IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

CASE NO. 5D14-759

LUALHATI CRESPO and
JOSE CRESPO,

Appellants,

v. L.T. Case No.: 2013- CA-006610-O

EILEEN HERNANDEZ, M.D., NANCY BROWN, M.D., LEIGH WHITE, M.D., KAI FU, M.D., QUTEN D. NGUYEN, M.D., NICHOLAS ABRUDESCU, M.D., WOMEN'S CARE FLORIDA, LLC D/B/A PARTNERS IN WOMEN'S HEALTHCARE, ALISTAIR MADLE, AND IGNACIO ARMAS, M.D.,

Appellees.
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INITIAL BRIEF OF APPELLANTS

CREED & GOWDY, P.A.
Jessie L. Harrell
Florida Bar No. 0502812
jharrell@appellate-firm.com
filings@appellate-firm.com
Bryan S. Gowdy
Florida Bar No. 0176631
bgowdy@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
(904) 350-0086 facsimile
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

This is an appeal of a non-final order determining that Appellees, Eileen Hernandez, M.D. and Women's Care Florida, LLC, d/b/a Partners in Women's Healthcare (collectively "Physicians"),[1] are entitled to have the claims of the Appellants, Lualhati and Jose Crespo, submitted to contractual arbitration. (Appx. 1-3.) Specifically, the trial court found that an arbitration agreement, signed by Mrs. Crespo, is valid and binding on the parties. (*Id.*) On this appeal, the Crespos contend that the arbitration agreement is not valid or binding because: (i) it contravenes the Legislature's public policy as set forth in the Florida Medical Malpractice Act, Chapter 766, *see Franks v. Bowers*, 116 So. 3d 1240 (Fla. 2013), and (ii) Mr. Crespo cannot be bound by an agreement he never signed.

The Dispute Between the Crespos and Physicians

This dispute between the Crespos and Physicians arises from the death of the Crespos' stillborn baby. (Appx. 9 at ¶ 36.) As alleged in the Amended Complaint, when Mrs. Crespo was thirty-nine weeks pregnant, she was having contractions and went to Physicians for an appointment. (Appx. 8 at ¶ 30.) Because she arrived a few minutes late, Mrs. Crespo was denied treatment. (*Id.* at ¶ 31.) At that time,

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[1] In their Amended Complaint, the Crespos also brought claims against numerous other doctors employed by Partners in Women's Healthcare. Those doctors are identified as Appellees in the case caption. However, the claims are not relevant to this appeal because the parties stipulated that the hearing would only concern Physicians. (Appx. 83-87; 109, 174.) The purpose of bringing the other doctors into the suit was to determine who was in charge of the front desk staff on the day of Mrs. Crespo's appointment. (Appx. 173-74.)

Mrs. Crespo could still feel her baby moving. (*Id.* at ¶ 32.) Mrs. Crespo's appointment was rescheduled for four days later. (*Id.* at ¶ 34.) The day prior to the appointment, Mrs. Crespo began experiencing labor, and she went to the hospital. (*Id.* at ¶ 35.) The baby was stillborn with a nuchal cord, which was also in a knot. (Appx. 9 at ¶ 36.) The Crespos claim that Physicians' negligence caused the baby to be stillborn and that they "have sustained damages in the form of mental pain and suffering, mental anguish, funeral expenses and any incurred medical expenses incident to the pregnancy." (Appx. 9 at ¶ 39; Appx. 10 at ¶ 43; 11 at ¶ 47; 12 at ¶ 51; 13 at ¶ 55; 15 at ¶ 59; 16 at ¶ 63; 17 at ¶ 67; 19 at ¶ 71; 21 at ¶ 77; 25 at ¶ 82; 26 at ¶ 87; 28 at ¶ 92.)

The Arbitration Agreement

Before Physicians would treat Mrs. Crespo, they required her (but not Mr. Crespo) to sign the Arbitration Agreement ("Agreement"). (Appx. 113, 119-121.) In paragraph 5 of the Agreement, titled "ARBITRATION PROCEDURES," Mrs. Crespo and Physicians "agree[d] and recognize[d] that the provisions of Florida Statutes, Chapter 766, governing medical malpractice claims shall apply to the parties and/or claimant(s) in all respects" with one exception. (Appx. 89.) Chapter 766 is also commonly referred to as the Florida Medical Malpractice Act (MMA). *See Franks*, 116 So. 3d at 1241-42. Given that the Agreement adopted the MMA's dispute-resolution provisions, we first explain those provisions. We then explain the Agreement's exception to the MMA's dispute-resolution provisions.

The MMA's Dispute-Resolution Provisions

The MMA sets forth detailed dispute-resolution procedures that must be followed before a medical malpractice claim is initiated in court. The Legislature intended that its procedures would provide for "prompt resolution of medical negligence claims." § 766.201, Fla. Stat. (2011). First, a claimant must conduct a presuit investigation. §§ 766.201(2)(a), 766.203(2), Fla. Stat. (2011). During the investigation, the claimant typically must first request his medical records from the defendant doctor. *See* § 766.204, Fla. Stat. (2011). Then, the claimant must provide those records to an expert, who, in turn, must provide a verified written opinion corroborating that reasonable grounds exist to believe the defendant doctor was negligent. *Id.*; §§ 766.106(2)(a), 766.203(2), Fla. Stat. (2011). After conducting this investigation, and "prior to filing a complaint for medical negligence, a claimant shall notify each prospective defendant by certified mail, return receipt requested, of intent to initiate litigation for medical negligence." § 766.106(2)(a), Fla. Stat. (2011).

The claimant must then allow the defendant doctor ninety days to conduct a review of the claim before filing suit. § 766.106(3)(a), Fla. Stat. (2011). The parties are also required to engage in informal discovery during this presuit period. § 766.106(6)(a), Fla. Stat. (2011). After conducting his or her own good faith investigation, the doctor may reject the claim, make a settlement offer, or offer to

arbitrate under the MMA, in which "liability is deemed admitted and arbitration will be held only on the issue of damages." § 766.106(3)(b), Fla. Stat. (2011).

Section 766.207, Florida Statutes, sets forth the MMA's arbitration rules and procedures:

> (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. . . . The evidentiary standards for voluntary binding arbitration of medical negligence claims shall be as provided in ss. 120.569(2)(g) and 120.57(1)(c).
>
> (4) The arbitration panel shall be composed of three arbitrators, one selected by the claimant, one selected by the defendant, and one an administrative law judge furnished by the Division of Administrative Hearings who shall serve as the chief arbitrator. . . .
>
> (5) The arbitrators shall be independent of all parties, witnesses, and legal counsel, and no officer, director, affiliate, subsidiary, or employee of a party, witness, or legal counsel may serve as an arbitrator in the proceeding.
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> (6) The rate of compensation for medical negligence claims arbitrators other than the administrative law judge shall be set by the chief judge of the appropriate circuit court by schedule providing for compensation of not less than $250 per day nor more than $750 per day or as agreed by the parties. In setting the schedule, the chief judge shall consider the prevailing rates charged for the delivery of professional services in the community.
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> (7) Arbitration pursuant to this section shall preclude recourse to any other remedy by the claimant against any participating defendant, and shall be undertaken with the understanding that damages shall be awarded as provided by general law, including the Wrongful Death Act, subject to the following limitations:

(a) Net economic damages shall be awardable, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments.

(b) Noneconomic damages shall be limited to a maximum of $250,000 per incident, and shall be calculated on a percentage basis with respect to capacity to enjoy life, so that a finding that the claimant's injuries resulted in a 50-percent reduction in his or her capacity to enjoy life would warrant an award of not more than $125,000 noneconomic damages.

. . .

(e) The defendant shall be responsible for the payment of interest on all accrued damages with respect to which interest would be awarded at trial.

(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.

. . .

(k) Any offer by a claimant to arbitrate must be made to each defendant against whom the claimant has made a claim. … A defendant who rejects a claimant's offer to arbitrate shall be subject to the provisions of s. 766.209(3). . . .

§ 766.207, Fla. Stat (2011).

The MMA also provides that "voluntary arbitration [under the MMA] is an alternative to jury trial and shall not supersede the right of any party to a jury trial." § 766.209(1), Fla. Stat. (2011). If the defendant rejects a claimant's offer to arbitrate under the MMA, "the claim shall proceed to trial," and the claimant, upon proving negligence, is entitled not only to damages (subject to the caps in section 766.118) but also to pre-judgment interest and reasonable attorney's fees (subject to a cap of twenty-five percent of the award reduced to present value). § 766.209(3)(a), Fla. Stat. (2011). If the claimant rejects a defendant's offer to arbitrate under the MMA, the noneconomic damages recoverable at trial are capped at $350,000 per incident and economic damages recoverable at trial for the loss of wages or earning capacity are capped at eighty percent of the actual loss. § 766.209(4), Fla. Stat. (2011). "If neither party requests or agrees to voluntary binding arbitration [under the MMA], the claim shall proceed to trial or to any available legal alternative such as offer of and demand for judgment under [section] 768.79 or offer of settlement under [section] 45.061." § 766.209(2), Fla. Stat. (2011) (emphasis added).

The Agreement's Exception to the MMA's Dispute-Resolution Provisions

Though the Agreement adopts the MMA's dispute-resolution provisions, it also makes an exception to the MMA:

> 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

> the 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 [the MMA,] 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. . . .

(Appx. 93-94) (emphasis added). Thus, while the MMA sets forth two paths to resolving disputes (MMA arbitration or trial), *see* § 766.209, Fla. Stat. (2011), the Agreement removes the MMA's option of a trial and instead inserts in its place a contractual arbitration scheme that is different from the MMA's arbitration scheme.

The Agreement's different arbitration scheme has the following pertinent provisions, rules, and procedures:

> 1. AREEMENT 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, … at the time of the occurrences giving rise to the claim. … 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 to a court action.

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 remaining 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.

(Appx. 93-95.)

Procedural History

Pursuant to the MMA's dispute-resolution provisions, the Crespos engaged in the presuit process, sent Physicians in November 2012 the original notice of intent to litigate, and proceeded to file suit in court on May 13, 2013. *See* § 766.106(2)(a), Fla. Stat. (2011); (Appx. 66, 109, 161, 272). Physicians then moved to stay the proceedings and compel arbitration under the Agreement. (Appx. 164.)

Subsequently, the Crespos learned that Dr. Hernandez was not present when Mrs. Crespo was turned away from her appointment. (Appx. 67, 109.) Accordingly, on August 30, 2013, the Crespos served Dr. Hernandez with a supplemental notice of intent, further alleging negligence in her supervision of non-professional staff and failing to have policies ensuring that patients are seen and evaluated. (*Id.*) The supplemental notice also advised that "this letter serves as notice that Jose Crespo and Lualhati Crespo, individually and on behalf of Joseph Crespo, intend to initiate medical negligence claims against you and Women's Care Florida, LLC d/b/a Partners in Women's Healthcare regarding the care and treatment provided to Lualhati Crespo which caused the death of Joseph Crespo." (*Id.*)

The day prior to serving the supplemental notice, the Crespos also requested that Physicians agree to arbitration under the MMA scheme. *See* § 766.207, Fla. Stat. (2011); (Appx. 78-79). Dr. Hernandez refused the Crespos' request for MMA arbitration, claiming that her pre-suit period was over. (Appx. 80.) The Crespos then again requested that Dr. Hernandez engage in MMA arbitration. (Appx. 81.) This request for MMA arbitration to Dr. Hernandez was served within 90 days of the supplemental notice of intent. (Appx. 66, 81; 109-10.) At the hearing, the Crespos continued to offer to participate in MMA arbitration. (Appx. 110.)

On the motion to compel arbitration under the Agreement, both parties argued the issue of whether the Agreement is valid and enforceable in light of *Franks v. Bowers*, 116 So. 3d 1240 (Fla. 2013). (*See* Appx. 102-08.) The Crespos argued that, under *Franks*, medical malpractice arbitration agreements must adopt all of the MMA's provisions. (Appx. 225.) In their argument, the Crespos identified the following areas in which the Agreement differs from the arbitration scheme created by the Legislature under the MMA:

i. The Agreement violates the Crespo's constitutional right, and statutory right under the MMA, to proceed to a jury trial. (Appx. 43.)

ii. The Agreement does not require that Physicians admit liability before being permitted to arbitrate. (Appx. 44.)

iii. The Agreement alters the MMA scheme for selecting arbitrators in medical malpractice cases and does not require arbitrators to remain independent of the parties. (Appx. 45.)

iv. The Agreement does not require Physicians to pay the Crespos' reasonable attorney's fees or the costs of arbitration. (Appx. 46, 225.)

v. The Agreement does not require Physicians to be jointly and severally liable for any arbitration award. (Appx. 225.)

vi. The Agreement does not require Physicians to pay prejudgment interest for Physicians' refusal of a request to participate in voluntary arbitration under the MMA made during the pre-suit screening process. (*Id.*)

vii. The parties have the right to appeal an arbitration decision under the MMA; under the Agreement there is generally no right to appeal. (Appx. 47.)

viii. The arbitration costs under the Agreement would be far in excess of those allowed to be charged under the MMA. (Appx. 46, 189.)

In addition, the Crespos' counsel attested that: (i) in his experience, the costs of arbitrating under the MMA scheme were "minimal" and lower than the costs of arbitrating under a contractual arbitration scheme like the one in the Agreement; (ii) unlike the $250 to $750 per day rate for arbitrators mandated by the MMA, *see* § 766.207(6), Fla. Stat. (2011), the prevailing rate for arbitrators under the Agreement's scheme would be $250 to $500 per hour and thus the arbitration

would cost $6,000 to $12,000 per day; and (iii) the arbitration in this case likely would take five days and thus cost, under the Agreement, $30,000 to $60,000. (Appx. 63.)[2] Because of the differences between the Agreement and the MMA, the Crespos argued that the Agreement was void as against public policy. (Appx. 227-28.)

On the other hand, Physicians argued that the Agreement leaves the MMA's dispute-resolution process entirely intact. (Appx. 102, 198-200.) The only difference they argued was that, if the parties do not agree to the MMA's arbitration scheme, then their claims are not adjudicated at trial (as the MMA would require in such an event) but instead are adjudicated under the Florida Arbitration Code (Chapter 682) and the Agreement's arbitration scheme. (*See* Appx. 102, 199-200.) Alternatively, Physicians argued that the severability clause allowed the trial court to strike only the offensive provisions of the Agreement, leaving the remainder intact. (Appx. 202, 215-16.)

The Crespos also argued that the Agreement was void because Mr. Crespo could not be bound to an agreement he did not sign. (Appx. 44.) Mr. Crespo attested that he was not present when Mrs. Crespo signed the Agreement, that he did not sign the Agreement, and that Mrs. Crespo did not have the authority to bind

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[2] In contrast, Physicians' video, explaining the arbitration process, informs patients that arbitration is less expensive for the parties. (Appx. 192, 196.)

him to the Agreement or waive his statutory or constitutional rights. (Appx. 58.) Mrs. Crespo also attested to similar facts. (Appx. 60.) Physicians' own witness testified that their "office policy" was to permit only the patient to sign the Agreement and thus the "office policy" did not permit Mr. Crespo to sign the Agreement. (Appx. 117-20.) Nevertheless, Physicians argued that Mr. Crespo was bound by the Agreement because he was a spouse with a consortium claim. (Appx. 111-12.)

At the conclusion of the hearing, the trial court asked both parties to prepare proposed orders. (Appx. 241.) The trial court adopted Physicians' proposed order, finding that the Agreement was valid and enforceable. (Appx. 1.) Specifically, the court found that "the MMA benefits and incentives remain intact under the Arbitration Agreement at issue." The court also found that Mr. Crespo's "loss of consortium" claim was subject to the Agreement. (Appx. 2.) Accordingly, the court granted Physicians' motion to stay proceeding and compel arbitration under the Agreement. (Appx. 1.) This timely appeal followed. (Appx. 226-27.)

SUMMARY OF ARGUMENT

The order compelling arbitration under the Agreement must be reversed. The trial court erred in interpreting Florida law to find that the Agreement is valid and enforceable for two independent reasons, either one of which standing alone requires reversal. First, the trial court erred because the Agreement violates the public policy established in the MMA and, therefore, is unenforceable. Second, the

trial court erred because the Agreement cannot compel Mr. Crespo, a non-signatory, to arbitrate.

Although the Agreement's dispute resolution provisions are not consistent with the MMA's dispute resolution provisions, the trial court concluded that "the MMA benefits and incentives remain intact under the Arbitration Agreement at issue." (Appx. 1.) This was error. The Supreme Court of Florida has established that an agreement that selectively incorporates the MMA's dispute-resolution provisions and that creates an arbitration scheme inconsistent with the MMA's arbitration scheme is void as against public policy. Because the Agreement, among other things, does not require Physicians to admit liability, takes away the right to trial, rewrites the selection process for arbitrators, makes arbitration more expensive for the Crespos, does not provide a mechanism for recovery of attorney's fees, and denies the Crespos their statutory right to pursue an appeal – all of which the Crespos would have enjoyed under the MMA's arbitration scheme – the Agreement is void as against public policy. The provisions that offend public policy cannot severed so as to salvage the Agreement.

The trial court also committed a separate and independent error when it found that Mr. Crespo was bound by the Agreement. His claims are not derivative of Mrs. Crespo's claims. Rather, he is pursuing negligent stillbirth causes of action in his own name for the emotional distress of losing his unborn child. Mrs. Crespo had no authority to sign away Mr. Crespo's constitutional right to a trial by jury for

his independent claims. The trial court erred in holding otherwise. Because the requirement in the Agreement that all claims must be arbitrated by all parties cannot be severed from the rest of the Agreement, the entire Agreement must fail.

ARGUMENT

I. THE AGREEMENT VIOLATES THE LEGISLATIVE PUBLIC POLICY OF THE MMA AND IS VOID, AND THE OFFENDING PROVISIONS CANNOT BE SEVERED.

Standard 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.'" *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)). Whether offending provisions in an arbitration agreement can be severed so as to salvage the rest of the agreement is also "a pure question of law, subject to de novo review." *Shotts*, 86 So 3d at 475.

Argument. The trial court erred when it concluded that the Agreement "is valid and binding on the parties." (Appx. 1.) The Agreement is unenforceable and void as against public policy because the Agreement's dispute-resolution and arbitration scheme contravenes the dispute-resolution and arbitration scheme required by the Medical Malpractice Act ("MMA"), Chapter 766, Florida Statutes. "Contracts transgressing public policy . . . are considered to be illegal and will not generally be enforced by the courts." *Vacation Beach, Inc. v. Charles Boyd Constr., Inc.*, 906 So. 2d 374, 377 (Fla. 5th DCA 2005).

A. The Agreement Upsets the Balance of Interests Crafted by the Legislature in the MMA's Dispute-Resolution and Arbitration Scheme.

In enacting the MMA's dispute-resolution procedures, the Legislature carefully balanced the rights of patients and the needs of doctors to address an "overpowering public necessity" – the medical malpractice crisis. *Franks v. Bowers*, 116 So. 3d 1240, 1247 (Fla. 2013). The Legislature expressly found that the "high cost of medical negligence claims in the state can be substantially alleviated by requiring early determination of the merit of claims, by providing for early arbitration of claims, thereby reducing delay and attorney's fees, and by imposing reasonable limitations on damages, while preserving the right of either party to have its case heard by a jury." § 766.201(1)(d), Fla. Stat. (2011). The Legislature's plan for prompt non-judicial resolution of disputes "consist[ed] of two separate components, presuit investigation and arbitration." §766.201(2), Fla. Stat. (2011). However, if a medical malpractice dispute could not be resolved without judicial intervention either in the presuit investigation stage or under the MMA's voluntary arbitration scheme, then the Legislature directed that the dispute would be resolved at a judicial trial – not under some other arbitration scheme designed in a form agreement drafted by a medical provider. *See* § 766.209, Fla. Stat. (2011).

The Physicians in the Agreement agreed that its dispute with the Crespos would be resolved under the MMA's dispute-resolution procedures. (Appx. 93 at

¶ 5.) However, the Agreement does not comply with the MMA's procedures and runs afoul of the MMA's public policy. Instead of allowing a judicial trial when the parties do not settle at the pre-suit investigation stage or mutually agree to the MMA's arbitration scheme, the Agreement substitutes its own arbitration scheme that is very different from the MMA scheme.

The MMA provides "[s]ubstantial incentives for both claimants and defendants to submit their cases to binding arbitration, thus reducing attorneys' fees, litigation costs, and delay." § 766.201(2)(b)(1), Fla. Stat. (2011). The Agreement's arbitration scheme stands in stark contrast to the balanced dispute-resolution and arbitration scheme carefully crafted by the Legislature in the MMA. Specifically, the Agreement strips away the following "substantial incentives" for arbitration that the Legislature required under the MMA's arbitration scheme:

- Physicians will not have to concede liability; thus, the Crespos will not save the litigation costs and attorney's fees necessary to prove liability (*see* § 766.201(2)(b), Fla. Stat.);
- The arbitration panel will be composed of three arbitrators, none of whom will be an administrative law judge and who do not have to be independent of the parties (*compare* Appx. 94 at ¶ 4 *with* § 766.207(4)-(5), Fla. Stat.);
- The amount paid to the arbitrators will not be capped (*compare* Appx. 94 at ¶ 7 *with* § 766.207(6), Fla. Stat.);

- The Crespos will have to share the considerably more expensive cost of a three-lawyer arbitration panel under the Agreement's arbitration scheme rather than Physicians bearing the lower costs of an MMA arbitration panel (*compare* Appx. 63, 94 at ¶ 6 *with* § 766.207(7)(g), Fla. Stat.).
- Physicians will not have to pay interest on the award (*compare* Appx. 94 at ¶ 8 (substantive Florida law applies) *with* § 766.207(7)(e), Fla. Stat.);
- Physicians will not have to pay the Crespo's attorney's fees, up to fifteen percent of the award (*compare* Appx. 94 at ¶ 8 (substantive Florida law applies) *with* § 766.207(7)(f), Fla. Stat.);
- Physicians will not be jointly and severally liable for the award (*compare* Appx. 94 at ¶ 8 (substantive Florida law applies) *with* § 766.702(7)(h), Fla. Stat.); and
- The Crespos' appellate rights will be more limited (*compare* Appx. 95 at ¶ 11c *with* § 766.212, Fla. Stat.).

Under the MMA, the Crespos were entitled either to go to trial or to arbitrate under a scheme with all of the aforementioned incentives. *See* § 766.209, Fla. Stat. (2011). In contravention of the MMA, the Agreement provides neither option. Instead, the Agreement – though adopting the MMA's dispute-resolution provisions (Appx. 93 at ¶5) – eliminates any trial option, strips away all of the incentives to arbitrate that are required by the MMA, replaces the MMA's arbitration scheme with a different contractual arbitration scheme devised by the

Physicians in a form agreement, and leaves in place all of the burdens from the MMA's presuit dispute-resolution and investigation process.

Finally, whether the Crespos' demand on Dr. Hernandez to arbitrate under the MMA was timely or not is irrelevant. The Agreement's arbitration scheme runs afoul of public policy because, even though it adopts the MMA's dispute-resolution scheme (Appx. 93 at ¶5), it deprives the Crespos of the judicial trial option mandated by the MMA, *see* § 766.209, Fla. Stat. (2011) and compels arbitration of the dispute without the incentives for arbitration required under the MMA, *see* §§ 766.207, 766.209, Fla. Stat. (2011). (Appx. 93-95.)

B. **Because the Agreement Contravenes the Legislative Intent Behind the MMA Arbitration Provisions, it is Void as Against Public Policy**.

The MMA is a remedial statute that sets forth procedures designed to promptly resolve medical malpractice claims. *See* § 766.201, Fla. Stat. (2011). As explained in section I.A., *supra*, the Legislature created a two-step resolution process: presuit investigation and arbitration. The presuit investigation places substantial burdens on claimants before filing suit. *See supra* at 3-4. Presuit investigation of claims is mandatory; arbitration is voluntary and "shall provide [s]ubstantial incentives for both claimants and defendants to submit their cases to binding arbitration, thus reducing attorney's fees, litigation costs, and delay." § 766.201(2)(b)1, Fla. Stat. (2011). Because the Agreement adopts the MMA's presuit, dispute-resolution burdens, while removing the MMA's incentives to

arbitrate, the Agreement is void as against public policy. This conclusion is supported by the Supreme Court of Florida's decision in *Franks*, 116 So. 3d at 1240.

In *Franks*, Mr. Franks signed an agreement prior to undergoing surgery. *Id.* at 1241. Dr. Bowers lacerated Mr. Franks' external iliac vein during surgery, resulting in Mr. Franks' death. *Id.* When Mrs. Franks brought suit, Dr. Bowers moved to compel arbitration. *Id.* The arbitration provision there provided that the patient had to comply with all presuit notice and investigation procedures, but that the case would be "resolved by arbitration as provided by the Florida Arbitration Code, Chapter 682 (Florida Statutes)." *Id.* at 1242. Thus, after the patient had engaged in presuit, the parties were to proceed under a contractual arbitration scheme rather than to trial or under the MMA's arbitration scheme.

The contractual arbitration provision in *Franks* also capped the amount of non-economic damages recoverable. *Id.* While the supreme court held that this limitation on damages provision contravened the public policy expressed in Chapter 766, the court also found the agreement's rejection of other incentives to patients to be against public policy. *Id.* at 1243, 1248. Specifically, the court listed all of the incentives provided under Chapter 766 to claimants and physicians to engage in arbitration. *Id.* at 1243-45. Incentives relevant to the instant case are: (a) the "defendant shall be responsible for the payment of interest on all accrued damages"; (b) 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"; (c) the "defendant shall pay all costs of the arbitration proceeding and the fees of all the arbitrators other than the administrative law judge";[3] (d) "[e]ach defendant who submits to arbitration under this section shall be jointly and severally liable for all damages pursuant to this section"; and (e) the defendant's concession of liability. *Id.* at 1243-44 (quoting § 766.207(2), (7), Fla. Stat. (2008)).

As with the Agreement in this case, the agreement in *Franks* required the parties to submit to arbitration "and therefore meets the first stated goal of the MMA." *Id.* However, both in this case and in *Franks*, "the 'substantial incentives' for the claimants to submit to the arbitration have been removed under the agreement.'" *Id.* Here, because Physicians need not concede liability in order to arbitrate, the Crespos will not save the attorneys' fees and costs necessary to prove liability. *See id.* Moreover, Physicians will not be jointly and severally liable (§ 766.207(7)(h)), Physicians will not have to pay the arbitration costs (§ 766.207(7)(g)), and Physicians will not have to pay any of the Crespos' attorney's fees (§ 766.207(f)).

The supreme court explained that these incentives – particularly the concession of liability – are necessary provisions of the MMA. *Franks*, 116 So. 3d

[3] Arbitration agreements that require the parties to share arbitration costs, contrary to the language of a remedial statute, are unenforceable. *See Flyer Printing Co., Inc. v. Hill*, 805 So. 2d 829, 833 (Fla. 2d DCA 2001).

at 1248. Because the agreement in *Franks* did not require the defendants to concede liability, it "contravene[d] the intent of the statute and, accordingly, the public policy of this state." *Id.* The court continued: "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." *Id.* (emphasis added). Here, the Agreement seeks to enjoy the benefits of arbitrating a medical malpractice lawsuit, as well as the MMA's other dispute-resolution procedures, but it fails to adopt all of the MMA's substantial incentives to arbitrate that the Legislature found were necessary for claimants to arbitrate.

Physicians argued to the trial court that the Agreement leaves intact all of the MMA arbitration incentives, but merely changed the forum from a trial court to an arbitration panel should the parties not agree to the MMA's arbitration scheme. (Appx. 102, 198.) This argument ignored that the Agreement forces the Crespos to arbitrate after undergoing the costly presuit dispute-resolution process and without following the MMA's comprehensive dispute-resolution and arbitration scheme, including the Physicians' concession of liability. Physicians effectively argued that by obtaining Mrs. Crespo's signature on the Agreement, they could ignore the rights, remedies, and limitations crafted by the MMA's dispute-resolution and arbitration scheme. Physicians claimed that they may compel the Crespos to

arbitrate under Chapter 682, ignoring altogether the MMA, once the presuit period is over. Physicians are wrong for two reasons.

First, Chapter 682 does not provide a vehicle for making an end-run around Chapter 766's comprehensive arbitration scheme because of the general rule that "a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms." *E.g.*, *Maggio v. Fla. Dep't of Labor & Emp't Sec.*, 899 So. 2d 1074, 1079-80 (Fla. 2005) (internal quotations omitted). In this case, the MMA's comprehensive arbitration scheme and Chapter 682's arbitration code are in conflict with one another. This is demonstrated by the multiple provisions in the Agreement (which would be authorized under Chapter 682) that cannot be reconciled with the MMA's arbitration scheme. (*E.g.*, *compare* Appx. 94 at ¶ 6 *with* § 766.207(7)(g), Fla. Stat.) Accordingly, because Chapter 766 governs specifically the arbitration of medical malpractice disputes, it must control Chapter 682, which speaks generally to the arbitration of all disputes.

Second, because the MMA is a remedial statute, designed to further an important state interest, it provides the means for the parties to arbitrate in a medical malpractice lawsuit. *Franks*, 116 So. 3d at 1248 ("any contract that seeks to enjoy the benefits of the arbitration provisions under the statutory scheme must necessarily adopt all of its provisions."). "When an arbitration agreement contains provisions which defeat the remedial provisions of the statute, the agreement is not

enforceable." *Romano ex rel. Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62 (Fla. 4th DCA 2003); *see also Flyer Printing Co., Inc. v. Hill*, 805 So. 2d 829, 833 (Fla. 2d DCA 2001) (discussed *supra* at note 3). Here, by failing to incorporate the MMA's incentives for the Crespos to arbitrate, the Agreement defeats the remedial arbitration scheme crafted by the Legislature and is void. In short, Physicians must either accept the MMA's comprehensive dispute-resolution and arbitration scheme or they must defend the Crespo's action in court, also as directed by the MMA. They cannot elect to selectively incorporate parts of the MMA and then arbitrate on terms different from those established in the MMA; doing so would defeat the MMA's remedial provisions.[4] *See Franks*, 116 So. 3d at 1248.

Physicians may argue that the supreme court's holding was limited to the particular agreement at issue in *Franks* and that the Court held that its decision "does not prohibit all arbitration agreements under the MMA." *Id.* at 1249. While true, neither argument supports deviating from the reasoning in *Franks.*

First, although the court's decision in *Franks* was limited to the agreement before it, no material distinction exists between the *Franks* agreement and the Agreement here. The agreements in both cases incorporated the MMA and then

[4] Nor should the courts allow doctors to rewrite the remedial statutory rights of their patients as a precondition to providing care. Doctors hold a fiduciary position of trust with their patients. *See Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 206 (Fla. 2003); (Appx. 41.). This relationship of trust should require doctors to fully and fairly disclose to patients any rights the patients are forfeiting. In contrast, Physicians used video propaganda to promote their alternative arbitration scheme as financially desirable for their patients, when in fact the alternative scheme is far more costly than litigation. (Appx. 62-63, 192.)

excised substantial arbitration incentives crafted by the Legislature under the MMA. Therefore, the fact that arbitration agreement in *Franks* also adopted non-economic damages caps and did not require the defendants to engage in the presuit process is not dispositive. It was the agreement's failure to include the MMA's incentives – particularly the concession of liability – that caused the *Franks* agreement to be void as against public policy. 116 So. 3d at 1248 ("The [concession of liability] incentive provided to claimants to encourage arbitration is a necessary provision of the MMA.").

Second, Physicians could have drafted an arbitration agreement consistent with the MMA by ensuring that the substantial incentives provided to claimants remained intact under the Agreement. Rather, the Agreement takes away the requirements that the Physicians concede liability and agree to be jointly and severally liable (§ 766.201(2)(b), (7)(h), Fla. Stat.), does not require Physicians to pay any attorney's fees to the Crespos (*compare* Appx. 94 at ¶ 8 (substantive Florida law applies) *with* § 766.207(7)(f), Fla. Stat.), forces the Crespos to arbitrate at significantly increased costs above those provided in the MMA (*compare* Appx. 94 at ¶ 6 *with* § 766.207(7)(g), Fla. Stat.), changes the composition of the arbitration panel (*compare* Appx. 94 at ¶ 4 *with* § 766.207(4)-(5), Fla. Stat.), and imposes heightened appellate standards upon the Crespos (*compare* Appx. 95 at ¶ 11c *with* § 766.212, Fla. Stat.).

All of these requirements contravene the intent of the MMA. As Justice Pariente explained in her special concurrence, "by requiring arbitration without in turn requiring the counter-balance of the defendant admitting liability, the [agreement] undermines the public policy set forth in the statute of reducing attorney's fees, litigation costs, and delay." *Franks*, 116 So. 2d at 1253 (Pariente, J., specially concurring); *see also, id.* at 1251 ("I agree with the majority that the [agreement] that the patient was required to sign takes away the patient's significant statutory rights without requiring the commensurate benefit of requiring the defendant to admit liability, as specifically envisioned by the Medical Malpractice Statute."). For these reasons, the Agreement here is also void as against public policy.

C. **The Severability Clause Does Not Salvage the Agreement**.

Physicians may argue that the severability clause saves the Agreement. Specifically, they may argue that the trial court may excise any provisions of the Agreement that offend public policy. (Appx. 202.) *Franks* illustrates why this argument is wrong. There, the Supreme Court of Florida explained:

> "As to when an illegal portion of a bilateral contract may or may not be eliminated leaving the remainder of the contract in force and effect, the authorities hold generally that a contract should be treated as entire when, by a consideration of its terms, nature, and purpose, each and all of its parts appear to be interdependent and common to one another and to the consideration. Stated differently, a contract is indivisible where the entire fulfillment of the contract is contemplated by the parties as the basis of the arrangement. On the other hand, a bilateral contract is severable where the illegal portion of the contract

> does not go to its essence, and 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."

Franks, 116 So. 3d at 1249 (quoting Williston on Contracts, rev. ed., Vol. 6, sec. 1782) (internal citations omitted).

Here, the Agreement runs afoul of public policy because it adopts substantial portions of the MMA's dispute-resolution scheme without providing the arbitration incentives to the Crespos. Most important among the missing incentives, the Agreement does not require Physicians to concede liability as they must concede under the MMA's arbitration scheme. *See* § 766.106(3)(b), Fla. Stat. (2011). No provision in the Agreement can be excised to force this concession upon Physicians. (*See* Appx. 93-95.)

Moreover, this failing to admit liability is interdependent with the majority of the remaining paragraphs in the Agreement. Paragraph 1 requires the parties to arbitrate all claims related to future care. (Appx. 93.) Paragraph 2 requires the parties to arbitrate all claims related to past care. (*Id.*) Paragraph 3 is a recognition of the waiver of a right to a jury trial. (*Id.*) Paragraph 4 requires arbitration by all claimants. (*Id.*) Paragraph 5 sets forth the arbitration procedures, including the selection of arbitrators. (Appx. 93-94.) Paragraph 8 sets forth that arbitration shall be conducted and governed by the Florida Arbitration Code. (Appx. 94.)

Without a concession of liability, none of these provisions comply with Florida public policy. However, if these provisions were removed, the Agreement would be gutted, leaving no mutual promises to arbitrate left to be fulfilled. Indeed, to even have an arbitration framework after the removal of these provisions, the trial court would be forced to "rewrite the agreement and to add an entirely new set of procedural rules and burdens and standards, a job that the trial court is not tasked to do." *Shotts*, 86 So. 3d at 459 (despite severability clause in arbitration agreement, court declined to remove reference to one set of procedural rules because it would then be forced to insert alternative rules into the agreement). Accordingly, the severability clause in the Agreement cannot save the Agreement from being declared void as against public policy.

Additionally, the same rationale exists here for declining to sever offending portions of an arbitration agreement as existed in *Fletcher v. Huntington Place Ltd. P'ship*, 952 So. 2d 1225, 1227 (Fla. 5th DCA 2007). There, this Court examined an arbitration agreement between a nursing home and its patient. *Id.* at 1226. After finding that a provision in the agreement was void, this Court declined to sever that provision. *Id.* at 1227. The Court explained that "[g]iven the nature of the relationship between a nursing home and its patient, the courts ought to expect nursing homes to proffer form contracts that fully comply with Chapter 400, not to revise them when they are challenged to make them compliant. Otherwise, nursing homes have no inventive to proffer a fair form agreement." *Id.* The same is true of

the doctor-patient fiduciary relationship. Doctors should be expected to proffer agreements that comply with the MMA, not rely on the courts to reform offending agreements.

In short, the severability clause cannot save the Agreement from its multiple violations of public policy, as expressed in the MMA. Accordingly, the entire Agreement fails. For this reason, the Court should reverse and remand for proceedings in the trial court.

II. MR. CRESPO IS NOT BOUND BY THE AGREEMENT, AND THUS THE ENTIRE AGREEMENT IS UNEFORCEABLE AS TO BOTH MRS. AND MR. CRESPO BECAUSE THE PROVISION REQUIRING MR. CRESPO TO ARBITRATE CANNOT BE SEVERED.[5]

Standard of Review. The standard of review on a ruling compelling arbitration is *de novo. See Steritech Grp., Inc. v. MacKenzie*, 970 So. 2d 895, 989 (Fla. 5th DCA 2007). Whether a provision in an agreement is severable is "a pure question of law, subject to de novo review." *Shotts,* 86 So 3d at 475.

A. Mr. Crespo, as a Non-Signatory, Cannot Be Compelled to Arbitrate His Claims.

The trial court erroneously concluded that Mr. Crespo is bound by the Agreement. The trial court concluded that Mr. Crespo's "loss of consortium claim" is derivative of Mrs. Crespo's claims and therefore subject to the Agreement. (Appx. 2 at ¶ 3b.) However, Mr. Crespo did not bring a claim for loss of

[5] If the Court concludes that the Agreement is void as against public policy, as argued in section I, *supra*, it need not reach this second argument.

consortium. He brought claims, in his own right, for the emotional distress he suffered as a result of losing his unborn child to stillbirth. (Appx. 10 at ¶ 43; 11 at ¶ 47; 12 at ¶ 51; 13 at ¶ 55; 15 at ¶ 59; 16 at ¶ 63; 17 at ¶ 67; 19 at ¶ 71; 21 at ¶ 77; 25 at ¶ 82; 26 at ¶ 87; 28 at ¶ 92.)

The Supreme Court of Florida has recognized that parents may bring an action for the negligent stillbirth of their child. *See Tanner v. Hartog*, 696 So. 2d 705, 708 (Fla. 1997) ("public policy dictates that an action by the parents for negligent stillbirth should be recognized in Florida."). The court explained that an action "for negligent stillbirth is a direct common law action by the parents which is different in kind from a wrongful death action." *Id.* (emphasis added). The damages in a negligent stillbirth case are "limited to mental pain and anguish and medical expenses incurred incident to the pregnancy," rather than the damages available to parents under the wrongful death statute. *Id.* at 708-09. Thus, while Mr. Crespo's claims would be derivative of the estate's claims in a wrongful death case, *see Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752, 762 (Fla. 2013), Mr. Crespo has his own independent cause of action for his damages in a negligent stillbirth case, *see Kammer v. Hurley*, 765 So. 2d 975, 977 (Fla. 4th DCA 2000), *receded from on other grounds*, *Special v. Baux*, 79 So. 3d 755 (Fla. 4th DCA 2011) (father and mother each awarded $2.5 million for mental pain and suffering in negligent stillbirth action). Indeed, Mr. Crespo's claims cannot be derivative

because he could bring his own, direct claim for negligent stillbirth even if Mrs. Crespo elected not to sue.

Mr. Crespo alleged only wrongful stillbirth claims against Physicians; therefore, he has brought a direct cause of action. *Tanner*, 696 So. 2d at 708. His claim is not derivative of his wife's claim. He has not even alleged a claim for loss of consortium, as there is no claim that Mrs. Crespo was physically injured by the Physicians' negligent care. (*See* Appx. 4-30.) The trial court's reliance on *Henderson v. Idowu*, 828 So. 2d 451 (Fla. 4th DCA 2002), was misplaced. While the *Henderson* court did conclude that a wife's derivative claim for loss of consortium was subject to an arbitration agreement signed by her husband (828 So. 2d at 453), that case is inapplicable because Mr. Crespo has not pled any claim that is derivative of Mrs. Crespo's claim.

Accordingly, the trial court erred in compelling Mr. Crespo to arbitrate under the Agreement. One "'who has not agreed, expressly or implicitly, to be bound by an arbitration agreement cannot be compelled to arbitrate.'" *Technical Aid Corp. v. Tomaso*, 814 So. 2d 1259, 1261 (Fla. 5th DCA 2002) (quoting *Regency Island Dunes, Inc. v. Foley & Assocs. Constr. Co.*, 697 So. 2d 217 (Fla. 4th DCA 1997)). Mr. Crespo did not sign the Agreement; nor was he asked to sign the Agreement by Physicians. (Appx. 117-20.) Mrs. Crespo had no authority to bind Mr. Crespo. (Appx. 58, 60.) Physicians have never argued that Mr. Crespo is bound to the

Agreement as a signatory or third party beneficiary.[6] (*See* Appx. 111-12.) Their only argument has been that Mr. Crespo's claims are derivative. (*Id.*) This argument is wrong for the reasons already explained. *See supra* at 30-32.

In summary, because "'no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate,'" the trial court erred in compelling Mr. Crespo to arbitrate under the Agreement. *Technical Aid Corp.*, 814 So. 2d at 1262 (quoting *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999)). Thus, even if the Court concludes that the Agreement is not void as against public policy as argued in section I, *supra*, the claims of Mr. Crespo, a non-signatory, cannot be stayed and cannot be directed to arbitration; his claims must be allowed to proceed in the trial court. *See Liberty Commc'ns, Inc. v. MCI Telecomms. Corp.*, 733 So. 2d 571, 576 (Fla. 5th DCA 1999) (affirming order compelling arbitration as to signatory to agreement but reversing the order compelling arbitration as to a non-signatory).

B. Because Mr. Crespo Cannot Be Compelled to Arbitrate, and the Provision of the Agreement Requiring the Participation of All Claimants is Not Severable, the Agreement is Unenforceable in its Entirety as to Both Mr. and Mrs. Crespo.

The Agreement specifically states:

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[6] The Agreement reveals no express intent to primarily and directly benefit Mr. Crespo. (Appx. 93-95); *see Technical Aid*, 814 So. 2d at 1261 (arbitration agreement binding on intended, third-party beneficiaries provided the parties or contract express "an intent to primarily and directly benefit the third party.").

> 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 … at the time of the occurrence giving rise to the claim. …

(Appx. 93 (emphasis added).) The Agreement also states: "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." (Appx. 95 at ¶ 10.) While Physicians argued below that any offending provision of the Agreement could be severed (Appx. 202), the clear language of the Agreement to address all claims, by all claimants, in one forum, expresses an intention not to arbitrate except upon these terms.

As the Supreme Court of Florida explained in *Shotts*, if the offending clause is severed, "the trial court would be hard pressed to conclude with reasonable certainty that, with the illegal provision gone, 'there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other,' – particularly, when those legal promises are viewed through the eyes of the contracting parties." 86 So. 3d at 478 (internal citation omitted). The same is true here. Paragraph 4 of the Agreement expresses a clear intent not to engage in more than one proceeding. (Appx. 93.) In fact, Paragraph 4 is the only paragraph in the entire Agreement that sets forth words to the effect of

"it is the intention of the parties . . . ." (Appx. 93-95.) Thus, of all of the provisions in the Agreement, none asserts a more definite expression of intent than the intent that the Agreement be binding on all claimants to resolve at one time all claims. Because Mr. Crespo's claims cannot be arbitrated, the entire agreement must fail because the essence of the agreement can no longer be fulfilled. *See Franks*, 116 So. 3d at 1249; *Shotts*, 86 So. 3d at 477 ("contractual provisions are severable, where the illegal portion of the contract does not go to its essence . . . .") (emphasis added).

CONCLUSION

This Court should reverse the order staying proceedings and compelling arbitration and remand for further proceedings. On remand, this Court should instruct the trial court that: (i) the Arbitration Agreement is void for public policy; and (ii) the Agreement cannot be enforced against either Mr. or Mrs. Crespo because the provisions that offend public policy cannot be severed. As a first alternative, on remand, this Court should instruct the trial court that: (i) Mr. Crespo, as a non-signatory, cannot be compelled to arbitrate under the Agreement; and (ii) the Agreement cannot be enforced against either Mr. or Mrs. Crespo because the provision requiring arbitration of all claims by all claimants cannot be severed. As a second alternative, on remand, this Court should instruct the trial court that Mr. Crespo, as a non-signatory, cannot be compelled to arbitrate under the Agreement.

Respectfully submitted,

CREED & GOWDY, P.A.

/s/ Jessie L. Harrell
Jessie L. Harrell
Florida Bar No. 0502812
jharrell@appellate-firm.com
filings@appellate-firm.com
Bryan S. Gowdy
Florida Bar No. 0176631
bgowdy@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
(904) 350-0086 facsimile

Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to the following by e-mail on March 31, 2014:

Thomas Earl Dukes, III
tdukes@mmdorl.com
nos@mmdorl.com
Ruth C. Osborne
rosborne@mmdorl.com
McEwan, Martinez, & Dukes, P.A.
108 East Central Boulevard
Post Office Box 753
Orlando, Florida 32802-0753
Attorneys for Defendants/Appellees

Maria D. Tejedor
mail@theorlandolawyers.com
Carlos R. Diez-Arguelles
arguelles@theorlandolawyers.com
Diez-Arguelles & Tejedor, P.A.
505 North Mills Avenue, Suite 100
Orlando, Florida 32803-5369
Trial Counsel for Plaintiffs/Appellants

/s/ Jessie L. Harrell
Attorney

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ Jessie L. Harrell
Attorney