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' REPLY 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

Cases

Statutes

ARGUMENT

I. THE ARBITRATION AGREEMENT IS VALID AND DOES NOT VIOLATE PUBLIC POLICY

If this Court were to hold that the arbitration agreement at issue in this case is invalid, the Court would effectively abolish a patient's right to contract for the arbitral resolution of disputed claims with her physician, even when that contract keeps the Chapter 766 presuit and statutory arbitration proceedings (if elected by both parties) intact. Nothing in *Franks v. Bowers*, 116 So. 3d 1240 (Fla. 2013), or the Medical Malpractice Act ("MMA") either suggests or compels this result, which would run contrary to Florida public policy favoring arbitration.

Respondents brief details the statutory medical malpractice presuit investigation process at length. (AB, pp.2-6). Respondents do not dispute, however, that the arbitration agreement at issue in this case fully preserves this process, which was created by the Legislature to facilitate the expedient resolution of malpractice claims. (A.Appx. 93-94 at ¶ 5: "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 conclusions 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 claims through arbitration pursuant to this Agreement."); *Univ. of Miami v. Wilson*, 948 So. 2d 774, 777 (Fla. 3d DCA 2006)

("The policy underlying the medical malpractice statutory scheme is to require the parties to engage in meaningful presuit investigation, discovery, and negotiations, thereby screening out frivolous lawsuits and defenses and encouraging the early determination and prompt resolution of claims.").

Likewise, Respondents do not dispute that the arbitration agreement also clearly preserves both the provider and the patient's right to request statutory arbitration at the conclusion of presuit, as well as the ability of the parties to mutually agree to submit their dispute to statutory arbitration under the MMA in lieu of contractual arbitration. (AB, pp.5-6). Here, there was no timely request to arbitrate pursuant to section 766.207 served on either Dr. Hernandez or Women's Care Florida by Respondents.[1] However, assuming *arguendo* that Respondents had made such a request and it was accepted by the Petitioners, then the claim would have proceeded to statutory arbitration, with all of the statute's attendant benefits and disadvantages for all parties. *See* §§ 766.207, 766.209, Fla. Stat.

If the offer to arbitrate had been rejected by the Petitioners, then the claims would have proceeded to contractual arbitration governed by the substantive provisions of Florida law governing medical malpractice claims, including the

[1] As discussed in Petitioners' Initial Brief, the second notice of intent served by Respondents on Dr. Hernandez was a legal nullity, and thus, Respondents' "request for arbitration" served on Dr. Hernandez on October 7, 2013, was also void. (IB, p.13 & n.16). *See* § 766.207(2), Fla. Stat. (requiring a request for voluntary binding arbitration to be served within 90 days of the claimant's notice of intent to initiate litigation).

statutory "penalty" imposed when a claimant's offer to arbitrate is rejected. *See* § 766.209(3), Fla. Stat. (when a defendant refuses a claimant's offer to arbitrate but is found liable for medical negligence, the claiamnt "shall be entitled to recover damages, … prejudgment interest, and reasonable attorney's fees up to 25 percent of the award reduced to present value").

If the scenario detailed above were reversed, and it was the claimants who had rejected Dr. Hernandez or Women's Care Florida's offer of statutory arbitration, then contractual arbitration would have commenced with the claimants' recoverable damages limited pursuant to section 766.209(4) (limiting damages for a claimant who rejects arbitration to net economic damages, 80 percent of future wage loss and earning capacity, and noneconomic damages "not to exceed $350,000 per incident"). Because in this case contractual arbitration is conducted pursuant to "the provisions of Florida Statutes, Chapter 766, governing medical malpractice claims", the statutory consequences occasioned by a party's rejection of an offer to arbitrate under section 766.207 are simply imposed at the conclusion of a contractual arbitration, rather than at the conclusion of a jury trial and entry of judgment. Thus, the MMA's incentives for the election of statutory arbitration are fully preserved under the arbitration agreement at issue in this case.[2] (A-App. 94).

[2] Respondents erroneously contend that the mere existence of a contractual arbitration agreement removes the "substantial incentives" for a defendant to submit to statutory arbitration. (AB pp.18-19). However, even with a contractual

Moreover, Respondents' extended focus on the distinctions between statutory arbitration pursuant to section 766.207 and contractual arbitration pursuant to the arbitration agreement (and by incorporation, the Florida Arbitration Code) is misplaced. (AB, pp.14-16). There is no reason to compare these two separate proceedings because nothing in the arbitration agreement limits the parties' rights to elect voluntary, binding statutory arbitration under the MMA at the end of the presuit investigation process. Respondents' rights under section 766.207 or any other part of the MMA are not impaired. Instead, in the event the parties do not so agree to statutory arbitration, they proceed to contractual arbitration instead of a costly, drawn-out jury trial. Here, Respondents chose to proceed with civil litigation. By filing their complaint, the Respondents evinced a desire to go through the time and expense of proving liability and causation. They

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arbitration agreement in place, a potential defendant still has significant incentives to agree to statutory arbitration and the requirement of admission of liability if offered timely by a claimant. For example, the $250,000 per-incident cap on noneconomic damages in statutory arbitration, *see* section 766.207(7)(b), Florida Statutes, is a major incentive, particularly in light of this Court's recent decision in *McCall v. United States*, 134 So. 3d 894 (Fla. 2014), and the Fourth District's decision in *North Broward Hospital District v. Kalitan*, __ So. 3d __, 2015 WL 3973075 (Fla. 4th DCA July 1, 2015). In *McCall*, this Court held unconstitutional the section 766.118 litigation (but not arbitration) caps on noneconomic damages in wrongful death medical malpractice cases. In *Kalitan* the Fourth District, relying on *McCall*, held that the application of the statutory caps is unconstitutional in personal injury medical malpractice actions as well. Conversely, a defendant who accepts a claimant's offer to arbitrate pursuant to the statute can take advantage of the $250,000 per-incident cap on non-economic damages, a cap that is not present in the contractual arbitration proceedings.

accepted the fact that they were going to have to bear their own costs and attorney's fees in the litigation. That the arbitration agreement requires cost-splitting between the parties is simply a reflection of the standard American Rule in litigation and not a basis for the invalidation of the agreement on public policy grounds. In sum, neither the Petitioners nor the Respondents ever sought to reap the benefits of arbitration under the MMA while at the same time refusing to also abide by the MMA's consequences.

This is the key distinction between this case and *Bowers.* The problem this Court focused on in *Bowers* was the defendants' attempt to reap the financial "benefit" of the MMA's statutory arbitration provision (limited non-economic damages) without making the corresponding sacrifices (the admission of liability, payment of claimant's attorney's fees, and joint and several liability) that the Legislature required in the MMA. It is this quid pro quo—this attempt by the Legislature to "careful[ly] balance[e] the rights of the patients and the needs of doctors"—that the arbitration agreement in *Bowers* ran afoul of. *See* 116 So. 3d at 1241 ("Because we find that the damages clause of the arbitration provision … violates the public policy pronounced by the Legislature in the Medical Malpractice Act (MMA), … we quash the decision below compelling arbitration under the agreement."); *see also id.* at 1251 (Pariente, J., specially concurring) ("I agree with the majority that the [arbitration agreement] that the patient was

required to sign takes away the patient's significant statutory rights without providing the commensurate benefit of requiring the defendant to admit liability, as specifically envisioned by the [MMA]. For this reason, the [Agreement] violates the public policy of Florida…").

Contrary to Respondents' broad reading, *Bowers* simply does not hold that, in a medical malpractice case, arbitration can only be held pursuant to the provisions of section 766.207 (in which the defendant admits liability and only damages are contested), or else no arbitration may be held at all. Nothing in *Bowers* limits the rights of patients and their doctors to contract for arbitration to resolve all disputed issues, including liability, instead of resorting to a traditional civil action with a jury trial after they have rejected arbitration under the MMA. *See Bowers*, 135 So. 3d 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]."); *see also Santiago v. Baker*, 135 So. 3d 569, 571 (Fla. 2d DCA 2014) ("[N]othing in the [MMA] specifically prohibits parties from arbitrating their claims by private agreement outside the statutory scheme.").

The MMA itself recognizes this. There is nothing in the MMA demonstrating or even suggesting that contracted-for arbitration is not "an[] available legal alternative" to a jury trial that the parties can pursue in the event the claim is not resolved in presuit or through agreed-upon statutory arbitration.

§ 766.209(2), Fla. Stat. The binding arbitration provisions of Chapter 766 are clearly permissive. *See* § 766.207(2), Fla. Stat. ("Upon the completion of presuit investigation … the parties may elect to have damages determined by an arbitration panel.") (emphasis supplied). Although the Legislature recognized that voluntary binding arbitration was one manner in which to expediently resolve medical malpractice claims when a defendant is willing to concede liability and have only damages determined by the factfinder, nothing in the MMA grants medical malpractice claimants a non-waivable "super-right" to a jury trial in the event the parties do not agree to statutory arbitration.

Had the Legislature wanted to foreclose contractual arbitration of medical negligence claims, and instead left only the prospect of a lengthy litigation and jury trial process as a claimant's sole avenue for relief, it could have done so "in unambiguous text" as it has done elsewhere. *See, e.g., Toiberman v. Tisera,* 998 So. 2d 4, 6 (Fla. 3rd DCA 2008) (holding that plain language of section 44.104, Florida Statutes, which generally authorizes voluntary binding arbitration to settle civil disputes, prohibits arbitration of disputes involving child custody, visitation or child support by virtue of language stating "[t]his section shall not apply to any dispute involving" such matters); *cf. Slusser ex rel. Slusser v. Life Care Ctrs. of Am.*, 977 So. 2d 662, 663 (Fla. 4th DCA 2008) ("Had the legislature intended to

stop parties from arbitrating their claims under the [Nursing Home Residents] Act, it would have created an express prohibition. It did not do so.").

Significantly, by not expressly forbidding non-766 arbitrations, the Florida Legislature left individuals free to enter into contractual agreements for arbitrating medical malpractice matters. "[T]he rights of access to courts and trial by jury may be contractually relinquished." *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 398 (Fla. 2005). Moreover, "[b]oth federal and Florida public policy favor resolving disputes through arbitration when the parties have agreed to do so." *Orkin Exterminating Co. v. Petsch*, 872 So. 2d 259, 263 (Fla. 2nd DCA 2004); *see Global Travel Mktg.*, 908 So. 2d at 397 ("[I]n Florida as well as under federal law, the use of arbitration agreements is generally favored by the courts.").

The use and enforcement of arbitration agreements is favored because, in addition to respecting the parties' contract rights, arbitration is an "efficient means of settling disputes" that "avoids the delays and expenses of litigation." *KFC Nat'l Mgmt. Co. v. Beauregard*, 739 So. 2d 630, 631 (Fla. 5th DCA 1999); *see Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220-21 (1985) (noting "the two goals of the [Federal] Arbitration Act [are] enforcement of private agreements and encouragement of efficient and speedy dispute resolution"). Arbitration agreements are also favored due to their effect of decreasing burdens on the judiciary. *See Midwest Mut. Ins. Co. v. Santiesteban*, 287 So. 2d 665, 667 (Fla.

1973) ("The courts favor arbitration to expedite claims and reduce litigation"). Consequently, courts should not construe a statute to bar arbitration of a particular claim absent an explicit statutory prohibition against it. *See Sharpe v. Lytal & Reiter, Clark, Sharpe, Roca, Fountain, Williams*, 702 So. 2d 622, 624 (Fla. 4th DCA 1997) ("In order to find a legislative intent to preclude the submission of a class of claims to arbitration, … the legislature would have to state such a requirement in unambiguous text."). Here, Chapter 766 does not either explicitly or implicitly prohibit parties from entering into arbitration agreements governed by the Florida Arbitration Code (the "FAC").

When viewed properly, *Bowers* is simply an extension of well-accepted legal principle: although parties are free to contract to limit their liability, such provisions are contrary to public policy when they limit the remedies available under a remedial statute. *VoiceStream Wireless Corp. v. U.S. Comm., Inc.*, 912 So. 2d 34, 38 (Fla. 4th DCA 2005); *see Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456 (Fla. 2011) (holding that nursing home arbitration agreement violated public policy because it prohibited the right to recover punitive damages, a remedy permitted under Chapter 400); *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574, 578 (Fla. 1st DCA 2007) (holding that arbitration agreement was void as against public policy because it eliminated punitive damages and placed a cap on noneconomic damages). Here, there is no limitation of Respondents'

remedies under Chapter 766, as the arbitration agreement preserves the presuit process and the right to demand and engage in statutory arbitration.

Because this Court in *Bowers* did not hold that all non-section 766.207 arbitrations in medical malpractice cases are void as against public policy, Respondents' argument that there are only two methods of resolving medical malpractice claims under the Act—either a non-waivable jury trial or voluntary arbitration under the MMA—is simply wrong as a matter of law, and the decision of the Fifth District must be reversed.

II. MR. CRESPO'S CLAIM MUST BE SUBMITTED TO ARBITRATION PURSUANT TO THE ARBITRATION AGREEMENT

In the event that this Court exercises its discretion to review the issue, not visited by the Fifth District and outside of the question certified, of whether Mr. Crespo's claim must be arbitrated along with Mrs. Crespo's, it should hold that Mr. Crespo is required to arbitrate these claims. If the Court determines that Mr. Crespo is not required to arbitrate his claims, the provision of the arbitration agreement requiring arbitration of his claim is severable, as it does not go "to the very essence of the agreement."

A. Mr. Crespo's Claim is Derivative of Mrs. Crespo's Claim and Must be Arbitrated

While Respondents cite the general rule that no party can be compelled to arbitrate a dispute that the party did not intend and agree to arbitrate, *Seifert v. U.S.*

Home Corp., 750 So. 2d 633, 636 (Fla. 1999),"[i]t is well established that the courts broadly construe arbitration provisions containing the language, 'arising out of or relating to,' such that in certain instances the clause will include non-signatories." *Cuningham Hamilton Quiter, P.A. v. B.L. of Miami, Inc.*, 776 So. 2d 940, 942 (Fla. 3d DCA 2000); *see Armas v. Prudential Sec., Inc.*, 842 So. 2d 210 (Fla. 3d DCA 2003) (provision in agreement, requiring arbitration of any controversy "arising out of or related to" transactions with client, was broad enough to require arbitration of claim against non-signatory corporation); *Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752, 762 (Fla. 2013) (estate and heirs bound to arbitrate claims despite not signing arbitration agreement).

Respondents contend that while Mr. Crespo's claim would have been derivative of the estate's claim in a wrongful death case, Mr. Crespo has his own independent action for negligent stillbirth. (AB, pp.30-32). In support of this argument, Respondents cite to *Kammer v. Hurley*, 765 So. 2d 975, 977 (Fla. 4th DCA 2000). However, Respondents' argument neglects the obvious overlap between the two causes of action. As the Fourth District noted in *Kammer*, "the only difference between the causes of actions is that the statutory damages under the Wrongful Death Act are not available to plaintiffs in a wrongful stillbirth action." *Id*. at 978. Consequently, although the damages available for the two causes of action may differ, the source of liability would be universal. In the

current case, Mr. Crespo's claim arises exclusively from the alleged negligent care and treatment provided to Mrs. Crespo and the fetus. Mr. Crespo never received medical care from Petitioners independent of his wife.

Based on the fact that liability in this case, if present, only can exist if Petitioners are found to have been negligent in their interactions with Mrs. Crespo, Mr. Crespo's claim is functionally derivative of his wife's claim and should be heard in the same forum. Such a holding would also obviate the possibility of inconsistent outcomes between the arbitral proceeding that Mrs. Crespo agreed to and the separate civil action, if any, by Mr. Crespo.

Whether Mr. Crespo could have maintained his claim as an independent cause of action even if Mrs. Crespo had elected not to pursue hers is irrelevant. (AB, pp.30-31). Mr. Crespo's claim would nevertheless hinge on the finding of a breach of the duty of care by the Petitioners to Mrs. Crespo, their patient. Compare *Albritton v. State Farm Mut. Auto. Ins. Co.*, 382 So. 2d 1267, 1268 (Fla. 2d DCA 1980) (noting that one spouse's derivative claim is barred when the other spouse's "cause of action has been terminated by an adverse judgment on the merits"). Thus, it is not Mrs. Crespo's presence or absence in the suit that renders Mr. Crespo's claim derivative. Instead, it is the fact that Mr. Crespo's claim is premised on his showing of legally-cognizable breach of the standard of care and harm to Mrs. Crespo that renders his claim "wholly derivative" of her claim.

With respect to California case law, the fact that California has a specific statute authorizing arbitration in medical negligence claims (so long as the arbitration agreement contains certain provisions), and the fact that California courts have permitted one spouse to bind another to arbitration to effect this statute's purpose, is irrelevant. (AB, pp.35-36). Even though Florida has no statute specifically authorizing arbitration of liability and damages in medical malpractice claims, Florida public policy favors arbitration. *Orkin*, 872 So. 2d at 263. More importantly, the same policy considerations motivating the California courts' approval of arbitration agreements that bind spouses to arbitrate their derivative claims operate here as well. *See, e.g., Mormile v. Sinclair*, 26 Cal. Rptr. 2d 725, 730 (Ct. App. 1994) ("Mary's agreement with her physician provided for arbitration of all claims arising out of or relating to Sinclair's medical treatment or services, including the claims of any spouse or heir.… Gary's loss of consortium claim is based on Mary's injury or disability allegedly resulting from Sinclair's professional negligence. An order compelling arbitration of Gary's claim is consistent with the language of the statute, subserves the legislative goals underlying section 1295, protects Mary's right to privacy in her relationship with her physician and ensures that no third party will be able to intrude into that relationship or veto Mary's choices. In the balance, Mary's right to decide the

terms of her medical treatment outweighs Gary's right to a jury trial of his loss of consortium claim.") (emphasis supplied).

Because Mr. Crespo's claim is derivative of the wrong committed against his wife Mrs. Crespo, who signed the arbitration agreement, he must arbitrate his claim against Petitioners.

B. If the Court Concludes that Mr. Crespo's Claims are Not Subject to Arbitration, Mrs. Crespo's Claims are, and the Court Can Sever any Invalid or Unenforceable Language from the Arbitration Agreement.

Alternatively, if the Court concludes that the agreement is not binding on Mr. Crespo, the portion of the agreement requiring the arbitration of Mr. Crespo's claim is severable. *Compare Shotts*, 86 So. 3d 478 (provision of arbitration agreement requiring arbitration be conducted pursuant to AHLA rules was not severable from the remainder of the agreement, since the provision went "to the very essence of the agreement" and to sever it would force the parties or the court "to rewrite the agreement and to add an entirely new set of procedural rules and burdens and standards"). Here, the arbitration agreement has a severability clause, demonstrating the intent of the parties that "[i]f any provision of th[e] 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." (A.App.95 ¶10).

Even in the absence of this clear demonstration of intent and the presumption of severability, which Respondents' argument ignores, "[c]ontractual

provisions are severable where the invalid provisions do not go to the essence of the parties' contract and where there remain valid legal obligations even after severing the invalid provisions." *FL-Carrollwood Care, LLC v. Gordon*, 72 So. 3d 162, 167 (Fla. 2d DCA 2011). If this Court were to determine that Paragraph 4 of the arbitration agreement is invalid, such that the agreement does not govern the claims of third parties like Mr. Crespo, the agreement would still retain the full panoply of "valid legal obligations" and meaningful consideration required to form a valid contract. Petitioners would still be required to arbitrate Mrs. Crespo's claim, whether it be for negligent stillbirth or personal injury, pursuant to the arbitration agreement. Simply put, how the claims of a third party or parties to an agreement are resolved does not go to the essence of a bilateral contract between Mrs. Crespo and Petitioners. The essence of the contract would remain even if the claims of Mr. Crespo are not arbitrable, and accordingly, the provision requiring the arbitration of non-signatories' claims is severable from the agreement.

CONCLUSION

Petitioners submit that this Court should resolve the certified conflict by quashing the Fifth District's decision below, affirming the Second District's decision in *Santiago*, and remanding for arbitration of both Respondents' claims in accordance with 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/ Mark Hicks
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 **10th** day of **July, 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/ Mark Hicks
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/ Mark Hicks
MARK HICKS
Florida Bar No. 142436
DINAH S. STEIN
Fla. Bar No. 98272