SUPREME COURT OF FLORIDA

CASE NO.: SC10-2132
L.T. NO: 2008-CA-2619

DEBRA LAIZURE,
as Personal Representative
of the Estate of HARRY LEE STEWART,
deceased,

Petitioner,

vs.

AVANTE AT LEESBURG,
INC., a.k.a. AVANTE AT LEESBURG
OUTPATIENT REHAB, INC., AVANTE ANCILLARY
SERVICES, INC., and AVANTE GROUP,
INC.,

Respondents.

REPLY BRIEF OF PETITIONER

D. Paul McCaskill
Attorney for Petitioner
David & Philpot, P.L.
100 East Faith Terrace
P.O. Box 940218
Maitland, Fl 32751
Fla. Bar No.: 0688411
(407) 830-5050
Fax No.: (407) 830-9064

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITITES

CASES **PAGE**

CASES **PAGE**

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Petitioner will be referred to as “Laizure.” The Respondents will be referred to as “Respondents.” Avante at Leesburg, Inc., will be referred to as “AVL.”

The following designations will be used: (App.) -- Appendix.

ARGUMENT

I. THE TRIAL COURT COMITTED REVERSIBLE ERROR IN COMPELLING ARBITRATION

A. THE ESTATE'S WRONGFUL DEATH CLAIM IS NOT AN ARBITRABLE ISSUE

Laizure argued in her Initial Brief that one of the weaknesses of the opinion[1] below is its failure to fully consider who really "owns" the rights to a wrongful death claim. The Respondents' Answer Brief is similarly flawed because it frames its argument around the idea that this case is about arbitration instead of ownership of property rights. This point is critical and outcome determinative because if Harry Stewart did not "own" the wrongful death claim at issue and could not bargain it away to Respondents, then the claims of the survivors are not encompassed by the Arbitration Agreement nor can they be bound by it. Laizure presents the correct view of Florida law on this point. This Court should therefore align itself with the decisions of other state courts which have ruled on similar facts that an arbitration

[1] Laizure's characterization of the lower tribunal's opinion as ultimately unable to reconcile aspects of a Florida wrongful death claim was accurate. As shown herein, the independent and derivative features of a wrongful death claim are indeed reconcilable. The decision below announces no bright-line approach for analyzing the main issue in this case which is understandable since the Fifth District Court of Appeal clearly wanted this Court to answer the certified question. The Respondents overplay their hand in describing Laizure's characterization of the opinion as "patently false."

agreement can bind neither an estate nor survivors in a wrongful death claim, i.e., Woodall v. Avalon Care Ctr.-Fed. Way LLC, 231 P.3d 1252 (Wash. Ct. App. 2010); Peters v. Columbia Castings Co., 873 N.E. 2d 1258 (2007); Rhodes v. California Hospital Medical Center, 76 Cal. App. 3d 606 (Ct. App. 1978); and Lawrence v. Beverly Manor, 273 S.W. 3d 525 (Mo. App. 2009)[2].

In her Initial Brief, Laizure argued that a wrongful death claim belongs to a decedent's survivors and that section 768.20 provides the framework through which an estate may recover damages for survivors. Put simply, before he died, Harry Stewart did not own the property rights to a wrongful death claim. The Respondents disagree: "based on her rationale and her conclusion, it is clear that Petitioner either fails to understand or has chosen to ignore the statutory framework of the Wrongful Death Act[3]. . . ."

It is the Respondents who ignore the provisions of the Act. Section 768.20, Florida Statutes (2005), states: "When a personal injury to the decedent results in death, no action

[2] Respondents suggest that "it is particularly absurd for Petitioner to suggest that the Arbitration Agreement cannot apply to Mr. Stewart's Estate." Yet the courts which decided Woodall, Peters, Rhodes, and Lawrence had no trouble reaching this very conclusion.

[3] Laizure argues infra that Respondent's contention that a wrongful death claim is partially derivative misses the point.

for the personal injury shall survive, and any such action pending at the time of death shall abate." Thus, Harry Stewart's personal injury action ceased at his death. Section 768.20 also provides that a wrongful death action belongs to the survivors, not the decedent: "The action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death." This statute establishes that the survivors possess the rights for damages resulting from a decedent's wrongful death which the personal representative is authorized to vindicate on their behalf. Section 768.21, Florida Statutes (2005), also permits damages to the survivors which are meant to compensate them for losses they have suffered as a result of a decedent's death.

Further, under section 768.22, Florida Statutes (2005), separate verdicts are required in wrongful death actions: "The amounts awarded to each survivor and to the estate shall be stated separately in the verdict." Attached is the verdict form this Court recommends in wrongful death cases which designates separate awards to an estate and to survivors. (App. 1)

Significantly, recovery of damages by the survivors in a wrongful death action is separate from the recovery of damages

by an estate. Hartford Insurance Co. v. Goff, 4 So.3d 770, 773 (Fla. 2d DCA 2009)(citing section 768.21, Florida Statutes)). See also In re The Estate of Barton v. Poole, 631 So.2d 315 (Fla. 2d DCA 1994)(proceeds of wrongful death claim are not for the benefit of the estate, and are not subject to estate claims, and thus claim for back child support could not be asserted against survivors following wrongful death action).

The foregoing Florida statutory and decisional authorities establish this central point: they are indicia of ownership, of the fact that it is the survivors of a decedent who own the property rights to a wrongful death claim. Thus, the Florida Wrongful Death Act does not confer upon a decedent such as Mr. Stewart the authority to require statutory survivors to arbitrate their wrongful death claim, nor does it give Mr. Stewart the authority to release such a claim. Respondents have not argued that Mr. Stewart's survivors vested him with the authority to bargain away their right to a jury trial, nor have they maintained that Laizure has agreed to arbitrate this case on behalf of his survivors.

Respondents admit that "wrongful death claims are independent," but suggest that a decedent can bind survivors to arbitration because such claims "are derivative, at least in the sense that they are dependent on a wrong committed

against the decedent. . . .” Yet in acknowledging that wrongful death cases are independent causes of action in Florida, Respondents have conceded the central premise of Laizure’s Initial Brief because it is the independent and separate aspect of a wrongful death case established under the Wrongful Death Act and Florida case law that addresses who owns a decedent’s property rights. How the owners of these rights, who are the decedent’s survivors, ought to be compensated for their damages is set forth in section 768.21.

Any cursory reading of Florida case law will unearth decisions that indicate wrongful death claims have features that are independent and derivative[4]. See, e.g., Taylor v. Orlando Clinic, 555 So.2d 876 (Fla. 5th DCA 1989)(wrongful death action filed by personal representative is independent of personal injury action; claims are different and cannot exist at the same time because cause of action for wrongful death does not accrue until death which extinguishes personal injury cause of action); compare Safecare Health Corp. v. Rimer, 620 So.2d 161 (Fla. 1993)(wrongful death actions are also derivative in the sense that they are dependent upon a

[4] At least one case suggests that a wrongful death action is technically not derivative. See Stokes v. Liberty Mut. Ins. Co., 213 So.2d 695, 697 (Fla. 1968)(a wrongful death action “is not a derivative action in a technical sense because it awards damages suffered by the parent independently of any right of action in the deceased minor.”)

wrong committed by another person). In this case of first impression, this Court must look more closely at how Florida decisions have specified which parts of a wrongful death claim are independent, and which ones are, to some limited extent, derivative.

It is essential to understand that wrongful death claims in Florida are only derivative in a very narrow sense which has nothing to do with the question of who owns the property rights to such a claim. That part of a wrongful death claim which Respondents describe as "derivative" merely focuses on the acts of the wrongdoer. For example, this Court noted in Valiant Ins. Co. v. Webster, 567 So.2d 408,411 (Fla. 1990), that wrongful death claims "are also derivative in the sense that they are dependent upon a wrong committed upon another person." This is consistent with the analysis of other state courts:

> "[T]he action for wrongful death is derivative **only in the sense that it derives from the wrongful act causing death,** rather than from the person of the deceased." (Emphasis in original).

Woodall v. Avalon Care Ctr.-Fed. Way LLC, 231 P.3d 1252, 1259 (Wash. Ct. App. 2010).

Thus, the wrongful death claim in this case comes from the wrongful acts which caused Harry Stewart's death, not from the person of Harry Stewart. And, as pointed out by the

Respondents, section 768.17, Florida Statutes (2006), states: "It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoers. Sections 768.16-768.27 are remedial and shall be liberally construed." The focus here is again on the wrongdoer, which is not pertinent to who owns the property rights to a wrongful death claim. It would be illogical to shift losses away from the survivors and not provide them with legal rights to vindicate their losses.

The Respondents make much of the fact that affirmative defenses which could have been asserted against a decedent in a wrongful death action may be asserted against an estate. The Respondents, however, completely fail to connect this notion with the question of who owns the rights to such an action. Thus, the Respondents' reliance on Toombs v. Alamo Rent-A-Car, Inc., 833 So.2d 109 (Fla. 2002), is off-target. In Toombs, a deceased wife was a co-bailee of a rental car and found to be prevented from recourse under the dangerous instrumentality doctrine. This Court found that the survivors in a wrongful death claim were limited to the same extent that a decedent would have been limited had the decedent survived.

Toombs is inapposite. The fact that a wrongful death action which does not survive the death of a decedent cannot inure to the benefit of the decedent's survivors is irrelevant

in this case[5] because nothing in Toombs undercuts the principle that the survivors of a decedent own the exclusive right to bring a wrongful death claim. Toombs merely illustrates what should be an obvious point: the plaintiff in a wrongful death case must show as a statutory element[6] of his or her case that a decedent's claim was not barred. This point also distinguishes the general release cases cited by Respondents, i.e., Warren v. Cohen, 363 So.2d 129 (Fla. 3d DCA 1978), Ryter v. Brennan, 291 So.2d 55 (Fla. 1st DCA 1974), and Thomas v. Sports Car Club of America, Inc., 386 So.2d 272 (Fla. 4th DCA 1980), because an arbitration agreement, unlike a general release, would not have prevented Harry Stewart from bringing a claim had he not died. Again, however, this case is not about Harry Stewart's claims, but rather those of his survivors. While some defenses, such as the statute of limitations, might bar a wrongful death claim brought by an estate on behalf of survivors, arbitration is not one of them.

---

[5] The Respondents have not argued that Mr. Stewart's wrongful death action did not survive him.

[6] Section 768.19, Florida Statutes creates a statutory prerequisite that a wrongful death protagonist establish a decedent had a viable claim had he or she lived: "When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person . . . and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued . . . ." (Emphasis added).

This Court reiterated in Toombs that it had "long emphasized that an action for wrongful death is distinct from the decedent's action for personal injuries had he or she survived because it involves different rights of recovery and damages. . . ." Id. at 118. Citing a previous decision, Valiant Ins. Co. v. Webster, 567 So.2d 408, 411 (Fla. 1990), this Court noted that wrongful death claims "are also derivative in the sense that they are dependent upon a wrong committed upon another person." Toombs, 833 So.2d at 118. Again, this concept does not pertain to the property rights issue in this case.

The Respondents argue that the wrongful death action in this case falls within the language of the Arbitration Agreement and that the Estate is therefore bound to arbitrate such a claim as a matter of law. This is a weak and circular argument because whether or not Harry Stewart could bargain away the rights to a wrongful death claim which he did not possess is the issue at hand. The best that can be said about the Arbitration Agreement at issue is that it attempts, albeit unsuccessfully, to require arbitration of the survivors of Mr. Stewart who do own these rights.

Respondents suggest that it is absurd for Laizure to note that the Arbitration Agreement fails to reference wrongful death claims. Given the authority cited herein which shows

Harry Stewart did not possess the property rights to a wrongful death claim when he signed the Agreement, it was appropriate to address that document's silence on this point. Mr. Stewart could never have bargained away a claim he did not own anymore than he could have consented to arbitrate a claim which did not arise until after he died. This is important given this Court's teaching in Seifert v. U.S. Home Corp., 750 So.2d 633, 636 (Fla. 1999), that construction of arbitration clauses is a matter of contract interpretation, and that "[T]he determination of whether an arbitration clause requires arbitration . . . 'rests on the intent of the parties.'" See also Ocwen Federal Bank FSB v. LVWD, 766 So.2d 248, 249 (Fla. 4th DCA 2000)("[c]ontractual arbitration is mandatory only where the subject matter of the controversy falls within what the parties have agreed will be submitted to arbitration.")

Mr. Stewart's survivors, not Mr. Stewart, possess the property rights to his wrongful death claim. Respondents are therefore not entitled to enforce against the survivors an Arbitration Agreement to which they are strangers. If the decedent in this case had quitclaimed to the Respondents the Brooklyn Bridge, but the title was held by the real parties in

interest[7], the Respondents would not be entitled to begin collecting tolls.

B. AVL'S ARBITRATION AGREEMENT IS BOTH PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE

The Respondents incorrectly state that there is no record evidence to show that the Arbitration Agreement at issue is unconscionable. Laizure's Initial Brief refutes this contention in its review of the circumstances preceding the execution of the Agreement and discussion of the overreaching terms it contains.

The Respondents argue that Harry Stewart was not forced to sign the Arbitration Agreement and that there is nothing to show AVL would not treat him unless he did sign it. The Agreement certainly offers no assurances of treatment for those who would not sign it. It states that "he/she is not required to use the Facility for his/her healthcare needs and that there are numerous other health care providers in the State where Facility is located that are qualified to provide such care. . . ." (App. 2) A resident could fairly judge this

[7] In Florida, the estate's personal representative is merely a nominal party to a wrongful death action brought on behalf of a decedent; the estate and the decedent's survivors are the real parties in interest. Bradley v. Sebelius, 621 F.3d 1330 (11th Cir. 2010)(finding children's right of action under Florida Wrongful Death Act is an individual's property right, not derived from the estate in case of first impression regarding "Whose property is the settlement?").

provision to mean that if they do not sign the Agreement they can look elsewhere for their care.

The Respondents incorrectly claim that there no record evidence to show Harry Stewart had little or no chance to understand the terms and conditions of the Arbitration Agreement. Harry Stewart was never in a position to negotiate the terms of the Arbitration Agreement because AVL's employee, Ms. Brennan, never showed it to him before he had begun treatment at AVL. Further, it is inescapable that Brennan did not understand the Agreement herself. Accordingly, how could Harry Stewart have been expected to understand it?

The Respondents claim that the record does not show that the Arbitration Agreement is a contract of adhesion and that "Harry Stewart made a conscious and thoughtful" decision regarding the forms he signed. These are empty arguments. The only "conscious and thoughtful" decision shown by these forms is that of AVL in drafting and presenting them to serve its exclusive agenda. Because of the vulnerability of older citizens, which includes their physical illnesses, need for immediate care and relative lack of bargaining power, it is arguable that all arbitration agreements presented to residents are adhesion contracts. "By virtually any definition or vantage point, a nursing home admission contract arbitration provision is a contract of adhesion." The Fiction

of Freedom to Contract–Nursing Home Admission Contract Arbitration Agreements, 16 St. Thomas L. Rev. 319, 320 (Winter 2003); see also Maureen Armour, A Nursing Home's Good Faith Duty to Care: Redefining A Fragile Relationship Using the Law of Contract, 39 St. Louis U.L.J. 217 (1994).

AVL's Arbitration Agreement is not written in "simple, straightforward, understandable terms," as shown by the considerable judicial efforts which have thus far been required to interpret it. These efforts include a trial court hearing, a written decision by an appellate court, and review by this Court. AVL's own employee did not consider the Arbitration Agreement to be so simple and understandable: "if I was bringing my loved one and putting them in a nursing home facility I would not sign any agreement without first running it by my lawyer." (App. 3 at 64)

"One indicator of substantive unconscionability is that the agreement requires the customer to give up other legal remedies." Powertel, Inc. v. Bexley, 743 So.2d 570, 576 (Fla. 1st DCA 1999). AVL's Arbitration Agreement would require Mr. Stewart to give up significant legal remedies, including fraud claims. Respondents submit that nothing in FHRAA requires fraud to be litigated in public. This hardly means, however, that litigating these claims in a private forum does not contravene public policy. Arbitration is a closed process,

and thus claims against a nursing home such as fraud cannot be easily accessed by the public. This defeats the remedial purpose of Chapter 400, which is to protect residents due to their special vulnerability. Provisions which violate public policy and go to the essence of the contract can render an entire agreement unenforceable. See Lacey v. Healthcare and Retirement Corporation of America, 918 So.2d 333 (Fla. 4th DCA 2006).

Respondents say little about the effect of its fraud provision except to claim that it is irrelevant because the Estate has not pleaded a count for fraud in its current complaint. Laizure's discussion of this provision, which requires mandatory arbitration of fraud claims, was to show that AVL's Arbitration Agreement runs afoul of the intent of Chapter 400. Moreover, preventing fraud claims against nursing homes from public access blunts efforts to change public policy. The public should know about these claims because nursing homes are largely funded by tax dollars through Medicare and Medicaid. See Krasuski, Comment, Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents, 8 Depaul J. Health Care L. 263; 300-301(2004).

As shown in Laizure's Initial Brief, AVL's Arbitration Agreement contains a provision which requires that even if a

resident or their estate is successful in arguing before a trial court that arbitration should be denied, they are nonetheless precluded from their constitutional right to a jury trial because a judge is still required to preside over any ensuing bench trial. One might imagine that AVL might have accepted a jury trial in such circumstances, a point which shows that the provision is not only unfair, but also that it runs overwhelmingly to AVL's benefit.

AVL's exculpatory clause requires an undeservedly narrow reading to reach the conclusion that it is only meant to encompass situations where a resident is outside of AVL and not under its care or supervision. It envisions situations where a resident is injured at AVL's facility, but later deteriorates while away from it. If this rings familiar, it is because that is what happened to Harry Stewart.

III. THE ESTATE OF HARRY L. STEWART WAS NOT AN INTENDED THIRD-PARTY BENEFICIARY OF THE "ADDENDUM TO ADMISSION AGREEMENT–ARBITRATION AGREEMENT"

The Respondents have not shown that Agreement for Care or the Arbitration Agreement attempt to benefit the Estate or survivors and have therefore not demonstrated the intent necessary to establish either as a third-party beneficiary.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been by U.S. Mail this 25th day of May, 2011, to: Thomas A. Valdez and Teresa A. Arnold-Simmons, Esquire, Quintairos, Prieto, Wood & Boyer, P.A., 4905 West Laurel Street—Suite 200, Tampa, Florida 33607; Lisa J. Augspurger, Esquire, Bush, Augspurger & Lynch, P.A., 411 East Jackson Street, Orlando, Florida 32801; Kelly Bagby, Esquire, AARP Foundation Litigation, 301 E. Street, NW, Washington, DC 20049; George Vaka, Esquire, Vaka Law Group, P.L., 777 Harbour Place, Suite 300, Tampa, Florida 33602; and Kari Aasheim, Esquire, Mancuso & Dias, P.A., 5102 W. Laurel Street, Suite 700, Tampa, Fl 33607.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Initial Brief was typed in Courier New 12-point font.

_____
D. Paul McCaskill
Attorney for Petitioner
David & Philpot, P.L.
100 East Faith Terrace
P.O. Box 940218
Maitland, Fl 32751
Fla. Bar No.: 0688411
(407) 830-9064
Fax No.: (407)830-9064