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LAIZURE V. AVANTE AT LEESBURG: A WRONG TURN ON THE ROAD TO VINDICATING NURSING HOME RESIDENTS' RIGHTS

*Joseph S. Miller**

INTRODUCTION

There are currently 684 nursing homes in Florida with an estimated 72,000 residents paying an average of \$223 per day or nearly \$81,395 annually for elderly care.¹ Harry Stewart was one of the 72,000 Floridians in need of extended care after undergoing knee surgery in 2006.² In the hospital, after surgery, Stewart was persuaded by a representative of Avante at Leesburg (“Avante”) to continue his recovery at Avante.³ At the time of Stewart’s discharge from the hospital on May 14, 2006, his white blood cell count was normal and he was showing no signs of infection from the knee surgery.⁴ On May 15, 2006, at Avante, Stewart was presented with an “Agreement for Care” which included an “Arbitration Agreement” that Stewart signed without first consulting with his family, counsel, or independent representative.⁵ The agreement Stewart signed called for all disputes or claims arising out of his stay at Avante or claims regarding the “Agreement for Care” to be decided by binding arbitration, and all claims by his *heirs, beneficiaries, or his estate* would also be subject to arbitration.⁶

On May 16, 2006, two days after arriving at Avante, Stewart’s knee became seriously infected and his white blood cell count had undertaken a drastic reduction—Stewart died on May 18, 2006.⁷ Stewart’s daughter Deborah Laizure, acting as Stewart’s personal representative, brought a number of claims against Avante for negligence and deprivation of statutory rights, but her claim for the wrongful death of her father is the key issue in this note.⁸ Shortly after Laizure filed her claims, Avante filed a motion to compel arbitration of all Laizure’s

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1. *Facts About Long Term Care in Florida*, FLORIDA HEALTH CARE ASSOCIATION, http://www.fhca.org/media_center/long_term_health_care_facts/ (last visited Dec. 28, 2013).

2. See Brief for Petitioner at 1, *Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752 (Fla. 2013) (No. SC10-2132).

3. *Id.*

4. *Id.*

5. *Id.* at 1–2.

6. *Id.* at 2–6. Stewart was the only person to sign the agreement, his personal representative Deborah Laizure never signed the agreement, and the agreement never mentioned wrongful death claims. The representative that presented the “Agreement for Care” had no legal training and did not know what the term “binding arbitration” meant. *Id.*

7. See Brief for Petitioner at 2–3, *Laizure*, 109 So. 3d 752 (No. SC10-2132).

8. *Id.* at 4–5.

claims predicated on the arbitration agreement signed by Mr. Stewart; and the Circuit Court for Lake County agreed, granting the motion.⁹ Laizure appealed, and the Fifth District Court of Appeal of Florida affirmed the circuit court's decision and presented a certified question to the Supreme Court of Florida: "DOES THE EXECUTION OF A NURSING HOME ARBITRATION AGREEMENT BY A PARTY WITH THE CAPACITY TO CONTRACT, BIND THE PATIENT'S ESTATE AND STATUTORY HEIRS IN A SUBSEQUENT WRONGFUL DEATH ACTION ARISING FROM AN ALLEGED TORT WITHIN THE SCOPE OF AN OTHERWISE VALID ARBITRATION AGREEMENT?"¹⁰

Unfortunately for the 72,000 Florida families that have or are thinking about placing a loved one in an extended care facility or nursing home, the Court answered the certified question in the affirmative.¹¹ The Court's decision does not follow the Florida Legislature's intent when it enacted the Wrongful Death Act because the statute has "long [been] characterized . . . as creating a *new and distinct* right of action from the right of action the decedent had prior to death."¹² Stewart's daughter never signed the admissions contract, and she, not Stewart, brought a claim for the wrongful death of her father, which Floridians have declared an independent cause of action.¹³ This note argues that the Court's decision has stripped Floridians of their long recognized state and federal constitutional right to a jury trial.¹⁴ This note further argues that mandatory and binding arbitration clauses in nursing home contracts are unconscionable and against public policy. Unless proper methods are used in educating new patients as to the rights that they are signing away by agreeing to these draconian terms, family members of loved ones that have died as a result of a nursing home's negligence will be left with few options for redress.

Part I of this note discusses Florida's Wrongful Death Act and how it creates an independent cause of action in the party making a claim under the statute. Part I also gives a brief history of arbitration, the procedural rules, and any advantages or disadvantages to arbitration. Part I concludes with a synopsis of how Florida courts

9. *Id.* at 7. The circuit court judge identified the fact that he was faced with an issue of first impression, but he responded in a very peculiar way: "Well, the big issue is whether or not the heirs, as intended beneficiaries, are bound by it such that their independent cause of action for wrongful death is bound by the arbitration agreement. They're intended beneficiaries. *You've got freedom to contract.* I think they're bound by it." *Id.* at 9 (emphasis added).

10. Laizure v. Avante at Leesburg, Inc., 44 So. 3d 1254, 1259 (Fla. Dist. Ct. App. 2010).

11. Laizure v. Avante at Leesburg, Inc., 109 So. 3d 752, 754 (Fla. 2013).

12. *Id.* at 759 (quoting Toombs v. Alamo Rent-A-Car, Inc., 833 So. 2d 109, 111 (Fla. 2002) (emphasis added)).

13. *Id.* at 755, 757-58.

14. U.S. CONST. amend. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Id. Fla. CONST. art. I, § 22 (West, Westlaw through Nov. 2012 General Election) ("The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law").

have dealt with arbitration clauses in nursing home admissions contracts in the past. Part II breaks down the Supreme Court of Florida's opinion and how it answered the certified question presented. Additionally, Part II presents an overview of how other states with similar wrongful death statutes have decided this issue. Finally, Part II concludes with recommendations for changes.

I. BACKGROUND

A. Florida's Wrongful Death Act

Florida's Legislature has expressly provided in the wrongful death statute that "[i]t is the public policy of the [S]tate to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer."¹⁵ The Act provides for a cause of action that may be brought by a decedent's representative, heirs, or estate when the decedent's death is caused by another person's negligence, wrongful act, default, or breach of contract or warranty:

When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and *the event would have entitled the person injured to maintain an action and recover damages if death had not ensued*, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.¹⁶

The next section of the Act provides the Legislature's intent in making the Act an independent legal cause of action distinct from 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. *When a personal injury to the decedent results in death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate. . . .* A defense that would bar or reduce a survivor's recovery if she or he were the plaintiff may be asserted against the survivor, *but shall not affect the recovery of any other survivor.*¹⁷

The first section allows for any typical personal injury defenses such as contributory negligence or assumption of the risk, and the second section creates a

15. FLA. STAT. § 768.17 (2006).

16. FLA. STAT. § 768.19 (2006) (emphasis added).

17. FLA. STAT. § 768.20 (2006) (emphasis added).

new cause of action in the decedent's personal representative.¹⁸ The damages that may be awarded under the Act are also indicative of the Legislature's intent to make wrongful death claims independent and distinct causes of action: "The amounts awarded to each survivor and to the estate shall be stated separately in the verdict."¹⁹

A plain reading of the Act makes the Legislature's intent clear. The Supreme Court of Florida has made its purpose in construing a statute very clear: "A court's purpose in construing a statute is to give effect to legislative intent, which is the polestar that guides the court in statutory construction."²⁰ However, the court did not follow the "polestar" and decided to take a different path, completely ignoring the Legislature's express intent.²¹

B. Arbitration

1. *The Federal Arbitration Act*

The Federal Arbitration Act ("FAA") was enacted in 1925 and then reformed and codified in 1947 as title 9 of the United States Code.²² The FAA was intended to reverse the long-standing judicial resentment towards arbitration that had existed in English Common Law and transferred to American courts.²³ Congress intended to put arbitration agreements on the same footing as other contracts when it enacted the FAA.²⁴ The Supreme Court of the United States recognizes only two limitations on the validity of arbitration agreements: (1) "they must be part of a . . . contract 'evidencing a transaction involving commerce' . . ."; and (2) "such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.'"²⁵

In 2006, the Court gave a more decisive definition of the second limitation by explaining how the limitation can be broken down into two challenges: (1) challenges to the validity of the agreement to arbitrate; and (2) challenges to the contract as a whole, "either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid."²⁶ The Court then articulated three key principles for state courts to follow when reviewing challenges to arbitration agreements.²⁷

18. See *Toombs*, 833 So. 2d at 111.

19. FLA. STAT. § 768.22 (2006).

20. *Gomez v. Vill. of Pinecrest*, 41 So. 3d 180, 185 (Fla. 2010).

21. See discussion, *infra* Part II.

22. See *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

23. *Id.*

24. *Id.*

25. *Southland Corp. v. Keating*, 465 U.S. 1, 10–11 (1984).

26. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006).

27. *Id.* at 445.

First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator. . . . Third, this arbitration law [and the FAA] appl[y] in state as well as federal courts.²⁸

Thus, Florida courts must keep these federal provisions in mind when deciding issues regarding the validity of arbitration agreements in nursing home contracts; but the courts can only decide these issues when the arbitration clause is challenged.

2. *The Florida Arbitration Code*

Arbitration clauses in nursing home admissions contracts in Florida are subject to the Florida Arbitration Code ("FAC"), to the extent the FAC is not in conflict with the FAA.²⁹ The same three-step process that is used by the Supreme Court of the United States when deciding issues involving motions to compel arbitration is used by Florida courts under the FAC.³⁰ Florida courts consider the following issues: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitral issue exists; and (3) whether the right to arbitration was waived."³¹ The issue of whether a valid written agreement to arbitrate exists is controlled by Florida contract law, and the applicable defenses are unconscionability, fraud, duress, illegality, and public policy.³² Accordingly, one would think that anyone bringing a wrongful death claim against a nursing home would have no problem showing that an arbitration agreement signed by a patient does not even apply to a wrongful death action, yet the Supreme Court of Florida does not feel that way.

Arbitrating a civil claim in Florida puts the plaintiff at a disadvantage when compared to having the claim heard in court.³³ The American Health Lawyers Association ("AHLA") is a large alternative dispute company in Florida that handles the majority of claims arising out of nursing home litigation.³⁴ The AHLA has even gone so far as requiring plaintiffs to show a higher level of proof for claims brought under Florida's Nursing Home Resident's Rights Act and not awarding consequential, exemplary, incidental, punitive, or special damages.³⁵ However, AHLA and Florida nursing homes know that Florida is bound by the

28. *Id.* at 445–46.

29. *See* Seifert v. U.S. Home Corp., 750 So. 2d 633, 635 (Fla. 1999).

30. *Id.* at 636.

31. *Id.*

32. *See* Shotts v. OP Winter Haven, Inc., 86 So. 3d 456, 464–65 (Fla. 2011).

33. *See generally* Blankfeld v. Richmond Health Care, Inc., 902 So. 2d 296, 297 (Fla. Dist. Ct. App. 2005) (en banc) (reversing a motion to compel arbitration because the arbitration procedure substantially limits statutory created remedies and is void as contrary to public policy).

34. *Id.*

35. *Id.* at 298 ("In any claim brought pursuant to this part alleging a violation of resident's rights or negligence causing injury to or death of a resident, the claimant shall *have the burden of proving by a preponderance of the evidence* . . .") (emphasis added); *See* FLA. STAT. § 400.023(2) (2008).

provisions of the FAA favoring arbitration. The Fourth District Court of Appeal of Florida's Chief Justice Farmer summed up the dilemma: "The health care provider has different interests, which might even become antagonistic to the patient. It would be unprecedented to allow someone who may have adversarial interests dealing at arm's length to make such personal decisions for someone."³⁶

C. Arbitration Clauses in Nursing Home Agreements Prior to *Laizure*

In 1980, the Florida Legislature officially took notice of the substandard conditions in Florida nursing homes after a Dade County Grand Jury concluded that a majority of nursing homes in the county were unsafe and that patient care was lacking.³⁷ The Florida Legislature responded by enacting section 400.022, *Florida Statutes*, called the Nursing Home Residents' Rights Act ("NHRRA").³⁸ The NHRRA was established to provide "[d]evelopment, establishment, and enforcement of basic standards for[] (1) [t]he health, care, and treatment of persons in nursing homes and related health care facilities; and (2) [t]he maintenance and operation of such institutions that will ensure safe, adequate, and appropriate care, treatment, and health of persons in such facilities."³⁹ However, nursing homes, fearing excess litigation, began to protect their interests by inserting stiff mandatory binding arbitration clauses into admissions contracts.⁴⁰ Thus, a litany of litigation over the validity of these agreements ensued.⁴¹

In 2003, the Fourth District Court of Appeal of Florida refused to grant a nursing home's motion to compel arbitration because the agreement was so substantively unconscionable.⁴² In *Romano*, a husband signed his mentally competent wife's admission contract containing an arbitration agreement that waived portions of the NHRRA and certain procedural discovery rules recognized by state courts.⁴³ The court found the agreement to be procedurally unconscionable because the husband and wife were elderly and neither spouse had legal training.⁴⁴

36. *Id.* at 301 (Farmer, C.J., concurring).

37. See Troy J. Crofts, *The Nursing Home Residents' Rights Act—A Good Idea Gone Bad!*, 26 STETSON L. REV. 599, 605 (1996).

38. *Id.* at 599.

39. FLA. STAT. § 400.011 (2008).

40. See Linda Khan, *Thrown Out of Court: How Corporations Became People You Cannot Sue*, WASHINGTON MONTHLY MAGAZINE, http://www.washingtonmonthly.com/magazine/junejulyaugust_2014/features/thrown_out_of_court050661.php?page=all (last visited January 3, 2015). See, e.g., *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296, 297–98 (Fla. Dist. Ct. App. 2005).

41. See, e.g., *Romano ex rel. Romano v. Manor Care Inc.*, 861 So. 2d 59 (Fla. Dist. Ct. App. 2003); *Blankfeld*, 902 So. 2d at 296.

42. *Romano*, 861 So. 2d at 64.

43. *Id.* at 61.

44. *Id.* at 63. In Florida, to decline to enforce a contract as unconscionable, the contract must be both procedurally and substantively unconscionable. Procedural unconscionability pertains to the individual circumstance and context the agreement was entered into, and substantive unconscionability refers to the unreasonableness and unfairness of the contract terms. *Id.* at 62.

After *Romano*, nursing homes in Florida had to be sure their arbitration agreements did not restrict their patients' NHRRA rights.⁴⁵

In 2005, two years after the Fourth District's decision in *Romano*, the court held healthcare proxies are "not authorized to waive the right to a trial by jury, to waive common law remedies, or to agree to modify statutory duties applicable" to people receiving healthcare in Florida under the NHRRA.⁴⁶ In *Blankfeld*, a senile mother allowed her son to sign her admissions agreement as her personal representative.⁴⁷ The agreement contained an arbitration clause calling for all disputes to be resolved by binding arbitration administered by the National Health Lawyers Association ("NHLA").⁴⁸ The NHLA's arbitration rules limited damages provided for in the NHRRA, did not allow for the recovery of attorney's fees, and had a stricter burden of proof than the burden of proof expressly provided in the NHRRA.⁴⁹ The court distinguished its decision in *Romano* by concluding that this arbitration agreement was void as against public policy because a healthcare proxy can only make healthcare decisions, and waiving a claimant's right to trial is not a healthcare decision.⁵⁰ Thus, as of 2005, nursing homes could not circumvent challenges to their arbitration agreements by hiring arbitration firms with rules that attempt to limit a patient's or representative's rights.

In 2011, the Florida Supreme Court held that a nursing home arbitration agreement was not enforceable because it contained a limitation of liability provision capping non-economic damages, a provision calling for the arbitrator to determine whether the agreement was enforceable, and that the limitation of liability was void as against public policy.⁵¹ In *Gessa*, a patient's daughter acting as her attorney-in-fact signed an arbitration agreement that contained a waiver of numerous rights under the NHRRA and other statutes.⁵² The arbitration agreement had a clause that made the entire agreement applicable for subsequent visits.⁵³ During the mother's second visit, which resulted in negligent care, she filed suit against the nursing home for violations of the NHRRA.⁵⁴ The nursing home filed a motion to compel arbitration that was granted by the trial court and affirmed by the district court.⁵⁵ The lower courts believed any unconscionable portions of the contract could be severed and the agreement to arbitrate would survive.⁵⁶ The Supreme Court of Florida disagreed with the lower courts and voided the entire

45. See *Gessa v. Manor Care of Fla., Inc.*, 86 So. 3d 484, 492 (Fla. 2011) (citing *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456, 474 (Fla. 2011)).

46. *Blankfeld*, 902 So. 2d at 301. Proxy: "One who is authorized to act as a substitute for another. . . ." BLACK'S LAW DICTIONARY 610 (9th ed. 2009).

47. *Blankfeld*, 902 So. 2d at 297.

48. *Id.*

49. *Id.* at 298–99.

50. *Id.* at 300.

51. *Gessa v. Manor Care of Fla., Inc.*, 86 So. 3d 484, 494 (Fla. 2011).

52. *Id.* at 485.

53. *Id.* at 486.

54. *Id.* at 487.

55. *Id.*

56. *Id.*

agreement, setting a strong precedent in favor of residents and their families' rights.⁵⁷ However, this grace period would not last long.

II. LAIZURE V. AVANTE AT LEESBURG

A. Procedural History

1. Circuit Court

On June 16, 2008, Deborah Laizure, Mr. Stewart's daughter, acting as a personal representative of his estate, filed her initial four-count complaint against Avante, which was amended two days later.⁵⁸ The complaint included (1) a claim for deprivation of Mr. Stewart's rights pursuant to the NHRRA; (2) her claim for the wrongful death of Mr. Stewart; (3) a claim for deprivation of Mr. Stewart's rights pursuant to the NHRRA against Avante Ancillary Services, Inc., a subsidiary of Avante at Leesburg; and (4) her claim for the wrongful death of Mr. Stewart against Avante Ancillary Services, Inc.⁵⁹ Following the filing of the complaint, Avante filed a motion to compel arbitration of all claims.⁶⁰ On April 21, 2009, the Circuit Court for Lake County held a hearing on the motion to compel arbitration, the motion to dismiss Laizure's amended complaint, and the motion to stay discovery.⁶¹

On May 7, 2009, the circuit court granted Avante's motion to compel arbitration.⁶² The circuit court found (1) that Mr. Stewart signed the arbitration agreement, (2) that the arbitration agreement was valid, (3) the claims brought by Laizure on behalf of Mr. Stewart's estate were arbitrable issues, and (4) the claims were subject to the arbitration agreement.⁶³ Finally, the circuit court concluded that although Laizure did not sign the agreement, the beneficiaries of "Harry Stewart's Estate" were bound by the arbitration agreement because they were intended third-party beneficiaries.⁶⁴ Thus, the circuit court abated the issues pending resolution of Laizure's appeal in the district court.⁶⁵

2. District Court of Appeal

On appeal to the Fifth District Court of Appeal, Laizure appealed for a reversal of the circuit court's order granting Avante's motion to compel arbitration of her statutory wrongful death and NHRRA claims.⁶⁶ Laizure argued that the arbitration

57. *Gessa*, 86 So. 3d at 494.

58. *See* Brief for Petitioner at 4–5, *Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752 (Fla. 2013).

59. *Id.* at 4–5.

60. *Id.* at 7.

61. *Id.*

62. *Id.*

63. *Id.* at 8.

64. *See* Brief for Petitioner at 8, *Laizure*, 109 So. 3d at 752.

65. *Id.*

66. *Laizure v. Avante at Leesburg, Inc.*, 44 So. 3d 1254, 1255 (Fla. Dist. Ct. App. 2010).

agreement does not, and could not, encompass a wrongful death claim because that claim did not belong to Mr. Stewart; it was an independent legal cause of action that belonged to the estate.⁶⁷ As a result, Mr. Stewart could not bind the estate and his heirs to an agreement that they did not sign.⁶⁸ The court felt the issue was simple and Florida contract law could easily dispose of the issue.⁶⁹ However, the court noted that the issue of whether or not a nursing home patient could bind his or her heirs and estate to an arbitration agreement signed by the patient had not been decided by any Florida court.⁷⁰

The district court looked to the Supreme Court of Florida for guidance and relied heavily on a recent opinion where the court held an arbitration agreement in a homebuyer's contract was unenforceable against a wrongful death claim because the agreement did not mention claims for torts.⁷¹ In *Seifert*, a husband and wife signed a homebuyer's contract with an arbitration agreement for any contractual disagreement arising out of the purchase or construction of their new home.⁷² The husband died due to negligent construction of the home's air-conditioning vents that caused carbon monoxide to ventilate throughout the house.⁷³ The wife brought a wrongful death claim against the Home Buyer's Corporation ("HBC") for causing the death of her husband.⁷⁴ When the HBC filed a motion to compel arbitration, the Supreme Court of Florida reversed the lower court and held the agreement unenforceable because the agreement did not contain any language regarding claims for personal injury.⁷⁵

The district court, relying solely on *Seifert*, felt it was important to note that *Seifert* did not hold that wrongful death claims are not arbitrable; it held rather that if tort claims had been part of the agreement, then the agreement would have been arbitrable.⁷⁶ This is an odd conclusion to reach because *Seifert* is clearly distinguishable from *Laizure*. First, the issue addressed in *Seifert* is dissimilar to *Laizure* because in *Laizure* only one party signed the arbitration agreement: Mr. Stewart. Second, *Seifert* never even reached the issue of whether or not heirs bringing a wrongful death claim could be bound by an agreement to arbitrate signed solely by the decedent. Third, *Seifert* never addressed whether or not wrongful death claims are independent causes of action or derivative from the decedent's actions. Thus, the district court could not have found anything in *Seifert* that would warrant such a broad assumption that arbitration agreements can bind parties that are not, and have never been, part of an agreement to arbitrate.

The district court then addressed *Laizure's* argument that under Florida's Wrongful Death Act, her wrongful death claim has no relation to the arbitration

67. *Id.* at 1257.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 1257–58 (citing *Seifert v. U.S. Home Corp.*, 750 So. 2d 633 (Fla. 1999)).

72. *See Seifert*, 750 So. 2d at 635.

73. *Id.*

74. *Id.*

75. *Id.* at 642–43.

76. *Laizure*, 44 So. 3d at 1257–58 (citing *Seifert*, 750 So. 2d at 642).

agreement signed by Mr. Stewart because the claim, by statute, belonged to her.⁷⁷ The court turned to the Act, specifically section 768.20, for guidance.⁷⁸ Oddly, the court concluded that under the Act, a wrongful death claim belongs solely to the person bringing the claim, but the claim is “derivative” of the wrong committed against the decedent.⁷⁹ The court pointed out that other states have reached the same results.⁸⁰ Next, adding to the confusion, the court acknowledged how other states with the same statutory language as Florida’s wrongful death legislation have reached the opposite result.⁸¹ Thus, the district court, illogically, found that section 768.20 creates an independent right of action that is derived from the decedent’s action if he had survived. In an attempt to resolve the ambiguity, the district court certified the issue to the Supreme Court of Florida for further guidance.⁸²

B. Deciphering the Opinion

The Supreme Court of Florida began its analysis of the district court’s certified question by examining the arbitration agreement.⁸³ The court acknowledged that there are three elements for Florida courts to consider when ruling on a motion to compel arbitration: (1) whether a valid agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived.⁸⁴ The court only looked to the first two elements to decide the certified question.⁸⁵

1. Whether a Valid Written Agreement to Arbitrate Exists

The first part of the court’s analysis addressed Laizure’s argument that as a representative of Mr. Stewart’s estate, her wrongful death claims were not within the scope of the arbitration agreement.⁸⁶ The court quickly disposed of the first element by comparing Avante’s arbitration agreement to the agreement in *Seifert* and concluded that Avante’s agreement was valid because it included a term for the arbitration of tort claims.⁸⁷ The court found a “significant relationship” between the

77. *Id.*

78. *Id.*

79. *Id.* All the states that have decided this issue have similar wrongful death statutes that either create an independent cause of action or a derivative cause of action. The states with statutes that expressly provide for an independent cause of action universally deny agreements to arbitrate wrongful death claims when the decedent signed the agreement. However, states with derivative language in their wrongful death legislation will uphold the agreement; Florida is the only state to disregard legislative intent. *See Pisano v. Extencicare Homes, Inc.*, 77 A.3d 651, 659 (Pa. Super. Ct. 2013).

80. *Id.* at 1259 (citing *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640 (Tex. 2009) (Texas has a wrongful death statute that is derivative of the decedent’s actions); *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661 (Ala. 2004) (Alabama has a wrongful death statute that is derivative of the decedent’s actions)).

81. *Id.* (citing *Woodall v. Avalon Care Ctr.-Fed. Way, LLC*, 231 P.3d 1252 (Wash. Ct. App. 2010) (Washington has a statute that creates an independent cause of action for wrongful death claims); *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009) (same)).

82. *Laizure*, 44 So. 3d at 1259.

83. *Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752, 757 (Fla. 2013).

84. *Id.* (citing *Seifert v. U.S. Home Corp.*, 750 So. 2d 633 (Fla. 1999)).

85. *Id.*

86. *Id.* at 757–58.

87. *Id.* at 758. Avante’s agreement stated:

contract that Mr. Stewart signed and the allegations in Laizure's complaint because the agreement applied to Mr. Stewart's "heirs" and included all tort claims.⁸⁸ The court concluded, "It is clear that the contracting parties intended to include wrongful death claims such as those brought in this case."⁸⁹ One might imagine how it would be difficult to determine the parties' intentions in this situation seeing how Mr. Stewart's "heirs" never knew of the arbitration agreement or signed it. Yet, the court continued with its analysis without mentioning this aspect.⁹⁰

2. Whether an Arbitrable Issue Exists

Next, the court addressed the issue of whether a nursing home arbitration agreement signed by a nursing home resident, or his or her representative, can bind the resident's estate and statutory heirs to the agreement.⁹¹ To answer the second prong of the *Seifert* analysis, the court reviewed the Florida Wrongful Death Act, the NHRRA, and analyzed the "nature" of wrongful death claims in Florida.⁹²

The court began its analysis of the Wrongful Death Act by focusing on the language in sections 768.19 and 768.20.⁹³ Section 768.19 establishes the cause of action for statutory wrongful death claims.⁹⁴ The court focused on the statute's language that would entitle a survivor redress for the wrongful death of a family member by stating: "The event would have entitled the person injured to maintain an action and recover damages if death had not ensued"⁹⁵ Next, the court looked to section 768.20 which addresses defenses: "A defense that would bar or reduce a survivor's recovery if she or he were the plaintiff may be asserted against the survivor, *but shall not affect the recovery of any other survivor.*"⁹⁶ Finally, the court recognized that the Act created a new right of action that is different from any right of action that belonged to the decedent.⁹⁷

This agreement to arbitrate shall include, but is not limited to, any claim based on . . . breach of contract, breach of fiduciary duty, fraud or misrepresentation, common law or statutory negligence, gross negligence, malpractice or a claim based on any departure from accepted standards of medical or nursing care (collectively "Disputes"), where the damages or other amount in controversy is/are alleged to exceed ten thousand dollars (\$10,000.00). This shall expressly include, without limitation, claims based on Chapter 400, Florida Statutes, which allege damages in excess of ten thousand dollars (\$10,000.00).

Id. at 755.

88. *Laizure*, 109 So. 3d at 758. Avante's agreement stated: "This agreement shall be binding upon, and shall include any claims brought by or against the Parties' representatives, agents, heirs, assigns, employees, managers, directors, shareholders, management companies, subsidiary companies or related affiliated business entities." *Id.* at 755.

89. *Id.* at 758.

90. *Id.*

91. *Id.* at 757.

92. *Id.*

93. *Laizure*, 109 So. 3d at 758–59.

94. *Id.* (quoting FLA. STAT. § 768.19 (2008)).

95. *Id.* (quoting FLA. STAT. § 768.19 (2008)).

96. *Id.* at 758–59 (quoting FLA. STAT. § 768.20 (2008)).

97. *Id.* at 759 (citing *Toombs v. Alamo Rent-A-Car, Inc.*, 833 So. 2d 109, 111 (Fla. 2002)).

Even though the Act creates an independent claim, the court still reasoned that the language from the two sections of the Act created a right of the survivors to recover that is based on the decedent's right to recover.⁹⁸ The court went back twenty years and found support in a decision that barred a wrongful death claim by a survivor where the decedent had signed a "release" of liability prior to the decedent's death.⁹⁹ Next, the court turned to a more recent decision for further authority. In *Toombs*, the court barred recovery for a wrongful death claim grounded on the tort doctrine of "dangerous instrumentality" where the decedent had no right of action because she was the co-bailee of the vehicle she died in.¹⁰⁰ Finally, the court cited two Florida district court cases from the 1970s that barred survivors' wrongful death claims based on the decedents' actions in support of the court's conclusion that wrongful death claims in Florida are subject to defenses the defendant would have had against the decedent.¹⁰¹

From the precedent cited, the Court found that "[i]n wrongful death actions in Florida, the defendant's liability flows from actions toward the decedent, and the ability of the estate and heirs to recover is predicated on the decedent's entitlement to maintain an action and recover damages if death had not ensued."¹⁰² However, the Court pointed out what it thought was a "split" among other states that have considered the issue of whether an estate and heirs are bound by arbitration agreements signed by decedents in wrongful death claims.¹⁰³ Finally, the Court concluded that, like the states that have derivative language in their wrongful death

98. See *id.* at 760.

99. *Laizure*, 109 So. 3d at 760 (citing *Variety Children's Hospital v. Perkins*, 445 So. 2d 1010, 1011–12 (Fla. 1983)).

At the moment of his death [the injured party] had no right of action against the tortfeasor because this cause of action had already been litigated, proved and satisfied Since there was no right of action existing at the time of death, under the statute no wrongful death cause of action survived the decedent.

Id.

100. *Id.* (citing *Toombs*, 833 So. 2d at 118).

Although we have 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, the language of the Act makes clear a cause of action for wrongful death that is predicated on the decedent's entitlement to maintain an action and recover damages if death had not ensued.

Id.

101. See *id.* at 760 (citing *Warren v. Cohen*, 363 So. 2d 129, 131 (Fla. Dist. Ct. App. 1978) (holding that "the subsequently filed wrongful death action is barred by release signed by the decedent prior to her death")); see also *Ryter v. Brennan*, 291 So. 2d 55, 57 (Fla. Dist. Ct. App. 1974) (settlement and general release by decedent barred wife's subsequent wrongful death claims).

102. *Id.* at 761.

103. *Id.* The Court has incorrectly identified what they think is a split among other states. As will be discussed *infra*, in Part C, other states simply have wrongful death acts with language that either creates a derivative cause of action or an independent cause of action, and thus hold according to the legislative intent of the state.

statutes, “[t]he nature of a wrongful death cause of action in Florida is derivative in the context of determining whether a decedent’s estate and heirs are bound by the decedent’s agreement to arbitrate.”¹⁰⁴ The Court’s logic for this reasoning is even more perplexing than its conclusion: “The estate and heirs *stand in the shoes* of the decedent for purposes of whether the defendant is liable and are bound by the decedent’s actions and contracts with respect to defenses and releases.”¹⁰⁵

The obvious problem with the court’s decision is the fact that the estate cannot “stand in the shoes” of the decedent if their claim is independent of the decedent. Indeed, as the court pointed out, by statute, wrongful death claims are independent and belong solely to the heirs or representatives bringing the statutory wrongful death claims.¹⁰⁶ The authority used by the court to support its conclusion that the “nature” of wrongful death claims in Florida is derivative of the decedent’s agreement to arbitrate is unfounded. The authority used by the Court speaks of common negligence defenses, not choice of forum agreements.¹⁰⁷ By affirming the lower court’s holding that Mr. Stewart’s estate was a third-party beneficiary of his agreement with Avante, the court has frustrated plaintiffs’ claims in the nursing home arena of litigation. The court’s decision has stripped litigants’ constitutional rights to a jury trial by binding them to an agreement that they were not a witness to or signatory of. The other states that have decided this issue can help shine some light on the Supreme Court of Florida’s recent decision.

C. Other States

An overview of the cases decided based on those states’ statutory wrongful death language shows that courts in states where wrongful death actions are accepted as independent and separate causes of action hold that claimants are not bound by a decedent’s choice of forum agreement.¹⁰⁸ However, in states where the

104. *Id.* at 762.

105. *Laizure*, 109 So. 3d at 762.

106. *Id.* at 759 (citing *Toombs v. Alamo Rent-A-Car, Inc.*, 833 So. 2d 109, 111 (Fla. 2002)).

107. *See Variety Children’s Hosp. v. Perkins*, 445 So. 2d 1010, 1011–12 (Fla. 1983).

At the moment of his death [the injured party] had no right of action against the tortfeasor because his cause of action had already been litigated, proved and satisfied. . . . Since there was no right of action existing at the time of death, under the statute no wrongful death cause of action survived the decedent.

Id.

Although we have 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, the language of the Act makes clear a cause of action for wrongful death that is predicated on the decedent’s entitlement to maintain an action and recover damages if death had not ensued.

Toombs, 833 So. 2d at 118.

108. *See In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 647 (Tex. 2009).

applicable statutory language creates a wholly derivative action, courts generally hold a decedent's agreement to arbitrate valid when arbitration is compelled against the decedent's statutory heirs and estate.¹⁰⁹ Courts across the United States have uniformly held that it is the state legislatures' intent that controls the issue and not the courts' opinions.¹¹⁰ Thus, a brief overview of other states' decisions on the issue will help to highlight the Supreme Court of Florida's error in deciding *Laizure*.

1. Derivative

In 2009, the Texas Supreme Court held that a deceased son's parents were bound to arbitrate their claim for the wrongful death of their son because under Texas law wrongful death beneficiaries are generally bound by a decedent's pre-death agreement because of the derivative nature of the claims.¹¹¹ In *Labatt*, a Texas corporation compensated injured workers through an "occupational injury plan," and in order to receive the benefits of the "plan" each employee had to sign an agreement to arbitrate all personal injury claims arising out of his or her employment.¹¹² The son was the only person to sign the agreement.¹¹³ When the son died from an asthma attack while working, his parents brought a claim for his wrongful death against his employer, and the employer moved to compel arbitration asserting the parents were third-party beneficiaries.¹¹⁴ The parents argued that they were not signatories to the agreement and could not be bound by it.¹¹⁵

The trial court and the court of appeals denied the employer's motion to compel arbitration without stating a reason.¹¹⁶ The Supreme Court of Texas looked to the text of the state's wrongful death statute to determine whether the legislature intended the statute to create a derivative or independent cause of action.¹¹⁷ The court found that Texas's "Wrongful Death Act expressly conditions the beneficiaries' claims on the decedent's right to maintain suit for his injuries. The legislature created an entirely derivative cause of action"¹¹⁸ The court treated the issue as one of simple statutory construction and legislative intent, reasoning that other states with similar statutory language hold the same.¹¹⁹ Thus, under Texas statutory law, wrongful death claims are derivative of the decedent's claim

109. *Id.*

110. *See* *Variety Children's Hospital v. Perkins*, 445 So. 2d 1010, 1012 (Fla. 1983).

111. *In re Labatt*, 279 S.W.3d at 649.

112. *Id.* at 642.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *In re Labatt*, 279 S.W.3d at 646.

118. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.003(a)).

119. *Id.* at 647.

and any agreement to arbitrate that was signed by the decedent applies to his or her heirs and estate.¹²⁰

Similarly, the Eleventh Circuit Court of Appeals of the United States held that a nursing home's arbitration agreement signed by a resident was enforceable against the resident's estate, and the estate's claims would have to be decided by binding arbitration per the agreement.¹²¹ In *Entrekin*, a patient was admitted to an Alabama nursing home where she signed an admissions agreement requiring her and her estate (or heirs) to arbitrate any claims arising out of her stay with the facility.¹²² After the patient died, the executor of her estate brought an action against the nursing home under Alabama's wrongful death statute for damages.¹²³ The nursing home filed a motion to compel arbitration, and the district court denied the motion.¹²⁴ The district court interpreted Alabama's wrongful death precedent in a way that would not allow for the executor to be bound by an agreement that he or she did not sign.¹²⁵

The issue the Eleventh Circuit needed to resolve was the same issue in *Laizure*: whether or not an estate could be bound by an arbitration agreement signed solely by a nursing home resident.¹²⁶ The Eleventh Circuit began its analysis by pointing out that whether a claim falls within the scope of an arbitration agreement is a matter of state law, and in this case, Alabama law.¹²⁷ The Eleventh Circuit noted that the language in Alabama's wrongful death statute was "unique," and an analysis of the state's wrongful death case law would be helpful.¹²⁸ After a lengthy review of Alabama case law, the Eleventh Circuit concluded that "[a]n executor's wrongful death claim falls within the scope of a valid arbitration agreement between a nursing home and a decedent."¹²⁹ However, the Eleventh Circuit, though bound by Alabama law, made it clear that it did not agree with the result: "And because neither the decedent nor her estate ever owned the wrongful death claim, it would seem to follow that a decedent cannot bind the entity that would later own

120. *Id.*

121. *Entrekin v. Internal Med. Assocs. of Dothan, P.A.*, 689 F.3d 1248, 1259 (11th Cir. 2012).

122. *Id.* at 1249.

123. *Id.*

124. *Id.*

125. *Id.* at 1251.

126. *Compare Laizure v. Avante at Leesburg, Inc.*, 44 So. 3d 1254, 1259 (Fla. Dist. Ct. App. 2010); *with Entrekin*, 689 F.3d at 1249.

127. *Entrekin*, 689 F.3d at 1251.

128. *Id.* at 1253. Alabama's wrongful death statute provides:

A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama . . . for the wrongful act, omission, or negligence of any person, persons, or corporation, his or her or their servants or agents, whereby the death of the testator or intestate was caused, provided the testator or intestate could have commenced an action for the wrongful act, omission, or negligence if it had not caused death.

ALA. CODE § 6-5-410(a) (1975).

129. *Id.* at 1254.

the claim to arbitrate (the executor). *But things are not always as they seem.*¹³⁰ Thus, states with derivative language in their wrongful death statutes, such as Texas and Alabama, will compel the arbitration of wrongful death claims when the deceased is the only person to sign the agreement because of the legislature's intent in creating the statute.

2. Independent

In Utah, a wife filed a wrongful death action against a physician alleging that the doctor's negligent care caused her husband to commit suicide.¹³¹ The doctor filed a motion to compel arbitration of the wife's wrongful death claim because the husband had entered into an arbitration agreement as a part of his initial intake agreement.¹³² The doctor argued that the wife should be bound by the agreement because Utah's wrongful death statute applies to third parties when the claim arises out of the injury sustained by the person that signed the agreement.¹³³ Alternatively, the doctor argued that the wife should be bound by the agreement because she was an intended third-party beneficiary.¹³⁴ The district court denied the doctor's motion to compel arbitration holding that "since Mrs. Bybee did not sign the arbitration agreement, she was not bound by it and that she could not be bound under an agency or third-party beneficiary theory."¹³⁵

Utah is unique because it has incorporated its wrongful death statute into the state's constitution.¹³⁶ Under Utah wrongful death law, a wrongful death plaintiff is not subject to all of the defenses a defendant would have had against a decedent because in Utah a wrongful death claim is a separate claim that comes into existence upon the death of the injured person.¹³⁷ The court then distinguished states with wrongful death language that creates an independent cause of action with states that have language that creates a cause of action that is derivative of the decedent:

Courts that compel nonsignatory heirs to abide by arbitration agreements often do so because under *their law* a wrongful death cause of action is wholly derivative of and dependent on the underlying personal injury claim... The independent nature of the wrongful death cause of action in Utah means that in our state the heirs in a wrongful death action stand in, at most, one shoe of the decedent.¹³⁸

130. *Id.* at 1253–54 (emphasis added).

131. *Bybee v. Abdulla*, 189 P.3d 40, 41 (Utah 2008).

132. *Id.*

133. *Id.* at 42.

134. *Id.*

135. *Id.*

136. *Id.* at 45.

137. *Bybee*, 189 P.3d at 46.

138. *Id.*

When reaching its conclusion, the court looked to a key point that *Laizure* did not: the type of defenses that are granted by statutory language should matter.¹³⁹ The court reasoned that typical negligence defenses go to the heart of the wrongful death claim, but procedural defenses, such as a pre-existing choice of forum agreement, do not implicate the viability of the underlying claim.¹⁴⁰ In sum, the court made the distinction that the Legislature, by creating an independent cause of action in wrongful death claims, only intended typical negligence defenses to be applicable.¹⁴¹

The court quickly dismissed the doctor's third-party beneficiary argument by reasoning that the wife did not claim the benefit of some right for which she did not expressly bargain.¹⁴² The court rested on well-settled contract law that a third party may claim a contract benefit only if the parties to the contract clearly express an intention to confer a separate and distinct benefit on the third party.¹⁴³ Comically, the court looked to the arbitration agreement which expressly named "all persons whose claims for injuries and losses arise out of medical care rendered ... by [Dr. Abdulla]" to be bound by the agreement and found that "the intention to bind Mrs. Bybee is clear, [but] it is less apparent that the obligation to arbitrate was a 'separate and distinct benefit' bestowed by her husband and Dr. Abdulla on her."¹⁴⁴ The court did find that the wife intended to be the beneficiary of her husband's good health, but these were only incidental benefits of the doctor-patient relationship which disappeared when he died.¹⁴⁵

The Missouri Supreme Court refused to enforce an arbitration agreement for nursing home care signed by the daughter of a patient acting as the patient's attorney-in-fact.¹⁴⁶ In *Lawrence*, the arbitration agreement signed by the patient's daughter called for "any and all claims, disputes and controversies... shall be resolved exclusively by binding arbitration."¹⁴⁷ Shortly after being admitted, the patient died, and her son brought a claim against the nursing home under Missouri's wrongful death statute.¹⁴⁸ The nursing home filed a motion to compel arbitration and the circuit court denied the motion, reasoning that "the decedent's

139. *Id.* at 47.

140. *Id.*

141. *Id.*

While we are weary of announcing a categorical rule to distinguish between defenses that a decedent may successfully confer by contract on a defendant to assert against heirs in a wrongful death action, those least likely to be found enforceable are contract provisions that purport to affect the rights of heirs but do not affect the existence of the decedent's personal injury claim during his lifetime.

Id.

142. *Bybee*, 189 P.3d at 49.

143. *Id.*

144. *Id.*

145. *Id.* at 50.

146. *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 526–27 (Mo. 2009) (en banc).

147. *Id.* at 526.

148. *Id.*

daughter was an agent for the purpose of securing residential treatment for the decedent during her lifetime, [and] nothing in the arbitration agreement can be construed to extend to new and independent causes of action”¹⁴⁹

Missouri’s wrongful death statutory language is close to identical with Florida’s.¹⁵⁰ The court found that the language of the wrongful death act creates a new distinct cause of action and is distinct from any underlying tort claims.¹⁵¹ The court reasoned that since the patient could not be a party to her own wrongful death claim, then it is not possible for a claim for her wrongful death to be derivative of any agreements that related to her during her lifetime.¹⁵² Thus, the court, quite simply, held that “[t]he arbitration agreement, therefore, cannot bind parties to the wrongful death suit.”¹⁵³

D. Recommendations for Changes

The Court’s decision in *Laizure* made redress for family members that have lost a loved one due to a nursing home’s negligence an uphill battle that will likely end in arbitration. Yet, what fix is there for this? Unfortunately for Florida, our Court has set concrete precedent with little authority on which to stand. One solution, though highly improbable, would be a change to the FAA, which would automatically abrogate *Laizure*. If Congress were to change the FAA to expressly restrict the compulsion of arbitration clauses between statutory heirs in wrongful death claims, then the nursing home arbitration loophole would be shut. However, the Supreme Court of Florida has yet to accept to decide this issue, and it is highly likely that it never will because the issue is intertwined deeply in state contract law. Thus, the Supreme Court would not want to overreach, and the issue is nowhere near Congress’s radar.

Another solution would be to add a section specifically for nursing-home litigation to Florida’s Wrongful Death Act. With the draconian effects the court has created, it should not be long until Floridians are demanding a change. The Act already creates a distinct independent right of action, so it is not difficult to see what the Legislature intended when it created the Act. Alternatively, the Legislature could create a law that would provide for a clearer procedural process for understanding everything the new patient is agreeing to during the intake

¹⁴⁹. *Id.* at 526–27.

¹⁵⁰. *Id.* Missouri’s statute states:

Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured.

MO. ANN. STAT. § 537.080 (West 2013).

¹⁵¹. *Lawrence*, 273 S.W.3d at 527.

¹⁵². *Id.* at 529.

¹⁵³. *Id.*

process. The solution could involve making a statute that demands the presence of next-of-kin in the formation of any agreements that call for the compulsion of binding arbitration. Furthermore, since very few people are even able to understand what they are agreeing to, an informational video recording informing the patient of the statutory and constitutional rights he or she is waiving could be beneficial in making these decisions.

CONCLUSION

On balance, the 72,000 nursing home residents in Florida are currently being subjected to what the Supreme Court of Florida five years ago commonly held to be unconscionable contracts. After *Laizure*, the prospects of equal bargaining have become distant because now when an elderly person dies in a nursing home, an arbitrator hired by the nursing home will decide whether or not the contract was unconscionable. Freedom of contract only goes so far. *Laizure* has shut the door to our courts in the face of families with loved ones in nursing homes.