IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-67
L.T. Case No. 5D14-759

EILEEN HERNANDEZ, M.D. and WOMEN'S CARE FLORIDA, LLC d/b/a PARTNERS IN WOMEN'S HEALTHCARE,

Petitioners,

vs.

LUALHATI CRESPO and JOSE CRESPO,

Respondents.

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIFTH DISTRICT COURT OF APPEAL

PETITIONERS' INITIAL BRIEF ON THE MERITS

MCEWAN, MARTINEZ &
DUKES, P.A.
P.O. Box 753
Orlando, FL 32802
Tel: (407) 423-8571
Fax: (407) 423-8632
Counsel for Petitioners

HICKS, PORTER, EBENFELD &
& STEIN, P.A.
799 Brickell Plaza, 9th Floor
Miami, FL 33131
Tel: (305) 374-8171
Fax: (305) 372-8038
Appellate Counsel for Petitioners

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Statutes

INTRODUCTION

Petitioners/Defendants, EILEEN HERNANDEZ, M.D. and WOMEN'S CARE FLORIDA, LLC d/b/a PARTNERS IN WOMEN'S HEALTHCARE, pursuant to this Court's order of March 5, 2015 accepting jurisdiction, file their initial brief on the merits. The Fifth District Court of Appeal held that the Women's Care Florida arbitration agreement at issue violates the public policy pronounced by the Legislature in the Medical Malpractice Act (Chapter 766) and certified conflict with the Second District Court of Appeal's decision in *Santiago v. Baker*, 135 So. 3d 569 (Fla. 2d DCA 2014), which held the exact opposite. *See Crespo v. Hernandez*, 151 So. 3d 495, 496 (Fla. 5th DCA 2014). Petitioners submit that the Court should resolve the certified conflict by disapproving and quashing the Fifth District's decision, approving *Santiago*, and remanding for arbitration of Respondents' claims under the agreement as ordered by the trial court. (A.App.1-3).[1]

[1]Citations to the record filings set forth in the appendices to the parties' initial and answer briefs to the Fifth District will be designated "A.App.___" and "App.___," respectively.

STATEMENT OF THE CASE AND FACTS

A. Relevant facts.

On February 25, 2011, LUALHATI CRESPO ("Mrs. Crespo") presented to Women's Care Florida for an initial visit regarding her pregnancy. (A.App.134). At this initial visit, Mrs. Crespo was presented with a copy of the Women's Care Florida "Arbitration Agreement For Claims Arising Out Of Or Related To Medical Care and Treatment." (A.App.134-35). The arbitration agreement provided in relevant part:

> 1. AGREEMENT TO ARBITRATE CLAIMS REGARDING FUTURE CARE AND TREATMENT. The patient agrees that any controversy, including without limitation, claims for medical malpractice, personal injury, loss of consortium, or wrongful death, arising out of or in any way relating to the diagnosis, treatment, or care of the patient by the undersigned provider of medical services, including any partners, agents, or employees of the provider of medical services, shall be submitted to binding arbitration.
>
> * * *
>
> 3. WAIVER OF RIGHT TO JURY TRIAL. Both parties to this Agreement, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of binding arbitration.
>
> 4. ALL CLAIMS MUST BE ARBITRATED BY ALL CLAIMANTS. All claims based upon the same occurrence, incident, or care shall be arbitrated in one proceeding. It is the intention of the parties that this Agreement bind all parties whose claims may arise out of or relate to treatment or services provided by the provider of medical services, including the patient, the patient's estate, any spouse or heirs of the patient, any biological or adoptive parent of the patient and any children of the patient, whether born or unborn, at the time of the occurrence giving rise to the claim. In the case of any pregnant mother, the term "patient" herein shall mean both the mother and the

mother's expected child or children. By signing this Agreement, the parties consent to the participation in this arbitration of any person or entity that would otherwise be a proper additional party in a court action.

5. ARBITRATION PROCEDURES. The parties agree and recognize that the provisions of Florida Statutes, Chapter 766, governing medical malpractice claims shall apply to the parties and/or claimant(s) in all respects except that at the conclusion of the pre-suit screening period and provided there is no mutual agreement to arbitrate under Florida Statutes, 766.106 or 766.207, the parties and/or claimant(s) shall resolve any claim through arbitration pursuant to this Agreement. Accordingly, any demand for arbitration shall not be made until the conclusion of the pre-suit screening period under Florida Statutes, Chapter 766. Within (20) twenty days after a party to this Agreement has given written notice to the other of a demand for arbitration of said dispute or controversy, the parties to the dispute or controversy shall each have an absolute and unfettered right to appoint an arbitrator of its choice and shall give notice of such appointment to the other. Within a reasonable time after such notices have been given the two arbitrators so selected shall select a neutral arbitrator and give notice of the selection thereof to the parties. The arbitrators shall hold a hearing within a reasonable time from the date of the notice of selection of the neutral arbitrator. The parties agree that the arbitration proceedings are private, not public, and the privacy of the parties and of the arbitration proceedings shall be preserved.

* * *

7. ARBITRATION EXPENSES. Expenses of the arbitration shall be shared equally by the parties to this Agreement.

8. APPLICABLE LAW. Except as provided herein, the arbitration shall be governed by the provisions of the Florida Arbitration Code, Florida Statutes, Section 682.01 et seq. ... In conducting the arbitration under Florida Statutes, Section 682.01 et seq., all substantive provisions of Florida law governing medical malpractice claims and damages related thereto, including but not limited to, Florida's Wrongful Death Act, the standard of care for medical providers, caps on damages under Florida Statutes 766.118, the applicable statute of limitations and response as well as and [sic] the application of collateral sources and setoffs shall be applied. ...

* * *

10. SEVERABILITY. If any provision of this Agreement is held invalid or unenforceable, the remaining provisions shall remain in full force and shall not be affected by the invalidity of any other provision.

11. ACKNOWLEDGEMENTS BY PATIENT. The patient, by signing this Agreement, also acknowledges that he or she has been informed that:

* * *

c. BINDING ARBITRATION AND EFFECT ON RIGHT TO APPEAL. Binding arbitration means that the parties give up their right to go to court to assert or defend a claim covered by this Agreement. ... The decision of an arbitration panel is final and there will generally be no right to appeal an adverse decision.

* * *

(A.App.93-95).[2]

Additionally, Mrs. Crespo was given the opportunity to view a six minute video that discussed and fully explained the arbitration agreement. (A.App.134-35). After watching the video and being afforded an opportunity to review the agreement, Mrs. Crespo signed the document and returned it to the receptionist that had provided her the documents and video to review. (A.App.139-40).[3]

The underlying medical malpractice claim stems from an August 17, 2011, follow up visit in which Mrs. Crespo failed to arrive on time for her office appointment with Eileen Hernandez, M.D. (App.2 ¶8). The visit was for Mrs.

[2]Unless otherwise noted, all emphasis has been supplied by counsel.

[3]Mrs. Crespo signed at the signature block for "patient" which, under Paragraph 4, "shall mean both the mother and the mother's expected child or children." (A.App.34-36).

Crespo to undergo a routine ultrasound. (App.15). Based on her late arrival, Mrs. Crespo's appointment was rescheduled for August 19, 2011. (App.15). When Mrs. Crespo presented for her rescheduled appointment, and the absence of fetal heart tones was determined, the patient was sent to the hospital where she was induced and delivered a stillborn child. (App.15).

B. Procedural history.

On December 19, 2012, pursuant to Florida Statute section 766.106, Mrs. Crespo and her spouse, JOSE CRESPO ("Mr. Crespo"), the Respondents/Plaintiffs herein, served Petitioners with their Notice of Intent to Initiate Litigation. (App.14). Respondents identified Dr. Hernandez and Women's Care Florida as prospective defendants. Consistent with Chapter 766, a reasonable presuit investigation was conducted by Petitioners. At the end of the presuit investigatory period, Dr. Hernandez and Women's Care Florida denied Respondents' claim. (App.12-13). Neither Respondents nor Petitioners served a timely request for voluntary binding arbitration under section 766.207's statutory arbitration procedures. (A.App.80). *See* §766.207(2), Fla. Stat.

On May 13, 2013, Respondents filed a Complaint against Dr. Hernandez and Women's Care Florida, alleging negligence by Dr. Hernandez in the care and treatment of Mrs. Crespo. (App.1). Respondents claimed "damages in the form of mental pain and suffering, mental anguish, funeral expenses and any incurred

medical expenses incident to the pregnancy." (App.4 ¶18).

On May 31, 2013, Petitioners filed a Motion to Stay Proceedings and Compel Arbitration. (A.App.31-36). The trial court conducted an evidentiary hearing on the motion. At the hearing, Respondents argued that the arbitration agreement was unenforceable in light of this Court's decision in *Franks v. Bowers*, 116 So. 3d 1240 (Fla. 2013). (A.App.109-10). Respondents further argued that in order for an arbitration agreement to remain viable after *Bowers,* the contractual agreement must adopt each and every provision of section 766.207. (A.App.236-37). Petitioners countered that the holding in *Bowers* was expressly limited to the specific agreement therein, and that significant variances existed between it and the Women's Care Florida agreement at issue. Notably, Petitioners explained that unlike the agreement in *Bowers*, the Women's Care Florida agreement fully retains and incorporates the statutory arbitration remedy and "keeps 766 totally intact during presuit." (A.App. 198-200,241).

After hearing arguments and listening to witness testimony at the evidentiary hearing, the trial court entered an Order granting Petitioners' Motion to Stay Proceedings and Compel Binding Arbitration. (A.App.1-3). The trial court specifically found that "the MMA benefits and incentives remain intact under the Arbitration Agreement at issue." (A.App.2).

Respondents appealed to the Fifth District. During the pendency of the

appeal, the Second District issued its decision in *Santiago* finding the same arbitration agreement enforceable and consistent with *Bowers*. *Santiago*, 135 So. 3d at 570-71. The Fifth District in this case, however, disagreed with *Santiago*, certified conflict, and reversed. The Fifth District's opinion states in its entirety:

> The arbitration agreement at issue violates the public policy pronounced by the Legislature in the Medical Malpractice Act, chapter 766, Florida Statutes (2012), by failing to adopt the necessary statutory provisions. *Franks v. Bowers*, 116 So. 3d 1240, 1248 (Fla. 2013)("Because the Legislature explicitly found that the MMA was necessary to lower the costs of medical care in this State, we find that any contract that seeks to enjoy the benefits of the arbitration provisions under the statutory scheme must necessarily adopt all of its provisions."). Therefore, we reverse the order rendered by the trial court compelling binding arbitration pursuant to the arbitration agreement under review. We certify conflict with the decision of the Second District Court of Appeal in *Santiago v. Baker*, 135 So. 3d 569 (Fla. 2d DCA 2014). We remand this case to the trial court for further proceedings.

Crespo, 151 So. 3d at 496.

Petitioners filed a motion for rehearing en banc which was denied. Thereafter, Petitioners sought certified conflict review in this Court. Respondents "concede[d] that the Fifth District properly certified a conflict, and thus this Court could review this case." (Respondents' Brief on Jurisdiction p. 2) (emphasis in original). This Court accepted jurisdiction.

STANDARD OF REVIEW

Whether a contractual arbitration agreement is invalid on grounds that it violates public policy is a pure question of law, subject to *de novo* review. *See Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456, 471 (Fla. 2011). However, any factual findings made by the trial court in granting or denying a motion to compel arbitration are reviewed under a competent, substantial evidence standard. *See Best v. Education Affiliates, Inc.*, 82 So. 3d 143, 146 (Fla. 4th DCA 2012).

SUMMARY OF ARGUMENT

This Court should resolve the certified conflict by approving *Santiago*, disapproving and quashing the Fifth District's decision, and remanding for arbitration of all of Respondents' claims against Petitioners as ordered by the trial court. The Women's Care Florida arbitration agreement at issue does not violate public policy. The agreement is consistent with the MMA and this Court's limited holding in *Bowers*. The agreement expressly recognizes the applicability of Chapter 766, permits statutory arbitration, and merely establishes an alternative contractual arbitration scheme should the parties not mutually agree to statutory arbitration.

In addition, since the agreement here adopts "all substantive provisions of Florida law governing medical malpractice claims," Chapter 766 and its benefits, penalties and incentives are also adopted. In the case at bar, as in *Santiago*, the

plaintiffs did not timely request statutory arbitration and, thus, arguments relating to such arbitration are not before the Court or should be deemed waived. In any event, the voluntary waiver of statutory arbitration after presuit is something all litigants have a right to do under the MMA and it does not interfere with the MMA's incentives, benefits or detriments. Once statutory arbitration is rejected by both parties under the MMA, the case simply goes to trial. Under the arbitration agreement, such a trial proceeding will be by contractual arbitration rather than a jury trial.

This Court, in its discretion, may also decide a second issue raised by Respondents on appeal but not addressed in the Fifth District's decision. Respondents argued that the negligent stillbirth claims of Mr. Crespo, who did not sign the arbitration agreement, are not subject to contractual arbitration. As Mrs. Crespo's husband and the stillborn child's father, however, Mr. Crespo's damage claims were clearly derivative and embraced by the terms of the agreement. As such, Mr. Crespo was properly compelled to arbitration. Moreover, contrary to Respondents' argument, Mrs. Crespo's claims were subject to arbitration irrespective of whether the agreement bound Mr. Crespo. If Mr. Crespo, as a non-signatory, was not bound by the agreement, the case law recognizes that Mrs. Crespo's claims were still subject to arbitration. Alternatively, any unenforceable terms of the agreement can be severed.

ARGUMENT

I. THE ARBITRATION AGREEMENT AT ISSUE IS ENTIRELY CONSISTENT WITH THE MMA AND *BOWERS* AND DOES NOT VIOLATE PUBLIC POLICY.

The Fifth District ruled that the arbitration agreement at issue violates public policy by failing to adopt unspecified "necessary statutory provisions" of the Medical Malpractice Act ("MMA"). *See Crespo*, 151 So. 3d at 496. This holding is erroneous and the decision should be disapproved and quashed on *de novo* review. *See Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752, 757 (Fla. 2013).

A. Introduction

As will be explained, the arbitration agreement in the present case is valid and enforceable because:

(a) It adopts Chapter 766 and permits the parties to mutually agree to statutory arbitration under Florida Statute section 766.106 or 766.207.

Section 5 of the agreement states as follows: "The parties agree and recognize that the provisions of Florida Statutes, Chapter 766, governing medical malpractice claims shall apply to the parties and/or claimant(s) in all respects except that at the conclusion of the pre-suit screening period and provided there is no mutual agreement to arbitrate under Florida Statutes, 766.106 or 766.207, the parties and/or claimant(s) shall resolve any claim through arbitration pursuant to this Agreement. …"

(b) The agreement also provides that if the parties do not elect to use statutory arbitration, then arbitration (rather than a jury trial) shall be held pursuant to Florida Statute section 682.01 et seq.

In that arbitration, the agreement states that: "all substantive provisions of Florida law governing medical malpractice claims and damages related thereto, including but not limited to, Florida's Wrongful Death Act, the standard of care for medical providers, caps on damages under Florida Statutes 766.118, the applicable statute of limitations and response as well as and [sic] the application of collateral sources and setoffs shall be applied. ..."

(c) Because neither party demanded statutory arbitration in this case, Chapter 766 simply refers the case to jury trial. § 766.205, Fla. Stat. Here, by agreement, the parties waived a trial by jury, which they have a right to do, and elected to have arbitrators decide this case. There is simply no statutory benefit, detriment or incentive under Chapter 766 which has been violated or circumvented. Thus, the agreement is fully in accord with *Franks v. Bowers*.

(d) Although the Court need not reach the issue here of what would happen under this agreement had one of the parties timely requested statutory arbitration and the other refused it, the result is the same: the agreement is valid. This follows because as previously noted, the agreement adopts Chapter 766 and “all substantive provisions of Florida law governing medical malpractice claims and

damages related thereto..."

Had one party requested statutory arbitration and the other party refused, the case would have proceeded to contractual arbitration (rather than jury trial) with the penalties in section 766.209(3) or (4) to be enforced by the arbitrators depending upon which side prevailed in the arbitration. Thus, the arbitration agreement fully complies with Florida law, especially this Court's decision in *Franks v. Bowers*.

B. The Arbitration Agreement is valid.

As previously noted, the arbitration agreement at issue expressly recognizes the applicability of Chapter 766 and preserves the parties' ability "to arbitrate under Florida Statutes, 766.106 or 766.207" and merely establishes an alternative contractual arbitration procedure to resolve any claims in the event the parties do not mutually agree to statutory arbitration. (A.App.34 ¶5). As the Second District explained in *Santiago* in correctly finding that the same arbitration agreement did not violate public policy, neither the MMA nor *Bowers* prohibit such an alternative contractual arbitration procedure. 135 So. 3d at 571.[5]

Indeed, like the plaintiffs in *Santiago*, the Respondents herein never even

[5]According to the testimony at the evidentiary hearing, the same Women's Care Florida arbitration agreement is used at all of its locations. (A.App.128-29). The plaintiffs' initial brief to the Second District in *Santiago* confirms that the agreement therein contained the same material provisions. (App.51).

properly invoked the statutory arbitration scheme and thus their arguments should be barred in the first instance by waiver and estoppel principles. *See id.* at 570-71; *see also Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So. 2d 707, 710-11 (Fla. 2005) (finding waiver of right to arbitration). Respondents are not entitled to the benefits of section 766.207, having failed to serve a request for voluntary binding arbitration under the statute within 90 days of serving their Notice of Intent. *See* §766.207(2); *see also Columbia/JFK Med. Ctr. Ltd. v. Sangounchitte*, 977 So. 2d 639, 642 (Fla. 4th DCA 2008) (finding service untimely).[6] Respondents are asking the Court to invalidate an agreement for not containing statutory protections and incentives which Respondents never invoked or wanted in the first place.

C. *Santiago* correctly held that the same arbitration agreement does not violate public policy.

In *Santiago*, the Second District affirmed the trial court's order granting defendants' motion to compel arbitration of a medical malpractice claim and

[6]The Respondents served their Notice of Intent against Dr. Hernandez and Women's Care Florida on December 19, 2012. (App.14). To invoke the protections of §766.207, Respondents were required to serve any request for voluntary binding arbitration within 90 days of December 19, 2012. Respondents failed to do so. Respondents subsequently attempted to circumvent the statutory time limitation for requesting §766.207 arbitration by serving a "Supplemental" Notice of Intent on August 20, 2013 and then serving a request for voluntary binding arbitration on October 7, 2013. (App.30, 37). However, Respondents were not permitted to revive the time period for serving a request for arbitration by serving a second notice of intent. *See Melanson v. Agravat*, 675 So. 2d 1032, 1033-34 (Fla. 1st DCA 1996) (failure to comply with presuit requirements could not be cured by serving second notice of intent and re-initiating entire process).

rejected the same argument that the Women's Care Florida arbitration agreement violated the public policy reflected in the MMA. 135 So. 3d at 570-71. *Santiago* correctly recognizes that: (1) the MMA's voluntary statutory arbitration procedure can validly coexist with a separate contractual arbitration procedure which is triggered if the MMA's voluntary statutory arbitration is not invoked; (2) the contractual arbitration procedure need not mirror the terms of the MMA's statutory arbitration procedure where the statutory procedure was waived by both parties after presuit;[7] and (3) neither the MMA nor *Bowers* say anything to the contrary. *Id.*

In *Santiago*, Leydiana Santiago and Armando Ocasio, the parents and natural guardians of the child, Z.O.S., brought a medical malpractice action against Dr. Marisa Baker and Women's Care Florida. *Id.* at 570. The parents alleged that Women's Care Florida informed Ms. Santiago that her pregnancy was nonviable, which caused the mother to resume taking medication that she previously ceased taking. *Id.* Because of the medication, the child was born with severe birth defects. *Id.* Significantly, the parents did not request voluntary statutory

[7]Respondents argued on appeal to the Fifth District that, unlike §766.207's arbitration scheme, the Women's Care Florida agreement, among other things, did not require Petitioners to pay Respondents reasonable attorney's fees or the costs of arbitration; did not require that Petitioners admit liability before being permitted to arbitrate; altered the scheme for selecting arbitrators; did not require Petitioners to be jointly and severally liable; and took away Respondents' right to proceed to a jury trial. (Initial Brief of Appellants 11, 18-26).

arbitration under section 766.207 but rather filed a complaint. *Id.* Women's Care Florida moved to compel arbitration pursuant to the agreement signed by Ms. Santiago prior to Z.O.S.'s birth. *Id.* The trial court granted the motion and the parents appealed. *Id.* The Second District affirmed and ruled that the arbitration agreement did not violate public policy, notwithstanding that the contractual arbitration procedure imposed different obligations than statutory arbitration:

> Ms. Santiago and Mr. Ocasio argue that the arbitration agreement violates the State's public policy reflected in the medical malpractice statutes (the Act). *See* chapter 766, Fla. Stat. (2011). More specifically, they claim that the Act requires the resolution of malpractice claims exclusively through statutory voluntary binding arbitration or by trial. [Women's Care Florida] contends that the Act sweeps less broadly. We agree.
>
> Ms. Santiago and Mr. Ocasio never requested voluntary statutory arbitration, thus they never invoked the protections of section 766.207, which provides, in part, as follows:
>
> > (2) Upon the completion of presuit investigation with preliminary reasonable grounds for a medical negligence claim intact, the parties may elect to have damages determined by an arbitration panel. Such election may be initiated by either party by serving a request for voluntary binding arbitration of damages within 90 days after service of the claimant's notice of intent to initiate litigation upon the defendant....
> >
> > ...
> >
> > (7)(f) The defendant shall pay the claimant's reasonable attorney's fees and costs, as determined by the arbitration panel, but in no event more than 15 percent of the award, reduced to present value.
> >
> > (g) The defendant shall pay all the costs of the arbitration proceeding and the fees of all the arbitrators other than the administrative law judge.
> >
> > (h) Each defendant who submits to arbitration under this section

> shall be jointly and severally liable for all damages assessed pursuant to this section.

Ms. Santiago willingly signed the arbitration agreement. Our record reflects no coercion or duress. We find nothing in the record suggesting that the agreement is procedurally or substantively unconscionable. The agreement clearly specifies that the parties waive the right to a jury trial and consent to arbitrate all claims arising out of or related to medical care and treatment. Unlike the provisions of section 766.207, the agreement provides that the parties shall share the arbitration expenses equally.

Ms. Santiago and Mr. Ocasio insist that *Franks v. Bowers*, 116 So. 3d 1240 (Fla. 2013), compels reversal. They read *Bowers* broadly to hold that if neither party seeks arbitration under section 766.207, the malpractice claim cannot be arbitrated at all. They contend that the arbitration agreement lessens their rights under the Act and is inconsistent with the Act's purpose and public policy.

Bowers disapproved an arbitration provision that failed to follow the Act's requirements. The supreme court held that any agreement that seeks to enjoy the benefits of the arbitration provision *under the statutory scheme* must necessarily adopt all of its provisions. *Id.* at 1248. Here, the parties never invoked the statutory arbitration scheme.

Critically, *Bowers* did not hold that all private arbitration agreements are void as against public policy. Indeed, the supreme court noted that the Act

> does not preclude all arbitration -- and, in fact, encourages arbitration under the specified guidelines -- and that our decision here is fact-specific pertaining only to the particular agreement before us and does not prohibit all arbitration agreements under [the Act.]

Id. at 1249-50. Indeed, nothing in *Bowers* "impede[s] the general enforceability of agreements to arbitrate." *Id.* at 1251.

> Moreover, nothing in the Act specifically prohibits parties from arbitrating their claims by private agreement outside the statutory scheme.
>
> On the record before us, we do not find the agreement void as against public policy. We must also reject Ms. Santiago's and Mr. Ocasio's argument that *Bowers* categorically precludes private binding arbitration agreements under the Act.

Santiago, 135 So. 3d at 570-71.

This Court should approve *Santiago* and quash the Fifth District's decision. *Santiago*'s analysis of *Bowers* and the MMA is eminently correct.

D. *Bowers* does not support the Fifth District's decision.

The Fifth District's reliance on *Bowers* is misplaced. *See Crespo*, 151 So. 3d at 496. *Bowers* invalidated a Financial Agreement containing arbitration provisions which – unlike the Women's Care Florida arbitration agreement – did not permit or incorporate the statutory arbitration procedures set out in section 766.207 and did not adopt "all substantive provisions of Florida law governing medical malpractice claims…," and which solely provided for a contractual arbitration procedure in place of the standing arbitration procedure. 116 So. 3d at 1242-50. Further, unlike the Women's Care Florida arbitration agreement, the Financial Agreement in *Bowers* capped noneconomic damages at $250,000. *Id.* at 1242.

Under these disparate circumstances, where the Financial Agreement "d[id] not provide the same remedies as provided by the Legislature" and contained a

$250,000 damage-limitation clause, this Court found the agreement void as against public policy. *Id.* at 1241-42. Importantly, the Court narrowly confined its holding to the specific facts and agreement before it and confirmed that contractual arbitration agreements are not prohibited and may co-exist with the statutory arbitration scheme. *Id.* at 1249-50 ("[O]ur decision here is fact-specific pertaining only to the particular agreement before us and does not prohibit all arbitration agreements under the MMA.").

In *Bowers*, the personal representative of the Estate of Joseph Franks brought a wrongful death action against Dr. Gary Bowers. *Id.* at 1240. The defendants moved to compel arbitration based on the Financial Agreement signed by Mr. Franks prior to his surgery. *Id.* The trial court granted defendants' motion to compel and the First District affirmed. *Id.* at 1243. This Court quashed the First District's decision,[8] finding that the Financial Agreement – which, unlike the Women's Care Florida agreement, did not preserve statutory arbitration under section 766.207 – avoided the incentives for arbitration under the MMA and thus contravened public policy. This Court reasoned:

[8]The Court granted review on grounds of express and direct conflict with *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993). 116 So. 3d at 1241. *Echarte* analyzed the MMA and ruled that the statutory provisions providing a monetary cap on noneconomic damages in medical malpractice claims when a party requests arbitration were not unconstitutional. 618 So. 2d at 190.

> Under the statute, Franks would be entitled to receive a maximum of $1 million if the case proceeded to court without either party seeking arbitration, or if Dr. Bowers and NFS refused to proceed with arbitration under the conditions of section 766.207. *See* §766.209, Fla. Stat. (2008) (providing that the caps under §766.118, Fla. Stat. (2008), apply when voluntary arbitration is refused.); §766.118(2)(a)-(b), Fla. Stat. (2008) ("With respect to a cause of action for ... wrongful death arising from medical negligence or practitioners, ... noneconomic damages shall not exceed $500,000 per claimant.... [I]f the negligence resulted in a ... death, the total noneconomic damages recoverable from all practitioners ... under this paragraph shall not exceed $1 million."). Under the Financial Agreement, Franks could only receive a maximum of $250,000. Further, the agreement dispenses with the inherent concession of liability provided by section 766.207. *See* §766.207(2), Fla. Stat. (2008)("[T]he parties may elect to have damages determined by an arbitration panel."). This Court has previously stated that the concession of liability is one of the incentives provided by the chapter. *See St. Mary's Hospital*, 769 So. 2d at 970.
>
> The incentive provided to claimants to encourage arbitration is a necessary provision of the MMA. We therefore find that the Financial Agreement's avoidance of the incentive contravenes the intent of the statute and, accordingly, the public policy of this state. Because the Legislature explicitly found that the MMA was necessary to lower the costs of medical care in this State, we find that any contract that seeks to enjoy the benefits of the arbitration provisions under the statutory scheme must necessarily adopt all of its provisions.

Bowers, 116 So. 3d at 1248.

Unlike the unique Financial Agreement in *Bowers*, the Women's Care Florida arbitration agreement expressly recognizes and permits the parties to elect voluntary statutory arbitration after presuit under section 766.207, without any modification to the statutory procedures, benefits, incentives or penalties . In fact,

the contractual arbitration procedure in this case is only triggered "provided there is no mutual agreement to arbitrate under Florida Statutes, 766.106 or 766.207." (A.App.34,199).[9]

The statement in *Bowers* "that any contract that seeks to enjoy the benefits of the arbitration provisions under the statutory scheme must necessarily adopt all of its provisions" does not support the Fifth District's decision here because the arbitration procedure set forth in section 766.207 is fully recognized in the Women's Care Florida agreement and the contractual arbitration procedure is contingent on the parties not agreeing to statutory arbitration. (A.App.241). In the case at bar, as in *Santiago,* the parties never agreed to statutory arbitration and plaintiffs never even served a timely request for arbitration under section 766.207. (A.App.80,198).

E. The arbitration agreement is consistent with the MMA.

Because the Women's Care Florida arbitration agreement provided Respondents with all the remedies available to them under the MMA, this Court should "not find the agreement void as against public policy." *See Santiago*, 135

[9]In *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014), this Court, in a plurality opinion, subsequently found the statutory cap on wrongful death noneconomic damages in §766.118 unconstitutional. It is unclear whether *McCall* impacts *Bowers* or the viability of the MMA's arbitration provisions. If *McCall* does upset the legislative scheme, Petitioners would argue that parties now have even greater freedom to enter into arbitration contracts.

So. 2d at 571; *see also Frantz v. Shedden*, 974 So. 2d 1193, 1198 (Fla. 2d DCA 2008) (arbitration agreement did not conflict with patient's statutory rights so as to be void as against public policy).

The Women's Care arbitration agreement requires the parties to engage in presuit investigation as required by Chapter 766; it allows the parties to elect to proceed to arbitration under section 766.207 and, if there is mutual agreement, to resolve the claimant's medical malpractice claims under the statutory arbitration procedure; and it allows parties to recover all damages available to them under the MMA. The agreement at issue does not eliminate any statutory remedies.[10]

The only distinguishing feature of the Women's Care Florida arbitration agreement is that, failing an election and mutual agreement to engage in statutory arbitration under section 766.207, the parties voluntarily agree to waive a jury trial and resolve their disputes through contractual arbitration. But this does not render the arbitration agreement unenforceable or inconsistent with the MMA. Parties are free to contract away their right to a jury trial, change the forum, and engage in contractual arbitration. *See Global Travel Marketing, Inc. v. Shea*, 908 So. 2d 392,

[10] *Compare Shotts*, 86 So. 3d at 465-75 (nursing home arbitration agreement violated public policy by undermining specific statutory remedies under Chapter 400); *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574, 577-78 (Fla. 1st DCA 2007) (arbitration agreement's capping noneconomic damages and eliminating punitive damages defeated remedial purpose of Nursing Home Residency Act and were void as against public policy).

398 (Fla. 2005) ("the rights of ... trial by jury may be contractually relinquished"); *Lopez v. Ernie Haire Ford, Inc.*, 974 So. 2d 517, 581 n.1 (Fla. 2d DCA 2008) ("a party may waive a jury trial by agreeing to arbitrate").

Further, Respondents did not argue on appeal to the Fifth District that the arbitration agreement was procedurally or substantively unconscionable and thereby conceded that Mrs. Crespo's consent and waiver of jury trial rights was entirely voluntary. Respondents also conceded that Petitioners' "delivery of services was not dependent on Mrs. Crespo executing the Agreement." (Reply Brief of Appellants 12).

Moreover, the MMA itself does not mandate a jury trial where, as here, neither party timely requested or agreed to statutory arbitration under §766.207. The MMA provides:

> If neither party requests or agrees to voluntary binding arbitration, the claim shall proceed to trial or to any available legal alternative such as offer of and demand for judgment under s. 768.79 or offer of settlement under s.45.061.

§766.209(2), Fla. Stat.

Because the Women's Care arbitration agreement was voluntarily executed and neither substantively nor procedurally unconscionable, the agreed-upon contractual arbitration qualifies as an "available legal alternative" to jury trial. *Id.* As aptly noted in *Santiago*, "nothing in the Act specifically prohibits parties from arbitrating their claims by private agreement outside the statutory scheme." 135

So. 3d at 571. *Bowers* itself "does not prohibit all arbitration agreements under the MMA." 116 So. 3d at 1250. The Legislature, in enacting the MMA, has not shown any intent to disavow or alter the strong public policy in favor of contractual arbitration. *See Global Travel*, 908 So. 2d at 397 ("the use of arbitration agreements is generally favored by the courts"); *see also Auchter Co. v. Zagloul*, 949 So. 2d 1189, 1195 (Fla. 1st DCA 2007) ("arbitration clauses are to be given the broadest possible interpretation in order to accomplish the purpose of resolving controversies out of court").

Based on the foregoing, this Court should find the Women's Care Florida arbitration agreement valid and enforceable, and not void as against public policy.

II. MR. CRESPO'S NEGLIGENT STILLBIRTH CLAIMS ARE SUBJECT TO ARBITRATION UNDER THE AGREEMENT.

The Fifth District did not address Respondents' additional arguments that Mr. Crespo, as a non-signatory, was not bound by the arbitration agreement and that the "ALL CLAIMS MUST BE ARBITRATED BY ALL CLAIMANTS" provision (Paragraph 4) was non-severable and rendered the entire agreement unenforceable against both Mr. and Mrs. Crespo. (Initial Brief of Appellants 30-35). The trial court had found Mr. Crespo's claims subject to arbitration. (A.App.2). If this Court exercises its discretion to decide these additional issues, Respondents' arguments should be rejected on the merits. Mr. Crespo's negligent stillbirth claims should be deemed derivative and subject to arbitration.

Alternatively, if the agreement is not enforceable against Mr. Crespo it is still clearly enforceable against Mrs. Crespo.

A. Mr. Crespo's claims are derivative and embraced by the terms of the agreement.

A non-signatory may be bound by an agreement to arbitrate if the non-signatory's claims are deemed "derivative" and "dependent upon a wrong committed upon another person" who is a signatory to the agreement. *See Laizure*, 109 So. 3d at 757-62 (non-signatory survivors' wrongful death claims, while independent and a new and distinct action, are dependent upon wrong committed against the decedent and thus survivors are bound by decedent's agreement to arbitrate); *see also Henderson v. Idowu*, 828 So. 2d 451, 453 (Fla. 4th DCA 2002) (non-signatory wife's loss of consortium claim was derivative and subject to husband's arbitration agreement).

Respondents' argument below that Mr. Crespo's "negligent stillbirth" claims are not derivative for purposes of being bound by Mrs. Crespo's arbitration agreement should be rejected. Whether or not Mr. Crespo, as the father of the stillborn child, has an "independent" or "direct" common law action which is different in kind from a statutory wrongful death action, his claim is nevertheless dependent upon a wrong committed against Mrs. Crespo, the pregnant mother, and

the unborn fetus.[12] Mr. Crespo's medical malpractice claim revolves around "the care and treatment provided to Lualhati Crespo" and is clearly dependent on showing a breach of duty and professional standard of care owed to Mrs. Crespo and her unborn fetus. (A.App.67). Accordingly, Mr. Crespo is bound by the arbitration agreement and the trial court's ruling should be affirmed. *See Laizure*, 109 So. 3d at 757-62.[13]

Mr. Crespo's negligent stillbirth claims are also plainly embraced by the terms of the arbitration agreement. (A.App.34 ¶¶1,4). *See Cuningham Hamilton Quiter, P.A. v. B.L. of Miami, Inc.*, 776 So. 2d 940, 942 (Fla. 3d DCA 2000) ("It is well established that the courts broadly construe arbitration provisions containing the language, 'arising out or relating to,' such that in certain instances the clause

---

[12]*See Tanner v. Hartog*, 696 So. 2d 705, 708 (Fla. 1997) ("A suit for negligent stillbirth is a direct common law action by the parents which is different in kind from a wrongful death action. The former is directed toward the death of a fetus while the latter is applicable to the death of a living person. As contrasted to the damages recoverable by parents under the wrongful death statute, the damages recoverable in an action for negligent stillbirth would be limited to mental pain and anguish and medical expenses incurred incident to the pregnancy."); *Kammer v. Hurley*, 765 So. 2d 975, 978 (Fla. 4th DCA 2000) ("[T]he only difference between the [negligent stillbirth and wrongful death] causes of actions is that the statutory damages under the Wrongful Death Act are not available to plaintiffs in a wrongful stillbirth action.").

[13]The trial court's order, in finding the arbitration agreement enforceable against Mr. Crespo, characterized his derivative claim as one for "loss or consortium." (A.App.2). Even if this characterization is technically incorrect, this Court can affirm a lower court's ruling where it is "right for the wrong reason." *See Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999).

will include non-signatories."); *see also Armas v. Prudential Secs., Inc.*, 842 So. 2d 210, 212 (Fla. 3d DCA 2003) ("[W]e find the breadth and scope of the arbitration agreements broad enough to include [non-signatory] Dole.").

California appellate decisions – which this Court partially relied on in recognizing negligent stillbirth claims, *see Tanner*, 696 So. 2d at 707 (discussing *Sesma v. Cueto*, 181 Cal. Rptr. 12 (Ct. App. 1982)) – have enforced arbitration agreements against non-signatory fathers of stillborn and other injured children under similar circumstances. *See Michaelis v. Schori*, 24 Cal. Rptr.2d 380, 383 (Ct. App. 1993) (medical malpractice claims of non-signatory father of stillborn baby were subject to arbitration agreement signed by pregnant mother on first visit); *Bolanos v. Khalatian*, 283 Cal. Rptr. 209, 212 (Ct. App. 1991) (medical malpractice claims of non-signatory father alleging emotional distress suffered as a result of injuries to child during delivery were subject to arbitration agreement signed by wife at initial visit when she was 25 weeks pregnant).

In *Michaelis*, for example, plaintiff Kate Michaelis consulted the defendant Dr. Shori for medical care relating to her pregnancy and signed an arbitration agreement during her first visit. 24 Cal. Rptr.2d at 380. When Ms. Michaelis went into labor, the hospital staff allegedly failed to detect signs of hypertension and the baby was stillborn. *Id.* Ms. Michaelis and the baby's father, Bodie Stroud, who did not sign the arbitration agreement, sued Dr. Shori, another doctor, and the

hospital and staff for medical malpractice. *Id.* The trial court denied the doctors' motion to compel arbitration, but the appellate court reversed and specifically ruled that the non-signatory father was bound by the arbitration agreement. *Id.* at 383. The court stated:

> As for Stroud, the agreement provided, per section 1295, for the arbitration of "any dispute as to medical malpractice," and contained a clause identical to that in *Bolanos v. Khalatian, supra,* 231 Cal.App.3d at page 1591, 283 Cal.Rptr. 209: "'... All Claims Must be Arbitrated: It is the intention of the parties that this agreement *bind all parties* whose claims may arise out of or relate to treatment or services provided by the physician including any spouse or heirs of the patient and any children, whether born or unborn, at the time of the occurrence giving rise to any claim. In the case of any pregnant mother, the term "patient" herein shall mean both the mother and the mother's expected child or children.'" (Italics added.) The *Bolanos* court held that the arbitration agreement bound third party nonsignatories. Quoting from *Gross v. Recabaren, supra,* 206 Cal.App.3d at page 781, 253 Cal.Rptr. 820, the *Bolanos* court held that "`where, as here, a patient expressly contracts to submit to arbitration "any dispute as to medical malpractice," and that agreement fully complies with Code of Civil Procedure section 1295 [requiring an arbitration agreement involving medical services to a minor to be signed by the minor's parent or legal guardian], it must be deemed to apply to *all* medical malpractice claims arising out of the services contracted for, regardless of whether they are asserted by the patient or a third party.'" (*Bolanos v. Khalatian, supra,* 231 Cal.App.3d at p.1591, 283 Cal.Rptr. 209.)

Michaelis, 24 Cal.Rptr.2d at 383.

Here, Mr. Crespo's "negligent stillbirth" medical malpractice claims should likewise be arbitrated under the agreement notwithstanding Mr. Crespo's status as a non-signatory third party.

Moreover, while the issue need not be addressed, Mr. Crespo would also be bound by the arbitration agreement as a "third-party beneficiary." *See Alterra*, 953 So. 2d at 579 ("A nonsignatory third-party beneficiary is bound by the terms of a contract containing an arbitration clause."); *cf. Laizure*, 109 So. 3d at 754 n.1 (declining to consider alternative third-party beneficiary argument where non-signatory's claim was derivative).[15]

B. Mrs. Crespo's claims are subject to arbitration regardless of whether the agreement binds Mr. Crespo.

Respondents also argued below that, to the extent Mr. Crespo cannot be compelled to arbitrate, the agreement is unenforceable in its entirety as to both Mr. and Mrs. Crespo. (Initial Brief of Appellants 33-35). But this makes little sense. If Mr. Crespo's negligent stillbirth claims were deemed not to be derivative, and his status as a non-signatory rendered the arbitration agreement inapplicable to him

[15]In *Santiago*, the Second District noted that Mr. Ocasio, the father of the injured child (Z.O.S.), failed to "challenge on appeal the extent to which he may be bound by the arbitration agreement." 135 So. 3d at 570 n.1. Thus, the issue was ostensibly waived. In a concurring opinion, Judge Altenbernd questioned whether the arbitration agreement could bind Mr. Ocasio. *Id.* at 572 ("It may be binding on Leydiana Santiago. It may even bind someone whose common law claim is derivative of Ms. Santiago's claim. But Armando Ocasio has a claim as parent and natural guardian of Z.O.S. Mr. Ocasio did not sign this agreement and he received no consideration for this agreement."). *Santiago*, however, did not involve a negligent stillbirth claim and there is no discussion as to the nature of the damages sought. *Santiago* merely states that "Z.O.S. suffers from severe birth defects" and that defendants were sued for medical malpractice. *Id.* at 570. Thus, Judge Altenbernd's remarks have little, if any, relevance to these facts.

under ordinary contract principles, the agreement would still be enforceable against Mrs. Crespo. *See Technical Aid Corp. v. Tomaso*, 814 So. 2d 1259, 1261 (Fla. 5th DCA 2002) (claim against signatory former employee was subject to arbitration but claim against non-signatory new employer was not).

Further, contrary to Respondents' contention, the use of broad "all claims," "all parties" and "any spouse" language in Paragraph 4 does not render the arbitration agreement illegal so as to void the entire agreement. (Initial Brief of Appellants 34). No case supports such a proposition. Paragraph 4 should be construed to apply to those claims and claimants, including non-signatories, permitted under contract law and other applicable legal principles. Respondents concede, for example, that "[u]nder the Agreement, Mr. Crespo's claim against Physicians would be derivative (and subject to arbitration) if Physicians had harmed Mrs. Crespo, resulting in a loss of consortium, or if the Crespos' child died after birth." (Reply Brief of Appellants 7-8). Paragraph 4 would at most have a limited scope under Florida law; its language does not render the entire agreement illegal and void.

Alternatively, any invalid or unenforceable language in Paragraph 4 should be severed (as mandated by Paragraph 10), and not render the entire arbitration agreement void. *See FL-Carrollwood Care, LLC v. Gordon*, 72 So. 3d 162, 167-68 (Fla. 2d DCA 2011) (any unenforceable limitations in arbitration agreement

were severable); *Frantz*, 974 So. 2d at 1198 ("the severability provision of the [Arbitration] Agreement would allow a court to simply eliminate those provisions that were invalid while enforcing the remainder of the Agreement").

CONCLUSION

Based on the foregoing, Petitioners respectfully request this Court to resolve the certified conflict by disapproving and quashing the Fifth District's decision, approving the Second District's decision in *Santiago*, and holding that the arbitration agreement at issue does not violate public policy. If the Court exercises its discretion to address the issue, the Court should also hold that Mr. Crespo's claims are subject to arbitration under the agreement. The Court should remand for arbitration of all of Respondents' claims pursuant to the trial court's order.

Respectfully submitted,

MCEWAN, MARTINEZ &
DUKES, P.A.
Post Office Box 753
Orlando, FL 32802-0753
Telephone: (407) 423-8571
Facsimile: (407) 423-8632
tdukes@mmdorl.com
rosborne@mmdorl.com
Counsel for Petitioners

HICKS, PORTER, EBENFELD &
STEIN, P.A.
799 Brickell Plaza, 9th Floor
Miami, FL 33131
Telephone: (305) 374-8171
Facsimile: (305) 372-8038

dstein@mhickslaw.com
eclerk@mhickslaw.com
Appellate Counsel for Petitioners

BY: /s/Dinah Stein
MARK HICKS
Fla. Bar No. 142436
DINAH STEIN
Fla. Bar No. 98272

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been filed via the Court's E-Portal and furnished by email via the E-Portal on this 21st day of April, 2015 to: Bryan S. Gowdy, Esq., Jessie L.Harrell, Esq., Creed & Gowdy, P.A., 865 May Street, Jacksonville, FL 32204, jharell@appellatefirm.com; bgowdy@appellatefirms.com; filings@appellatefirm.com and Maria D. Tejedor, Esq., Diez-Arguelles & Tejedor, P.A., 505 N. Mills Avenue, Orlando, FL 32803, mail@theorlandolawyers.com, arguelles@theorlandolawyers.com.

By: */s/Dinah Stein*
MARK HICKS
Florida Bar No. 142436
DINAH STEIN
Florida Bar No. 98272

CERTIFICATE OF COMPLIANCE

This brief complies with the font requirements of Rule 9.210. It is typed in Times New Roman 14 point type.

BY: /s/ *Dinah S. Stein*
MARK HICKS
Florida Bar No. 142436
DINAH S. STEIN
Fla. Bar No. 98272