

240 So.3d 120

District Court of Appeal of Florida, Fifth District.

NORTHPORT HEALTH SERVICES OF  
FLORIDA, LLC d/b/a West Melbourne  
Health and Rehabilitation Center, Appellant,

v.

Rosiette LOUIS, as Personal Representative  
of the Estate of Elienne Philistin, Appellee.

Case No. 5D17-335

Opinion filed March 2, 2018

**Synopsis**

**Background:** Personal representative of patient's estate brought action against rehabilitation center for wrongful death. The Circuit Court, Brevard County, [Charles J. Roberts, J.](#), denied center's motion to compel **arbitration**. Center appealed.

**Holdings:** The District Court of Appeal, [Lambert, J.](#), held that:

[1] provision of rehabilitation center's admission agreement that Alabama Rules of Evidence applied to **arbitration** hearing was unenforceable, but

[2] that provision was severable from remainder of agreement.

Reversed and remanded with directions.

West Headnotes (7)

**[1] Alternative Dispute Resolution****Scope and standards of review**

The standard of review of a trial court's order on a motion to compel **arbitration** is de novo.

2 Cases that cite this headnote

**[2] Alternative Dispute Resolution****Scope and standards of review**

A trial court's decision regarding whether an **arbitration** agreement or provision is void as against public policy presents a pure question of law, subject to de novo review.

Cases that cite this headnote

**[3] Health****Patients' rights**

The public policy of the Florida Nursing Home Resident's Rights Act is to provide rights for, and to protect, nursing home residents. [Fla. Stat. Ann. § 400.0060 et seq.](#)

Cases that cite this headnote

**[4] Alternative Dispute Resolution****Application of judicial rules****Health****Nursing homes**

Remedial purpose of Nursing Home Resident's Rights Act was violated by provision of rehabilitation center's admission agreement that Alabama Rules of Evidence applied to **arbitration** hearing; application of Alabama Rules of Evidence could preclude patient's estate from presenting evidence at **arbitration** hearing as to its compensatory damages. [Fla. Stat. Ann. § 400.023\(1\)\(c\).](#)

1 Cases that cite this headnote

**[5] Alternative Dispute Resolution****Severability**

Unenforceable provision of rehabilitation center's admission agreement that Alabama Rules of Evidence applied to **arbitration** hearing was severable from remainder of agreement; provision concerned procedure and not substantive law or remedies under Florida law to which parties specifically agreed.

1 Cases that cite this headnote

**[6] Contracts**

### 🔑 Partial Illegality

A contract is severable where with the illegal portion eliminated, there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other.

Cases that cite this headnote

## [7] Alternative Dispute Resolution

### 🔑 Severability

The dispositive issue of whether a void **clause** or **clauses** invalidate an entire **arbitration** agreement is whether the offending **clause** goes to the very essence of the agreement.

Cases that cite this headnote

\*121 Non-Final Appeal from the Circuit Court for Brevard County, **Charles J. Roberts**, Judge.

### Attorneys and Law Firms

**Lisette M. Gonzalez** and **Scott A. Cole**, of Cole, Scott & Kissane, P.A., Miami, for Appellant.

**Douglas F. Eaton**, of Eaton & Wolk, PL, Miami, for Appellee.

### Opinion

LAMBERT, J.

Northport Health Services of Florida, LLC d/b/a West Melbourne Health and Rehabilitation Center (“Northport”) appeals a non-final order denying its motion to compel **arbitration**.<sup>1</sup> The trial court found the parties' **arbitration** agreement to be “vague, confusing and conflicting” and that it was unenforceable for being void as against public policy because it limited the ability of the Appellee, Rosiette Louis, as personal representative of the Estate of Elienne Philistin (“Estate”) to recover damages and increased her evidentiary burden of proof. We reverse and remand to the trial court to sever the provision in the **arbitration** agreement that requires the application of Alabama law to the admissibility of evidence at the **arbitration** hearing.

Elienne Philistin was admitted to the West Melbourne Health and Rehabilitation Center on August 7, 2015, and resided there until she died on September 25, 2015. On the date of her admission, Philistin's daughter, Rosiette Louis, with power of attorney on behalf of her mother, executed an admission agreement<sup>2</sup> that contained the **arbitration** agreement before the court in which the parties agreed to resolve any disputes between them by binding **arbitration** and specifically waived \*122 the right to have any dispute resolved in a court of law before a judge or jury.

Estate filed suit against Northport alleging that Northport's failure to comply with its statutory duties under the Florida Nursing Home Resident's Rights Act<sup>3</sup> (“Act”) was the proximate cause of Philistin's wrongful death. Northport moved to compel **arbitration**. Estate responded by asserting that the agreement to **arbitrate** was void and unenforceable for two reasons. First, while acknowledging that the agreement expressly required the **arbitrator** to apply Florida's substantive law, its law of remedies,<sup>4</sup> and the evidentiary burden of proof applicable in Florida in these types of cases, Estate nevertheless contended that a separate provision contained in paragraph 8 of the **arbitration** agreement, stating that the admissibility of evidence at the **arbitration** hearing shall be determined in accordance with the Alabama Rules of Evidence, improperly limited its ability to recover compensatory damages because only punitive damages are recoverable in wrongful death claims in Alabama. *See Ala. Power Co. v. Turner*, 575 So.2d 551 (Ala. 1991). Second, Estate argued that another provision within the same paragraph required the application of the Alabama Rules of Civil Procedure to all pre-hearing discovery, which Estate asserted improperly limited it to discovery of only those negligent acts or omissions that it was able to identify at the outset of the lawsuit. The trial court granted Estate's motion, finding that the **arbitration** agreement violated public policy and was void because it limits Estate's ability to recover all available damages and also increased its evidentiary burden of proof. The court also ruled that these two provisions in paragraph 8 of the **arbitration** agreement were not severable from the rest of the agreement “because it will create more confusion among **arbitrators** regarding applicable procedures and evidence rules.”

[1] [2] The standard of review of a trial court's order on a motion to compel **arbitration** is de novo. *See Laizure*

*v. Avante at Leesburg, Inc.*, 44 So.3d 1254, 1256 (Fla. 5th DCA 2010). Additionally, “[a] trial court’s decision regarding whether an **arbitration** agreement or provision is void as against public policy presents ‘a pure question of law, subject to de novo review.’” *Fi–Evergreen Woods, LLC v. Estate of Vrastil*, 118 So.3d 859, 862 (Fla. 5th DCA 2013) (quoting *Shotts v. OP Winter Haven, Inc.*, 86 So.3d 456, 471 (Fla. 2011)).

[3] [4] The public policy of the Florida Nursing Home Resident’s Rights Act is to provide rights for, and to protect, nursing home residents. *Shotts*, 86 So.3d at 474. Under the Act, a resident may recover actual and punitive damages for the violation of these rights or for negligence, § 400.023(1)(c), Fla. Stat. (2016), and there are no caps for pain and suffering damages. Here, while the **arbitration** agreement specifically provides that the **arbitrator** apply Florida substantive law, including its law of remedies, which allow for an award of both compensatory and punitive damages, the application of the Alabama Rules of Evidence under the **arbitration** agreement may preclude Estate from presenting evidence at the **arbitration** hearing as to its compensatory damages, contrary to the remedial purpose of the Act.

\*123 [5] Northport reminds the court that in *Hancock v. Northport Health Services of Florida, LLC*, 150 So.3d 1262 (Fla. 5th DCA 2014), we affirmed an order compelling **arbitration**, determining that these identical **arbitration** provisions in the **arbitration** agreement did not limit a resident’s available remedies under the Act and that no convincing argument was made as to why the application of Alabama’s procedural rules would be problematic. 150 So.3d at 1263. Estate responds that *Hancock* is not dispositive because the appellant there did not raise the specific argument being raised here as to the unenforceability of the agreement. Northport alternatively asserts that the **arbitration** agreement contains a severability **clause** providing that in the event any provision of the agreement is held to be unenforceable for any reason, the remainder of the agreement “shall remain in full force and effect and shall be enforceable in accordance with its terms.”

[6] [7] A “contract is severable where ... with the illegal portion eliminated, there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other.” *Shotts*, 86 So.3d at 475 (quoting *Local No. 234 of United Ass’n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of U.S. & Can. v. Henley & Beckwith, Inc.*, 66 So.2d 818, 821–22 (Fla. 1953)). The dispositive issue of whether a void **clause** or **clauses** invalidate the entire **arbitration** agreement is whether the offending **clause** goes to “the very essence of the agreement.” *Rockledge NH, LLC v. Miley By & Through Miley*, 219 So.3d 246, 248 (Fla. 5th DCA 2017) (quoting *Shotts*, 86 So.3d at 478).

Estate is correct that the appellant in *Hancock* did not raise the specific argument being made here. Nevertheless, we conclude that the provision of the **arbitration** agreement requiring application of the Alabama Rules of Evidence at the **arbitration** hearing is severable because it concerns procedure and not the substantive law or remedies under Florida law to which the parties specifically agreed. Thus, this provision does not go to the “very essence” of the **arbitration** agreement. Lastly, we again hold, as we did in *Hancock*, that no convincing argument has been raised as to why the application of the Alabama Rules of Civil Procedure to the parties’ conduct of pre-hearing discovery is problematic. Accordingly, we hold that the trial court erred in denying the motion to compel **arbitration**.

REVERSED and REMANDED with directions that the trial court grant Northport’s motion to compel and sever from the **arbitration** agreement the provision applying the Alabama Rules of Evidence to the admissibility of evidence at the **arbitration** hearing.

COHEN, C.J. and EISNAUGLE, J., concur.

#### All Citations

240 So.3d 120, 43 Fla. L. Weekly D505

#### Footnotes

- 1 We have jurisdiction. See Fla. R. App. P. 9.130(a)(3)(C)(iv).
- 2 Neither party disputes the validity of the power of attorney or that Louis properly exercised her authority on behalf of her mother.

3 The Act is codified at [sections 400.022–.0238, Florida Statutes](#).

4 The agreement requires the **arbitrator** to “apply the substantive law (and the law of remedies, if applicable) of the State in which the facility is located.” The facility is located in Florida.