for the arbitrator to consider any objections to the existence, scope, or validity of the arbitration agreement. *See Saxa Inc. v. DFD Architecture Inc.*, 312 S.W.3d 224, 229–30 (Tex. App.—Dallas 2010, pet. denied). However, because the CARs were not offered into evidence, the trial court was required to determine the validity of the arbitration agreement. *See PER Grp. L.P. v. Dava Oncology, L.P.*, 294 S.W.3d 378, 386 (Tex. App.—Dallas 2009, no pet.) (concluding that because the record did not contain the CARs and did not indicate the rules were offered into evidence in trial court, the trial court was required to determine scope of arbitration agreement).

[3] We recognize the Firm contends it signed the Contract at some point. However, the Firm did not produce any evidence in response to Cavanaugh's motion to stay to support any claim that it signed the Contract prior to the termination of the representation. Accordingly, in addressing this issue, we presume the Firm did not sign the Contract prior to Cavanaugh's termination of the representation.

Analysis

"There are two types of challenges to an arbitration provision: (1) a specific challenge to the validity of the arbitration agreement or clause, and (2) a broader challenge to the entire contract, either on a ground that directly affects the entire agreement, or on the ground that one of the contract's provisions is illegal and renders the whole contract invalid." *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 647–48 (Tex. 2009) (orig. proceeding) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006)). A court may determine the first type of challenge, but a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator. *Id.* at 648; *see also Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 501 (Tex. 2015) ("[C]hallenges relating to an entire contract will not invalidate an arbitration provision in the contract; rather, challenges to an arbitration provision in a contract must be directed specifically to that provision.")

We interpret arbitration agreements under traditional contract interpretation principles. *J.M. Davidson*, 128 S.W.3d at 227. The elements of a valid written contract, including agreements to arbitrate, are: (1) an offer, (2) an acceptance, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent it be mutual and binding. *Ladymon v. Lewis*, No. 05-16-00776-CV, 2017 WL 3097652, at *4 (Tex. App.—Dallas July 21, 2017, no pet.) (mem. op.). The term "meeting of the minds" refers to the "parties' mutual understanding and assent to the expression of their agreement." *Weynand v. Weynand*, 990 S.W.2d 843, 846 (Tex. App.—Dallas 1999, pet. denied); *see also Izen v. Comm'n for Lawyer Discipline*, 322 S.W.3d 308, 318 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). "The parties must agree to the same thing, in the same sense, at the same time." *Celmer v. McGarry*, 412 S.W.3d 691, 700 (Tex. App.—Dallas 2013, pet. denied).

Cavanaugh contended in his motion to stay that there was no agreement to arbitrate because the Firm's failure to sign the Contract established there was neither a meeting of the minds as to the terms of the Contract nor delivery of the Contract. Texas law, however, generally does not require that arbitration clauses be signed, "so long as they are written and agreed to by the parties." *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 606 (Tex. 2005) (orig. proceeding) (per curiam); *Southwinds Express Constr., LLC v. D.H. Griffin of Tex., Inc.*, 513 S.W.3d 66, 75 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Although a "party's signature on a contract is 'strong evidence' that the party unconditionally assented to its terms," *Southwinds Express Constr., LLC*, 513 S.W.3d at 75, the "absence of a party's signature does not necessarily destroy an otherwise valid contract and is not dispositive of the question of whether the parties intended to be bound by the terms of the contract," *Ladymon*, 2017 WL 3097652, at *4. Rather, "other evidence may be used to establish the nonsignatory's unconditional assent to be bound by the contract, including any arbitration provision." *Id.* Specifically, "[i]f one party signs a contract, the other party may accept by his acts, conduct, or acquiescence to the terms, making it binding on both parties." *Foster v. Nat'l Collegiate Student Loan Trust 2007-4*, No. 01-17-00253-CV, 2018 WL 1095760, at *9 (Tex. App.—Houston [1st Dist.] Mar. 1, 2018, no pet. h.) (mem. op.); *see also In re Halliburton Co.*, 80 S.W.3d 566, 569 (Tex. 2002) (orig. proceeding) (concluding arbitration clause was accepted by continued employment); *Cedillo v. Immobiliere Jeuness Establissement*, 476 S.W.3d 557, 564 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). "In the absence of a signature on a contract, a court may look to other evidence to establish the parties' assent to the terms of the contract." *Firstlight Fed. Credit Union v. Loya*, 478 S.W.3d 157, 168 (Tex. App.—El Paso 2015, no pet.).[4]

[4] If the parties expressly state their intent to require a signature as a condition precedent to the agreement's enforceability, an arbitration agreement may not be enforced absent the required signature. *Wright v. Hernandez*, 469 S.W.3d 744, 758 (Tex. App.—El Paso 2015, no pet.) (citing *Simmons & Simmons Constr. Co. v. Rea*, 286 S.W.2d 415, 418 (Tex. 1955)). The Contract did not expressly provide the arbitration agreement is enforceable only if both Cavanaugh and the Firm signed it.

The evidence attached to Cavanaugh's motion to stay established Cavanaugh signed the Contract on June 9, 2015. The Contract required the Firm to "sue for and recover all damages and compensation to which [Cavanaugh] may be entitled as well as to compromise and settle all claims arising out of on or about: 6/8/2015." The Firm filed suit on Cavanaugh's behalf and continued to represent him until December 2016. Because the evidence established there was conduct by the Firm indicating it had agreed to the terms of the Contract, the Firm's failure to sign the Contract, standing alone, was insufficient to establish there was no meeting of the minds as to the terms of the parties' agreement.

Cavanaugh also contended the agreement to arbitrate was not valid because the Contract failed to comply with section 82.065(a) of the government code. Section 82.065(a) provides that a "contingent fee contract for legal services must be in writing and signed by the attorney and client." TEX. GOV'T CODE ANN. § 82.065(a) (West Supp. 2017). In the absence of barratry, the statute does not state any consequence or remedy for failing to comply with its requirements. *See id.* § 82.065(b); *Gillespie v. Hernden*, 516 S.W.3d 541, 551 (Tex. App.—San Antonio 2016, pet. denied). This Court, however, addressed the validity of a contingent fee agreement that was not signed by both the attorney and client in *Tillery & Tillery v. Zurich Ins. Co.*, 54 S.W.3d 356 (Tex. App.—Dallas 2001, pet. denied). In *Tillery*, an attorney sent a contingent fee agreement to a client in a letter. *Id.* at 357–58. Although the client did not sign the letter, the attorney filed an intervention on behalf of the client. *Id.* at 358. Before the attorney had done any substantial work on the case, the client told the attorney to take no further action. *Id.* We concluded a "contingent fee agreement that does not meet the requirements of section 82.065 is voidable by the client." *Id.* at 359;[5] *see also In re Estate of Arizola*, 401 S.W.3d 664, 671 (Tex. App.—San Antonio 2013, pet.

[5] Cavanaugh requests that we follow the Corpus Christi Court of Appeals' opinion in *In re Godt*, 28 S.W.3d 732, 738 (Tex. App.—Corpus Christi 2000, original proceeding), and conclude a lawyer may not enforce a contingent fee agreement that does not comply with section 82.065(a). We, however, are bound by our own precedent. *See OAIC Commercial Assets. L.L.C. v. White*, 293 S.W.3d 883, 885 (Tex. App.—Dallas 2009, pet. denied) (citing *Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995)).

denied) ("The client may void a contingent fee contract that violates section 82.065 by expressing his intent to do so before the attorney has fully or substantially performed."); *Cobb v. Stern, Miller & Higdon*, 305 S.W.3d 36, 42 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (same); *Sanes v. Clark*, 25 S.W.3d 800, 805 (Tex. App.—Waco 2000, pet. denied) (concluding oral contingent fee agreement was voidable by client).

A "voidable" contract is one that is "valid and effective unless and until the party entitled to avoid it takes steps to disaffirm it." *Neese v. Lyon*, 479 S.W.3d 368, 378 (Tex. App.—Dallas 2015, no pet.). Those steps may include expressing an intent to void the agreement before the attorney has fully or substantially performed. *Tillery*, 54 S.W.3d at 359.[6] However, an attorney's failure to sign a contingent fee contract, standing alone, does not make the agreement unenforceable against the client. *Chambers v. O'Quinn*, 305 S.W.3d 141, 152 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (agreeing with conclusion in *Enochs v. Brown*, 872 S.W.2d 312, 317–19 (Tex. App.—Austin 1994, no writ), *disapproved of on other grounds by Roberts v. Williamson*, 111 S.W.3d 113, 120 (Tex. 2003), that failure of contingent fee agreement to comply with section 82.065 because attorney did not sign contract did not make contract void and attorney who fully performed contract could enforce it against client who signed contract).

The evidence attached to Cavanaugh's motion to stay established the Contract was signed by Cavanaugh and contained an agreement to arbitrate. The Firm's failure to sign the Contract

[6] Both the Texas Supreme Court and this Court have stated that, pursuant to section 82.065(a), a contingent fee contract for legal services must be in writing and signed by the attorney and client to be enforceable. *See Hill v. Shamoun & Norman, LLP*, No. 16-0107, 2018 WL 1770527, at *10 (Tex. Apr. 13, 2018); *Abuzaid v. Modjarrad & Assocs., P.C.*, No. 05-16-00777-CV, 2017 WL 5559591, at *8 (Tex. App.—Dallas Nov. 14, 2017, no pet.) (mem. op.). *Hill*, however, addressed whether a law firm with an alleged oral contingent fee agreement could recover for the value of its services in quantum meruit and the appropriate measure of damages for that claim. *See Hill*, 2018 WL 1770527, at *1. *Abuzaid* involved a former client of a law firm who filed a motion for new trial after a default judgment was rendered in favor of the law firm for fees incurred during the representation. *Abuzaid*, 2017 WL 5559591, at *5. The issue before this Court was whether the evidence offered by the client in support of his motion for new trial set up the meritorious defense of payment under a contingent fee agreement with the law firm. *Id.* at *7. The evidence established the client made numerous changes to the contingent fee agreement prepared by the law firm and sent at least three revised agreements to the law firm. *Id.* at *8. The client signed the revised agreements, but the law firm did not. *Id.* We concluded this evidence failed to establish a meeting of the minds on the essential terms of the contract, a necessary element of a binding contract. *Id.* Neither *Hill* nor *Abuzaid* addressed (1) the enforceability against the client of a contingent fee agreement sent by an attorney to a client, which was not signed by the attorney but was signed by the client without revision; or (2) the circumstances under which the client could seek to have such an agreement declared void.

was insufficient to establish either that the Contract was not binding on Cavanaugh or was void. Cavanaugh, therefore, failed to carry his burden to show there was no agreement to arbitrate. Cavanaugh's contention the Contract is unenforceable, which is an attack on the entire Contract, must be determined by the arbitrator. *See Royston, Rayzor, Vickery & Williams, LLP*, 467 S.W.3d at 501; *In re Merrill Lynch Trust Co., FSB*, 235 S.W.3d 185, 190 n.12 (Tex. 2007) (orig. proceeding) (concluding defenses related to the parties' entire contract rather than arbitration clause alone was question for arbitrators rather than courts). We resolve the Firm's first issue in its favor.

Prior Material Breach of the Contract

In its second issue, the Firm argues the trial court erred by determining the Firm waived its right to arbitrate. In his motion to stay, Cavanaugh contended (1) the arbitration provision in the Contract constituted a forum selection clause, (2) the Contract required any arbitration to take place in Nueces County, (3) the Firm materially breached the Contract by filing the petition in intervention in Dallas County, and (4) the Firm's breach excused Cavanaugh from complying with the forum selection clause. Although Cavanaugh couched his argument in terms of breach of contract, he essentially asserted the Firm waived its right to arbitration by filing the petition in intervention. *See In re Deeb*, No. 03-17-00635-CV, 2017 WL 6503045, at *1 (Tex. App.—Austin Dec. 15, 2017, orig. proceeding) (mem. op.) (addressing claim defendant breached terms of arbitration agreement as argument defendant waived right to arbitrate).[7]

Whether a party has waived its right to arbitration is a question of law that we review de novo. *Henry*, 2018 WL 1022838, at *3. A party waives the right to arbitration by substantially

[7] A contractual forum-selection clause is enforceable through the filing of a timely motion to dismiss litigation brought in a forum other than the agreed-to forum. *See In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding). However, a party can waive a contractual forum-selection clause. *Id.* at 712–13. In this case, Cavanaugh did not seek to enforce the forum selection clause by filing a motion to dismiss the Firm's petition in intervention, but instead chose to proceed on a claim the Firm waived its right to arbitration by filing the petition in intervention.

invoking the judicial process to the other party's detriment or prejudice. *Id.* at *4; *Kennedy Hodges, L.L.P. v. Gobellan*, 433 S.W.3d 542, 545 (Tex. 2014) (per curiam).

The party claiming waiver has the heavy burden of establishing the judicial process was substantially invoked. *Medinet Invests, LLC v. English*, No. 05-17-00179-CV, 2018 WL 1602525, at *4 (Tex. App.—Dallas Apr. 3, 2018, no pet. h.) (mem. op.); *see also Kennedy Hodges*, 433 S.W.3d at 545 ("The strong presumption against waiver of arbitration renders this hurdle a high bar."). Whether a party has substantially invoked the judicial process depends on the specifics of each case. *Henry*, 2018 WL 1022838, at *4. The necessary conduct must go beyond merely filing suit or seeking initial discovery. *Id.* Factors the courts consider in determining whether the judicial process was substantially invoked include the length of time the party waited to compel arbitration, any reasons for the delay, the party's knowledge of the arbitration agreement during the period of delay, how much and what kind of discovery was conducted before arbitration was sought, whether the party requested the court to dispose of any claims on the merits or asserted affirmative claims for relief, how much merits-related pretrial activity the party engaged in, how much time and expense the parties have committed to the litigation, whether the discovery conducted would be unavailable or useful in arbitration, whether activity in court would be duplicated in arbitration, and when the case was scheduled to be tried. *G.T. Leach Builders, LLC*, 458 S.W.3d at 512 (citing *Perry Homes v. Cull*, 258 S.W.3d 580, 590–92 (Tex. 2008)).

Shortly after Cavanaugh terminated the representation, the Firm intervened in the underlying lawsuit, asserting its right to attorneys' fees pursuant to the Contract. In its petition in intervention, the Firm requested the trial court enforce the arbitration provision in the Contract. Filing the petition in intervention did not constitute a substantial invocation of the litigation process by the Firm. *See Henry*, 2018 WL 1022838, at *4 (merely filing suit is not substantially invoking

the judicial process). Because Cavanaugh failed to establish the Firm substantially invoked the judicial process, we need not consider whether Cavanaugh suffered prejudice. *See id.* at *6.

We conclude the Firm did not waive its right to arbitrate by filing the petition in intervention in Dallas County. Accordingly, we resolve the Firm's second issue in its favor.

Compliance with Section 171.002

In its third issue, the Firm asserts the trial court erred by applying section 171.002 of the civil practice and remedies code to preclude the enforcement of the arbitration agreement in the Contract. "The applicability of a statute is a question of law that we review de novo." *Landing Cmty. Improvement Ass'n, Inc. v. Young*, No. 01-15-00816-CV, 2017 WL 3910893, at *17 (Tex. App.—Houston [1st Dist.] Sept. 7, 2017, no pet.) (mem. op.) (citing *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008)).

Section 171.002 provides the TAA does not apply to a claim for personal injury, unless (1) each party to the claim, on the advice of counsel agrees in writing to arbitrate, and (2) the agreement is signed by each party and each party's attorney. TEX. CIV. PRAC. & REM. CODE ANN. § 171.002(a)(3), (c). Relying on *In re Godt*, 28 S.W.3d 732 (Tex. App.—Corpus Christi 2000, orig. proceeding), Cavanaugh argued in his motion to stay that the arbitration clause in the Contract was not enforceable because the Firm was "claiming an interest in and damages based on [his] personal injury claims" and he did not have independent counsel at the time he signed the Contract.

In *Godt*, Pamela Godt hired Thomas J. Henry in late 1997 to represent her in a medical malpractice claim. *Id.* at 734. Godt signed a contingent fee agreement with Henry that contained an arbitration provision. *Id.* at 734–35. Henry allegedly failed to investigate Godt's claims and withdrew from the representation shortly before limitations expired. *Id.* at 734. Godt sued Henry for, among other things, legal malpractice, and Henry filed a motion to compel arbitration based on the arbitration clause in the contingent fee agreement. *Id.* at 735. The trial court granted the

motion to compel arbitration and stayed the lawsuit. *Id.* In reversing the trial court's decision, the Corpus Christi Court of Appeals concluded the parties' arbitration agreement did not conform to the requirements of section 171.002 of the civil practice and remedies code because Godt was not acting on the advice of counsel when she signed the agreement and the agreement was not signed by an attorney representing either party. *Id.* at 738–39.

The *Godt* court's conclusion the contingent agreement failed to comply with section 171.002(c) was premised on its classification of a legal malpractice claim as a claim for personal injury for all purposes. *Id.* at 738–39. Other courts of appeals have disagreed with this conclusion. *See Chambers*, 305 S.W.3d at 147–48 (claim for legal malpractice is not a claim for personal injury excluded from the scope of the TAA by section 171.002(a)(3)); *Taylor v. Wilson*, 180 S.W.3d 627, 629–31 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (concluding legislature intended to restrict meaning of personal injury exception of TAA to "physical personal injury" and claim for legal practice was not a claim for personal injury within meaning of section 171.002(a)(3)); *Miller v. Brewer*, 118 S.W.3d 896, 898–99 (Tex. App.—Amarillo 2003, no pet.); *In re Hartigan*, 107 S.W.3d 684, 690–91 (Tex. App.—San Antonio 2003, orig. proceeding [mand. denied]). Regardless, *Godt* is not applicable to our analysis because this is not a legal malpractice case. Rather, the Firm intervened in Cavanaugh's lawsuit seeking to recover attorneys' fees it contends it is owed pursuant to the Contract signed by Cavanaugh. These damages are not based on a claim for personal injury and, therefore, section 171.002(a)(3) is not applicable to the Firm's claim. *See Smith v. Duncan Land & Expl., Inc.*, No. 2-05-334-CV, 2006 WL 2034031, at *5 (Tex. App.—Fort Worth July 20, 2006, no pet.) (mem. op.) (concluding attorney's intervention in lawsuit seeking to recover attorney's fee was not claim for personal injury subject to section 171.002(a)(3), (c)); *see also In re Pham*, 314 S.W.3d 520, 525–26 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding [mand. denied]) (legal malpractice claim is one for economic loss, not personal injury

caused by defendant, and fact that case on which malpractice action is based was for personal injury does not transform malpractice action into action alleging personal injury).[8] We resolve the Firm's third issue in its favor.

We reverse the trial court's order granting Cavanaugh's motion to stay arbitration and remand this case to the trial court for further proceedings.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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[8] Further, if the FAA applied because the Contract touches on interstate commerce, the state-specific safeguards in section 171.002(a)(3) would be preempted if they affect the arbitration agreement's enforceability. *See In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) (orig. proceeding) (per curiam) (Section 171.002(a)(3) and (c) are preempted by the FAA because they interfere with the "enforceability of the arbitration agreement by adding an additional requirement—the signature of a party's counsel—to arbitration agreements in personal injury cases.").

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

LAW OFFICE OF THOMAS J. HENRY, Appellant	On Appeal from the 116th Judicial District Court, Dallas County, Texas, Trial Court Cause No. DC-17-02977.
No. 05-17-00849-CV V.	Opinion delivered by Justice Fillmore, Justices Lang-Miers and Stoddart
JONATHAN CAVANAUGH, Appellee	participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant the Law Office of Thomas J. Henry recover its costs of this appeal from appellee Jonathan Cavanaugh.

Judgment entered this 7th day of May, 2018.