No. _____

In The
Supreme Court of the United States

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

Petitioners,

v.

LUALHATI CRESPO and JOSE CRESPO, *et al*.,

Respondents.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Arbitration Act (FAA) was enacted "in response to widespread judicial hostility to arbitration agreements," and "generally requires courts to enforce arbitration agreements as written." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 353 (2011). The statute reflects an "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). Despite this, some state courts have sought to apply various creative methods to avoid FAA preemption, repeatedly requiring this Court to intervene and reverse such incorrect and inconsistent state rulings. *Kindred Nursing Centers Ltd. P'ship v. Clark*, ___ S. Ct. ___, 2017 WL 2039160, at *4 (U.S. May 15, 2017); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012).

The Florida Supreme Court here added another novel but no less incorrect and inconsistent ruling by invalidating the parties' arbitration agreements because they contained substantive terms and conditions that differed from those contained in a state statute governing voluntary presuit arbitration of medical malpractice claims, even though the parties' arbitration agreements by their very terms operated wholly separate and apart from the statutory scheme. Thus, the question presented is:

> Whether the FAA preempts a state law rule that dictates onerous terms and conditions which must be included in private arbitration agreements between physicians and patients and invalidates all agreements that do not contain those terms and conditions.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, this proceeding involves the following additional parties from two closely related matters: (1) A.G. and P.G., individually and on behalf of A.G., a minor; (2) The Women's Centre for Excellence; (3), Parmelee Thatcher, M.D.; (4) April Merritt, M.D.; (5) Cherise Chambers, M.D.; (6) A.K. and W.K., individually and on behalf of N.K., a minor; (7) Women's Care Florida, LLC d/b/a Delaney Obstetrics & Gynecology; (8) Stephen P. Snow, M.D.; (9) Emma Fritz, M.D.; and (10) William T. Scott, M.D.

Pursuant to Supreme Court Rule 12.4, this single petition for a writ of certiorari is intended to cover the judgments in the *Crespo*, *A.K.*, and *A.G.* cases, as more fully described below.

RULE 29.6 STATEMENT

None of Women's Care Florida, LLC d/b/a Partners in Women's Healthcare, Women's Care Florida, LLC d/b/a Delaney Obstetrics & Gynecology, or The Women's Centre for Excellence, have parent corporations. The remaining petitioners are individuals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Eileen Hernandez, M.D., *et al.* (collectively "Women's Care Florida") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Florida in these three cases.

OPINIONS BELOW

The opinion of the Florida Supreme Court in *Crespo* is reported at 211 So. 3d 19 (Fla. 2016), and is found at App. 1-23. The unreported order of the Florida Supreme Court denying Women's Care Florida's timely motion for rehearing was entered February 27, 2017, and is found at App. 30-31. The opinion of the District Court of Appeal of Florida for the Fifth District reversing the trial court's order compelling arbitration is reported at 151 So. 3d 495 (Fla. 5th DCA 2014), and is found at App. 24-25. The unreported order of the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida granting Women's Care Florida's motion to stay proceedings and compel binding arbitration was entered January 31, 2014, and is found at App. 26-29.

The unreported order of the Florida Supreme Court in *A.G.* declining jurisdiction based on *Crespo* was entered March 31, 2017, and is found at App. 33-34. The *per curiam* opinion of the District Court of Appeal of Florida for the Fifth District affirming the trial court's order denying arbitration is reported at 196 So. 3d 574 (Fla. 5th DCA 2016), and is found at

App. 35-36. The unreported order of the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida denying Women's Care Florida's motion to stay proceedings and compel binding arbitration was entered December 29, 2014, and is found at App. 37-39.

The unreported order of the Florida Supreme Court in *A.K.* declining jurisdiction based on *Crespo* was entered March 31, 2017, and is found at App. 42-43. The opinion of the District Court of Appeal of Florida for the Fifth District reversing the trial court's order compelling arbitration is reported at 186 So. 3d 626 (Fla. 5th DCA 2016), and is found at App. 44-45. The unreported order of the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida granting Women's Care Florida's motion to stay proceedings and compel binding arbitration was entered July 15, 2014, and is found at App. 46-51.

JURISDICTION

The judgment of the Florida Supreme Court in *Crespo* was entered on December 22, 2016. App. 1-23. That court denied rehearing on February 27, 2017. App. 30-31. That court also declined jurisdiction based on *Crespo* in the closely related *A.G.* and *A.K.* matters on March 31, 2017. App. 33-34, 42-43. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

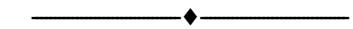
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the FAA, 9 U.S.C. § 2, provides in pertinent part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.



STATEMENT OF THE CASE

The Florida Supreme Court held that all contractual arbitration agreements between a patient and a physician are void as against public policy unless they include each and every substantive aspect of the voluntary binding arbitration provisions found in the

Medical Malpractice Act (MMA), Florida Statutes, Chapter 766. Henceforth, patients and physicians in Florida will not be free to craft the terms of their own arbitration agreements. Instead, the statute itself now essentially dictates the specific terms and conditions that patients and physicians must include in their private contracts, and any substantive variation will result in outright invalidity.

The Florida Supreme Court's application of the MMA to contractual arbitration agreements results in an interpretation of state public policy that is fundamentally inconsistent with, and therefore preempted by, the FAA. As recently as two weeks ago, this Court in *Kindred Nursing Centers Ltd. P'ship v. Clark*, ___ S. Ct. ___, 2017 WL 2039160 (U.S. May 15, 2017), rejected a strikingly similar attempt by a state court to evade FAA preemption. The Florida Supreme Court below ran afoul of *Kindred Nursing* and this Court's previous and frequently repeated instruction that courts cannot invalidate otherwise valid arbitration agreements based on grounds that derive their sole bases from the fact that "an agreement to arbitrate is at issue." *Kindred Nursing*, 2017 WL 2039160, at *4-*5; *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

The decision below does just this, by applying an existing statutory scheme for voluntary arbitration of medical malpractice claims to destroy and invalidate

all non-statutory medical malpractice arbitration agreements that do not incorporate every single substantive term contained in the statute, which includes among other things a requirement that the defendant admit liability as a condition to arbitration. This application of public policy has been uniquely targeted to extinguish only one kind of contract: medical malpractice arbitration agreements.

That approach cannot be reconciled with this Court's precedents, which hold that the FAA is meant to "ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989). This Court's review is therefore essential.

A. Factual Background

Petitioner Women's Care Florida is a specialty women's health physician group offering patient care across central Florida. Respondent Lualhati Crespo sought pregnancy care from a Women's Care Florida facility, and executed an arbitration agreement in which she agreed to "resolve any claim through arbitration" related to the medical care provided to her, pursuant to the detailed terms and conditions of the agreement. App. 2, 4-5.

By statute in Florida, all medical malpractice claims must proceed through a presuit screening period intended to encourage mutual resolution of such claims. *See* § 766.106 et seq., Fla. Stat. (2013). During

this presuit period, the parties may (but are not required to) mutually agree to submit the claim to binding arbitration. *See* § 766.106(3)(b), Fla. Stat. (2013), § 766.207, Fla. Stat. (2003). Among the many conditions of this voluntary statutory arbitration is that the defendant must admit liability, meaning that statutory arbitration is limited to the amount of damages to which the claimant is entitled. *See* § 766.207(7), Fla. Stat. (2003).

The arbitration agreement between Mrs. Crespo and Women's Care Florida indicated that it would only apply "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." App. 4. The agreement thus specified that "any demand for arbitration shall not be made until the conclusion of the pre-suit screening period under Florida Statutes, Chapter 766." App. 5. The substantive and procedural terms of the arbitration agreement executed by Women's Care Florida and Mrs. Crespo differed in several respects from the statutory arbitration provisions contained in Chapter 766 of the Florida Statutes, and in particular did not require Women's Care Florida to admit liability. App. 3-9, 13, 16.

In seeking medical care from Women's Care Florida, A.K. executed an identical arbitration agreement to that executed by Mrs. Crespo, while the agreement executed between A.G. and Women's Care Florida had

the same legal effect, even though it differed slightly in language.[1]

B. Proceedings Below

Respondents asserted claims against petitioners arising out of the medical care they had received at Women's Care Florida. The presuit period concluded in all three cases without the mutual assent of all parties to conduct statutory arbitration pursuant to Chapter 766 of the Florida Statutes. After the lawsuits were filed, petitioners sought stays and orders compelling arbitration in all three cases consistent with the private arbitration contracts the respondents had executed. App. 26-29, 37-39, 46-51.

The trial court in *Crespo* stayed the proceedings and referred the matter to arbitration, finding that the arbitration agreement was valid and binding. App. 26-29. The Fifth District Court of Appeal of Florida reversed, determining that the arbitration agreement violated public policy because it failed to adopt all of the "necessary statutory provisions." App. 24-25.

Petitioners sought review in the Florida Supreme Court, and a divided court affirmed the Fifth District Court of Appeal's decision to find the arbitration

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[1] The agreement in *A.G.* indicated that it would apply "at the conclusion of the pre-suit screening period and provided there is no mutual agreement to arbitrate" under Chapter 766, but did not contain the subsequent clarifying sentence that arbitration could not be demanded until after the statutory presuit period had concluded.

agreement invalid, by a 5-2 vote. The majority concluded that the parties' arbitration contract was void as against public policy because it "diverge[d] from the statutory provisions" in ways that were "more favorable to Petitioners" than the statute. App. 16. The majority then made the sweeping pronouncement that ***all*** arbitration agreements "which change the cost, award and fairness incentives of the MMA statutory provisions" are invalid in Florida. App. 17.

The majority asserted that any private arbitration agreement between a physician and a patient that varied in any substantive way from the terms and conditions of the statute "contravene[d] the Legislature's intent" to incentivize both sides to submit such cases to binding arbitration and to "reduc[e] attorney's fees, litigation costs, and delay." App. 17. The majority concluded that any arbitration agreement that does not incorporate each and every substantive provision of the statutory arbitration scheme "disrupt[s] the balance of incentives" reached by the state legislature and is therefore inherently void and invalid. App. 17-18.

The dissenting opinion authored by Justice Canady, which was joined by Justice Polston, noted the "astonishing irony" that the majority opinion employed a "line of judicial reasoning that condemns as invalid a voluntary agreement designed to limit the expense of medical malpractice litigation," while at the same time grounding that condemnation on a statute "expressly designed to limit the expense of medical malpractice litigation." App. 21-22. Observing that the arbitration agreement at issue was "designed to cure

the same mischief that the statute [sought] to address," the dissent would have held the agreement enforceable. App. 21.

Petitioners moved for rehearing in the Florida Supreme Court, arguing that the court's unexpectedly broad and sweeping interpretation of state public policy – invalidating ***all*** private medical malpractice arbitration agreements in Florida that did not exactly mirror the terms and conditions of the statutory scheme – went well beyond legal bounds and violated the FAA and this Court's precedents. App. 52-70. The motion was denied without elaboration. App. 30-31.

While the *Crespo* ruling was pending on appeal but before the Fifth District Court of Appeal issued its opinion, the trial court in *A.K.* stayed that litigation in favor of arbitration. App. 46-51. Following the Fifth District's opinion in *Crespo*, the trial court in *A.G.* denied the motion to compel arbitration. App. 37-39. Both orders were appealed, and the Fifth District reversed the order compelling arbitration in *A.K.*, and affirmed the order denying arbitration in *A.G.* App. 35-36, 44-45.

Petitioners appealed *A.K.* and *A.G.* to the Florida Supreme Court, which issued stay orders in both cases pending the outcome of *Crespo*. The Florida Supreme Court subsequently declined jurisdiction in both *A.K.*

and *A.G.* based on its opinion in *Crespo*. App. 32-34, 40-43.[2]

REASONS FOR GRANTING THE WRIT

The decision below defies this Court's clear and repeated holdings that the FAA preempts state rules that discriminate against contracts to arbitrate, and requires courts to rigorously enforce arbitration agreements according to their terms. Indeed, among such strong pronouncements by this Court is *Kindred Nursing*, issued only a few short weeks ago, in which this Court yet again condemned a lower court's discriminatory application of state law to undermine arbitration agreements in contravention of the FAA. 2017 WL 2039160, at *4-*5.

The decision by the Florida Supreme Court below falls squarely under *Kindred Nursing*'s reach. By preventing parties from entering into medical malpractice arbitration agreements that differ from the terms and conditions established by statute – even where such agreements operate entirely separate from that statute and apply only after the parties voluntarily decline statutory arbitration – the court below violated the FAA's mandate that "parties are generally free to

[2] These three cases qualify for joint review in a single petition under Supreme Court Rule 12.4 as they involve "identical or closely related questions," and the sole basis for the Florida Supreme Court declining jurisdiction in *A.K.* and *A.G.* was the binding nature of its earlier *Crespo* decision.

structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479.

The Florida Supreme Court's decision is another in a long and unbroken line of state court decisions seeking to evade this Court's precedents on arbitration, which this Court has roundly condemned. *See, e.g.*, *Kindred Nursing*, 2017 WL 2039160, at *4-*5; *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *Marmet*, 565 U.S. at 532; *Concepcion*, 563 U.S. 333 at 353; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683-84 (2010). By applying "public policy" so as to effectively destroy the ability of physicians and patients to craft arbitral contracts that do not mirror statutorily-dictated terms, Florida has sanctioned an invalid method of ruling around the FAA. Review and reversal or vacatur of the decision below is warranted to underscore that such end-runs are intolerable and to preserve the integrity of this Court's precedents.

A. The decision below conflicts with the FAA and defies this Court's precedents.

The Florida Supreme Court's reliance on state public policy to prevent physicians and patients from agreeing to arbitrate medical malpractice claims except under the specific terms and conditions dictated by the state legislature cannot be reconciled with the plain terms and manifest purpose of the FAA.

The FAA was enacted "in response to widespread judicial hostility to arbitration agreements," *Concepcion*, 563 U.S. at 339, and reflects a "liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). It provides, in pertinent part, that a written agreement to arbitrate disputes arising out of a contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In other words, agreements to arbitrate can be "invalidated by 'generally accepted contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339, *quoting Casarotto*, 517 U.S. at 687.

This language creates an "equal-treatment principle" that not only prevents courts from invalidating arbitration agreements based on legal rules that "apply only to arbitration," but also based on any rule that "covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining feature of arbitration agreements." *Kindred Nursing*, 2017 WL 2039160, at *4.[3]

[3] It is immaterial that the discriminatory rule here derives from common law rather than a statute; the FAA preempts any "state law, whether of legislative *or judicial* origin," that disfavors arbitration. *Perry*, 482 U.S. at 492 n.9 (emphasis added).

Among the impermissible methods of discriminating against arbitration agreements is the application of a state-law doctrine to invalidate or eviscerate arbitration agreements as written. Thus, while "[t]here is no federal policy favoring arbitration under a certain set of procedural rules," the federal policy is instead "simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt*, 489 U.S. at 476. Arbitration under the FAA "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Id.* at 479. The parties must be able to "specify by contract the rules under which [their] arbitration will be conducted." *Id.*

The Florida Supreme Court ran afoul of these very principles here. Respondents agreed that all disputes arising out of the medical care provided by Women's Care Florida would be subject to binding arbitration under the terms and conditions set forth in the parties' agreement, ***after*** the statutory presuit period had ended ***and*** conditioned on the parties' declination of the statutory voluntary presuit arbitration. But the majority below nonetheless refused to enforce the agreement as written, holding that ***any*** medical malpractice arbitration agreement that differed in any substantive way from the statutory scheme, even one explicitly made applicable only after the statutory scheme had expired, violated public policy and was void and invalid. This application of state public policy unmistakably violated this Court's repeated exhortations that courts cannot "selectively refus[e] to enforce

[arbitration] agreements once properly made," *Kindred Nursing*, 2017 WL 2039160, at *6, and must instead "rigorously enforce" arbitration agreements according to their terms. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

Florida's judicially-created rule fares no better than California's pronouncement, ultimately preempted in *Concepcion*, that class arbitration waivers in consumer contracts were *per se* unconscionable. Even though California's judicial rule applied to all contracts and not just arbitration agreements, it was preempted because it unduly disfavored arbitration and stood as an "obstacle" to one of the main purposes of the FAA, which is to enforce all arbitration agreements according to their terms. 563 U.S. at 342-44. Ultimately, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 351.

In direct contradiction to *Concepcion*, the Florida Supreme Court has adopted just such a prohibited procedure by invalidating all medical malpractice arbitration agreements inconsistent with the terms and conditions imposed by the state statute. That the court couched its decision in terms of public policy is inconsequential for purposes of FAA preemption.

The majority below justified their wholesale invalidation of non-statutory medical malpractice arbitration agreements by relying on *Franks v. Bowers*, 116 So. 3d 1240 (Fla. 2013), decided two years after *Concepcion*. However, the agreement at issue in *Franks*

was intended to be a ***substitute for*** statutory arbitration, whereas here the agreements act as an independent alternative form of dispute resolution, only after the parties mutually declined to participate in the statutory scheme. Indeed, it was on this very basis that the Florida Supreme Court in *Franks* justified avoidance of FAA preemption, claiming that its ruling in *Franks* did not "prohibit all arbitration agreements under the MMA" and that its "conclusion does not impede the general enforceability of agreements to arbitrate." *Id.* at 1249-51.

Whatever merit such justifications might have had in *Franks*, the Florida Supreme Court's untenable extension of these principles here cannot be squared with the FAA. The court dropped all pretenses by invalidating the agreement even though the arbitration could only occur "at the conclusion of the pre-suit screening period and provided there is no mutual agreement to arbitrate under [the MMA]." App. 4-5. Instead, the court held that ***all*** arbitration agreements "which change the cost, award and fairness incentives of the MMA statutory provisions" are void and invalid. App. 17. This runs directly contrary to the FAA and this Court's precedent, which consistently preempt state statutes or judicial rules which nullify otherwise valid arbitration agreements based on grounds that derive their sole bases from the fact that "an agreement to arbitrate is at issue." *Kindred Nursing*, 2017 WL 2039160, at *4; *see also Concepcion*, 563 U.S. at 339; *Marmet*, 132 S. Ct. at 1203.

Here, the parties' arbitration agreements were invalidated because they did not exactly track the specific procedures and rules for arbitration contained in the statute, even though they created a totally separate arbitration scheme that was only triggered after the presuit period had concluded and no voluntary arbitration under the statute had occurred. If the private arbitration agreements here are voided on this basis, it is hard to imagine ***any*** private arbitration agreement in a medical malpractice case that could possibly be crafted that would not be similarly voided. Indeed, even an arbitration agreement entered into between a physician and a patient after the statutory presuit phase had already concluded would be null and void under the Florida Supreme Court's reasoning. This "stand[s] as an obstacle to the accomplishment of the FAA's objectives," and "creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 343-44.

Medical malpractice defendants are now required to admit liability as a precondition to enjoying the right to enter into private arbitration agreements with their patients, which represents a discriminatory attack against such agreements by the Florida Supreme Court. Parties must be free to negotiate and enter into private arbitration agreements, safe in the knowledge that "the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995). The Florida Supreme Court has failed to enforce the parties' agreement as written, and

in doing so has "single[d] out arbitration agreements for disfavored treatment," in violation of the FAA and this Court's precedent. *Kindred Nursing*, 2017 WL 2039160, at *4.

B. The decision below is exceptionally important because it is the latest in a long line of cases undermining arbitration agreements in contravention of the FAA.

This Court has repeatedly been required to intervene when state courts have ignored or refused to apply controlling precedents interpreting the FAA. As the Court has explained, because "[s]tate courts rather than federal courts are most frequently called upon to apply the . . . FAA," "[i]t is a matter of great importance . . . that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 501 (2012) (*per curiam*).

In *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), this Court reversed a California court's interpretation of an arbitration agreement which allowed the court to find it unenforceable. This Court was compelled to instruct the lower courts that they had an "undisputed obligation" to follow FAA precedent despite their apparent "disagreement" with such decisions, since the "Supremacy Clause forbids state courts to dissociate themselves from federal law because of . . . a refusal to recognize the superior authority of its source." *Id.* at 468 (quoting *Howlett v. Rose*, 496 U.S. 356, 371 (1990)). Lower courts were told in no

uncertain terms: "The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it." *Id.*

In *Marmet*, this Court was forced to exhort the Court of Appeals of West Virginia that "[s]tate and federal courts must enforce the Federal Arbitration Act," after that court "did not follow controlling federal law" by "misreading and disregarding the precedents of this Court interpreting the FAA." 565 U.S. at 530. The West Virginia court was reminded that "[w]hen this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." *Id.* at 531; *see also id.* at 532 ("The West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court.").

In *Nitro-Lift*, this Court vacated the Oklahoma Supreme Court's decision to declare a contract containing an arbitration provision null and void instead of severing that provision from the contract and enforcing it, a decision which blatantly "disregard[ed] this Court's precedents on the FAA." 133 S. Ct. at 503. It admonished the Oklahoma court that it must "abide by the FAA, which is 'the supreme Law of the Land,' U.S. Const., Art. VI, cl. 2, and by the opinions of this Court interpreting that law." *Id.* In other words, "[i]t is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of

law." *Id.* (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994)).

And in *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011) (*per curiam*), this Court summarily vacated the Florida Fourth District Court of Appeal's refusal to compel arbitration. In doing so, it observed that the FAA represents an emphatic federal policy in favor of arbitral dispute resolution, and that "[t]his policy, as contained within the Act, 'requires courts to enforce the bargain of the parties to arbitrate.'" *Id.* at 21 (quoting *Dean Witter*, 470 U.S. at 217). This Court declared that the Florida court's decision "failed to give effect to the plain meaning of the [Federal Arbitration] Act and to the holding of *Dean Witter*." *Id.* at 22.

In addition, earlier this term, this Court reversed in part and vacated in part a decision of the Kentucky Supreme Court after the court "did exactly what *Concepcion* barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement." *Kindred Nursing*, 2017 WL 2039160, at *5. By displaying "the kind of hostility to arbitration that led Congress to enact the FAA," the Kentucky court "thus flouted the FAA's command to place [arbitration] agreements on an equal footing with all other contracts." *Id.* at *5-*6 (quotation omitted).

The decision below demonstrates that some state courts continue to display improper hostility to arbitration agreements, thereby flouting the FAA's mandate and this Court's repeated admonitions that such agreements must be enforced as written, and placed on

equal footing with all other types of contracts. This Court should respond, just as it did in *Kindred Nursing*, *Imburgia*, *Marmet*, *Nitro-Lift*, and *KPMG*.

The decision below provides a potential template for state legislatures and courts to create a "public policy" exception to the enforceability of arbitration agreements that could completely undermine the fundamental purpose of the FAA. All that would be necessary is a statute dictating the terms and conditions that all arbitration agreements must meet, and then a declaration of public policy that prevents private parties from deviating even slightly from such terms and conditions lest their private arbitral contract be declared void. Such an outcome is untenable, and would be fundamentally at odds with the FAA and this Court's precedent.

This Court has long recognized that "private parties have likely written contracts relying on [its FAA precedent] as authority." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995). That is precisely the case here, where private arbitration agreements like those entered into between respondents and Women's Care Florida – as well as countless others just like it across the state between physicians and patients – have been executed in reliance on the promise that such agreements would be rigorously enforced as written. Without review of the decision below, the reliance on a uniform national policy favoring arbitration and the right of parties to negotiate their own arbitration agreements embodied by the FAA would be replaced

with involuntary agreements consisting of government-imposed terms and conditions that differ from state to state depending on legislative and judicial whim.

CONCLUSION

For all of these reasons, this Court should grant the petition.

Respectfully submitted,

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Supreme Court of Florida

No. SC15-67

EILEEN HERNANDEZ, M.D., et al.,
Petitioners,

vs.

LUALHATI CRESPO, et al.,
Respondents.

[December 22, 2016]

QUINCE, J.

This case is before the Court for review of the decision of the Fifth District Court of Appeal in *Crespo v. Hernandez*, 151 So. 3d 495 (Fla. 5th DCA 2014). The district court certified that its decision is in direct conflict with the decision of the Second District Court of Appeal in *Santiago v. Baker*, 135 So. 3d 569 (Fla. 2d DCA 2014). We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const.

The issue presented is whether the medical malpractice arbitration agreement between Mrs. Crespo and Petitioners is void as against public policy because it excludes required provisions of the Medical Malpractice Act (MMA). We find that, as in *Franks v. Bowers*, the agreement in question is void and violates public policy because it includes statutory terms only favorable to the Petitioners, thereby "contraven[ing] legislative intent in a way that is clearly injurious to the

public good." 116 So. 3d 1240, 1247 (Fla. 2013). Therefore, we exercise our jurisdiction to grant the petition for review, and, in accordance with *Bowers*, we approve the decision below and disapprove the Second District's decision in *Santiago*. We decline to address whether Mr. Crespo's claims against Petitioners stand alone regardless of the viability of the medical malpractice agreement between Petitioners and Mrs. Crespo.

I. STATEMENT OF THE CASE AND FACTS

On August 17, 2011, Mrs. Crespo was 39 weeks pregnant and having contractions. She was turned away from her doctor's appointment because she was a few minutes late, and her appointment was rescheduled for August 21. On August 20, 2011, Mrs. Crespo delivered her stillborn son, Joseph Crespo. On December 19, 2012, Mr. and Mrs. Crespo furnished Petitioners, Dr. Eileen Hernandez and Women's Care Florida, a notice to initiate litigation regarding the treatment which caused Joseph's stillbirth. On March 11, 2013, Petitioners denied the Crespos' claim. On May 23, 2013, Mr. and Mrs. Crespo filed their complaint against Petitioners.

On May 31, 2013, Petitioners filed a motion to stay proceedings and compel binding arbitration pursuant to the agreement between Mrs. Crespo and Women's Care Florida. This undated arbitration agreement provides in pertinent part:

BY SIGNING THIS AGREEMENT YOU ARE WAIVING YOUR RIGHT TO A JURY TRIAL AND YOU ARE AGREEING TO ARBITRATE ALL CLAIMS ARISING OUT OF OR RELATED TO YOUR MEDICAL CARE AND TREATMENT

1. ***AGREEMENT TO ARBITRATE CLAIMS REGARDING FUTURE CARE & 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.

2. ***AGREEMENT TO ARBITRATE CLAIMS REGARDING PAST CARE AND TREATMENT.*** The patient further 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 past diagnosis, treatment, or care of the patient by a provider of medical services, or the provider's agents or employees, 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 presuit 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 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.

6. ***NICA.*** Nothing in this Agreement shall be construed as a waiver of any law related to Florida's Birth Related Neurological Injury Compensation Plan (Florida Statutes 766.301-766.316, hereinafter the "Plan"). If a request to submit a claim to the Plan is made by a party to this Agreement, all arbitration proceedings shall be stayed until it is determined whether the claim filed with the Plan is compensable. In accordance with the Plan, claims for "birth-related neurological injury[,"] as defined by the Plan, shall be the exclusive

remedy except that a civil action shall not be foreclosed and shall be submitted to binding arbitration in accordance with this Agreement where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety or property, provided that such suit is filed prior to and in lieu of payment of an award under the Plan and provided that such suit shall be filed before the award of the Division of Administrative Hearings becomes conclusive and binding.

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

8. ***APPLICABLE LAW.*** Except as herein provided, the arbitration shall be conducted and 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 repose as well as and [sic] the application of collateral sources and setoffs shall be applied. . . .

9. ***EFFECT OF REFUSAL TO PROCEED WITH ARBITRATION.*** In the event that

any party to this Agreement refuses to go forward with arbitration, the party compelling arbitration reserves the right to proceed with arbitration, the appointment of an arbitrator, and hearings to resolve the dispute, despite the refusal to participate or the absence of the opposing party. Submission of any dispute under this agreement to arbitration may only be avoided by a valid court order, indicating that the dispute is beyond the scope of this arbitration Agreement or contains an illegal aspect precluding the resolution of the dispute by arbitration. Any party to this agreement who refuses to go forward with arbitration hereby acknowledges that the arbitrator will go forward with the arbitration hearing and render a binding decision without the participation of the party opposing arbitration or despite that party's absence at the arbitration hearing.

BY SIGNING THIS AGREEMENT YOU ARE WAIVING YOUR RIGHT TO A JURY TRIAL AND YOU ARE AGREEING TO ARBITRATE ALL CLAIMS ARISING OUT OF OR RELATED TO YOUR MEDICAL CARE AND TREATMENT

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:

a. ***NO DURESS.*** The Agreement may not be submitted to a patient for approval when the patient's condition prevents the patient from making a rational decision whether or not to agree;

b. ***AGREEMENT BASED UPON OWN FREE WILL.*** The decision whether or not to sign the agreement is solely a matter for the patient's determination without any influence by the physician or hospital;

c. ***BINDING ARBITRATION AND EFFECT ON RIGHT OF 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 resolution of claims covered by this Agreement will be determined by a panel of arbitrators and not a judge or jury. Each party is entitled to a fair hearing, but the arbitration procedures are simpler and more limited than rules applicable in court. Arbitration decisions are as enforceable as any court order. The decision of an arbitration panel is final and there will generally be no right to appeal an adverse decision.

d. ***READ AGREEMENT, VIEWED VIDEO, AND UNDERSTOOD.*** I have read and understand the above Agreement and I have carefully viewed a video program that was presented to me that explained this Agreement to my satisfaction. I understand that I

> have the right to have my questions about arbitration or this Agreement answered and I do not have any unanswered questions. I execute this Agreement of my own free will and not under any duress. . . .

Mrs. Crespo signed the agreement, but Mr. Crespo did not. The agreement was also signed by Robert Yelverton, M.D., Chief Medical Officer, on behalf of Women's Care Florida and as an agent of its physicians, partners, and employees.

On August 29, 2013, Mr. and Mrs. Crespo requested binding arbitration pursuant to section 766.207, Florida Statutes, which Petitioners rejected, arguing that they were enforcing the signed agreement.

II. CERTIFIED CONFLICT CASE

The facts in *Santiago*, 135 So. 3d at 570, the certified conflict decision, are as follows:

> Leydiana Santiago and Armando Ocasio, the parents and natural guardians of the child, Z.O.S., sued Dr. Marisa Baker and Women's Care Florida, LLC, d/b/a Lifetime Obstetrics and Gynecology (collectively, Lifetime), for medical malpractice. Tragically, Z.O.S. suffers from severe birth defects allegedly caused by a drug that Ms. Santiago resumed taking to treat a chronic disease. According to the complaint, upon becoming a new patient at Lifetime, Ms. Santiago informed the medical staff that she and her husband were planning to have a second child.

> Later, an over-the-counter pregnancy test taken by Ms. Santiago yielded a positive result. On two visits several days later, however, Lifetime advised her that the pregnancy was nonviable; Lifetime recommended a dilation and curettage, which Ms. Santiago declined. Thereafter, Ms. Santiago resumed taking the drug, allegedly believing that spontaneous passage of the fetus would occur. She also alleged that she was unaware of the possible adverse effects the drug might have on a fetus.

The trial court granted Lifetime's motion to compel arbitration based on the arbitration agreement Ms. Santiago executed prior to the birth. *Id.* The plaintiffs in *Santiago* did not request voluntary statutory arbitration. *Id.* The agreement provided that the parties were to share the arbitration expenses equally. *Id.* at 571. The Second District held that the arbitration agreement was not void as against public policy because the parties never invoked the statutory arbitration scheme and found that nothing in the MMA prohibited the parties from arbitrating their claims by private agreement outside of the statutory scheme. *Id.* at 571 (quoting *Bowers*, 116 So. 3d at 1248).

III. THE AGREEMENT IS VOID AS AGAINST PUBLIC POLICY

This Court reviews the decision of the district court on this issue de novo. *DFC Homes of Fla. v. Lawrence*, 8 So. 3d 1281, 1282-83 (Fla. 4th DCA 2009) ("An order granting or denying a motion to compel arbitration is reviewed de novo."). Parties may contract freely around a statute, but "a contractual provision that contravenes legislative intent in a way that is clearly injurious to the public good violates public policy and is thus unenforceable." *Bowers*, 116 So. 3d at 1247. In order to determine whether the agreement at issue violates public policy, we must first determine the intent of the Legislature in passing the MMA.

This Court has previously accepted the Legislature's statement of findings relating to the purpose of the MMA:

> [T]he Legislature set out its factual findings in the preamble of chapter 88-1, which initially enacted the [Medical Malpractice Recommendations of the Academic Task Force for Review of the Insurance and Tort Systems]. In fact, the preamble in chapter 88-1 states in part:
>
> > [I]t is the sense of the Legislature that if the present crisis is not abated, many persons who are subject to civil actions will be unable to purchase liability insurance, and many injured persons will therefore be unable to recover damages for either

> their economic losses or their noneconomic losses. . . .
>
> Ch. 88-1. *This preamble clearly states the Legislature's conclusion that the current medical malpractice insurance crisis constitutes an "overpowering public necessity*." Moreover, the Legislature made a specific factual finding that "[m]edical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased unavailability of malpractice insurance for some physicians." § 766.201(1)(a).
>
> The Legislature's factual and policy findings are supported by the Task Force's findings in its report.

Id. (quoting *Univ. of Miami v. Echarte*, 618 So. 2d 189, 196 (Fla. 1993)). To achieve the explicit purpose of remedying the medical malpractice insurance crisis, the Legislature specifically created the MMA statutory scheme.

While we have, subsequent to *Bowers*, questioned the existence of a continuing medical malpractice crisis in holding caps on damages in medical malpractice unconstitutional, *see Estate of McCall v. United States*, 134 So. 3d 894, 914 (Fla. 2014) (plurality opinion); *id.* at 916-17 (Pariente, J., concurring in result), the issue in this case is not whether the arbitration provision of the medical malpractice statute is unconstitutional, but whether the unilateral alteration of the arbitration provision is contrary to the public policy expressed in the MMA. The MMA statutory scheme includes, among

others, the following provisions: defendant's concession of liability;[1] neutral arbitrators including an administrative law judge;[2] defendant's assumption of arbitration costs and attorney's fees;[3] defendant's responsibility for payment of interest on damages;[4] joint and several liability of defendants;[5] and the right to appeal.[6]

Parties may freely contract around state law where the provisions of such contracts are not void as against public policy because they contravene a statute or legislative intent. *See id.*; *Green v. Life & Health of Am.*, 704 So. 2d 1386, 1390 (Fla. 1998). Contractual

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[1] § 766.207(2), Fla. Stat. (1999) ("Upon the completion of the presuit investigation with preliminary reasonable grounds for a medical negligence claim intact, the parties may elect to have damages determined by an arbitration panel"); § 766.106(3)(b), Fla. Stat. (2003) ("At or before the end of the 90 days, the prospective defendant . . . shall provide the claimant with a response: 1. Rejecting the claim; 2. Making a settlement offer; or 3. Making an offer to arbitrate in which liability is deemed admitted and arbitration will be held only on the issue of damages."). *See also Bowers*, 116 So. 3d at 1248 ("[T]he agreement dispenses with the inherent concession of liability provided by section 766.207."); *Echarte*, 618 So. 2d at 194 ("The claimant benefits from the requirement that a defendant quickly determine the merit of any defenses and the extent of its liability. The claimant also saves the costs of attorney and expert witness fees which would be required to prove liability."); *St. Mary's Hosp., Inc. v. Phillipe*, 769 So. 2d 961, 970 (Fla. 2000) ("[T]he most significant incentive for defendants to concede liability and submit the issue of damages to arbitration is the $250,000 cap on noneconomic damages.").

[2] § 766.207(4)-(5), Fla. Stat. (1996).

[3] § 766.207(7)(f)-(g), Fla. Stat. (2003).

[4] § 766.207(7)(e), Fla. Stat.

[5] § 766.207(7)(h), Fla. Stat.

[6] § 766.212(1), Fla. Stat. (1988).

provisions which contravene a statute or legislative intent are injurious to the public good, violate public policy, and are therefore unenforceable. *See Bowers*, 116 So. 3d at 1247; *McKenzie Check Advance of Fla., LLC v. Betts*, 112 So. 3d 1176, 1183 (Fla. 2013); *Lacey v. Healthcare & Ret. Corp. of Am.*, 918 So. 2d 333, 334 (Fla. 4th DCA 2005); *see generally Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 229 (Fla. 1971). Because we hold the freedom to contract in high regard, we carefully weigh the right to freely contract against the legislative intent and the public policy it seeks to enact. *See Bituminous Cas. Corp. v. Williams*, 17 So. 2d 98, 101-02 (Fla. 1944).

We find that arbitration agreements which purport to incorporate the statutory scheme but have terms clearly favorable to one party, like the agreement between Mrs. Crespo and Petitioners, contravene the "'substantial incentives for both claimants and defendants to submit their cases to binding arbitration'" which "[t]he arbitration provisions were enacted to provide." *Chester v. Doig*, 842 So. 2d 106, 107 (Fla. 2003) (quoting § 766.201(2)(b), Fla. Stat. (1997)). The MMA statutory scheme was enacted with the explicit goal of "reducing attorney's fees, litigation costs, and delay" caused by terms favorable to one party like those in the agreement in this case. § 766.201(2)(b), Fla. Stat. (1988).

The agreement between the parties tracks the statute in that it provides for patients to give up the right to a jury trial but severely limits the benefits provided in exchange for giving up that right. The

agreement at issue incorporates the statutory provisions with a section recognizing that "Florida Statutes, Chapter 766, governing medical malpractice claims shall apply to the parties" in all aspects except that if there is no mutual agreement to arbitrate under sections 766.106 or 766.207 at the conclusion of the presuit screening period, the parties will resolve any claim through the terms of the agreement. Otherwise, the agreement between Mrs. Crespo and Petitioners only resembles the statute in that it provides for three arbitrators. The agreement also provides a method through which Petitioners can avoid arbitration under the statutory provisions altogether.

The agreement requires that the parties appoint arbitrators of their choosing within twenty days of a demand for arbitration, which favors Petitioners more than the balanced MMA statutory provision calling for independent arbitrators. The agreement does not specify whether this provision applies to demands for arbitration under Florida Statutes. Therefore, patients subject to this agreement but seeking arbitration under the statutes would have to secure the "mutual agreement to arbitrate under Florida Statutes, 766.106 or 766.207" within this twenty-day window in order to escape the unfavorable terms. This arrangement leaves the power to force arbitration under the agreement in the hands of Petitioners, who can simply withhold consent to arbitrate under the Florida Statutes for the twenty-day period after a demand for arbitration under the MMA scheme is made. The agreement also provides that if a party refuses to proceed with arbitration

under the agreement, "the arbitrator will go forward with the arbitration hearing and render a binding decision" without the refusing party. In essence, if Mrs. Crespo had demanded arbitration under Florida Statutes, Petitioners could have withheld consent for twenty days after her demand and selected arbitrators who could render a decision Mrs. Crespo could not appeal under the terms of the agreement.

The agreement at issue diverges from the statutory provisions for terms more favorable to Petitioners, contravening legislative intent, in six major places: (1) the agreement does not concede Petitioners' liability;[7] (2) the agreement does not guarantee independent arbitrators or that one arbitrator be an administrative law judge as required by statute;[8] (3) the agreement shares costs equally between the parties rather than having Petitioners assume most of the costs of arbitration as in the statutory scheme;[9] (4) the agreement does not provide for Petitioners' payment of interest on damages;[10] (5) the agreement does not require joint and several liability of defendants as the MMA does;[11] and (6) the agreement dispenses with the right to appeal provided by the statute.[12]

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[7] § 766.207, Fla. Stat. *See also Bowers*, 116 So. 3d at 1248; *Phillipe*, 769 So. 2d at 970.

[8] § 766.207(4)-(5), Fla. Stat.

[9] § 766.207(7)(f)-(g), Fla. Stat.

[10] § 766.207(7)(e), Fla. Stat.

[11] § 766.207(7)(h), Fla. Stat.

[12] § 766.212(1), Fla. Stat.

As in the instant case, the agreement at issue in *Santiago* also provides for both parties to share costs equally. 135 So. 3d at 571. The district court in *Santiago* couched its approval of the agreement in its own interpretation of *Bowers*, finding that the cost-sharing provision was an agreement outside the MMA scheme and that the agreement never invoked the statute. *Santiago*, 135 So. 3d at 571 (citing *Bowers*, 116 So. 3d at 1248) ("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."). While the district court was correct that "nothing in *Bowers* 'impede[s] the general enforceability of agreements to arbitrate,'" an agreement is void as against public policy where any of its provisions explicitly contradict those in the MMA. *Id.* (quoting *Bowers*, 116 So. 3d at 1251). In *Bowers*, we defended the freedom to contract around the MMA. We did not defend the freedom to ignore its balance of statutory incentives, which were designed to entice claimants and defendants to enter into arbitration.

We find that arbitration agreements which change the cost, award, and fairness incentives of the MMA statutory provisions contravene the Legislature's intent and are therefore void as against public policy. If the Legislature had intended for parties to pick and choose which of the MMA's provisions to include in their arbitration agreements, the MMA statutory scheme would be meaningless. Parties could avoid those statutory provisions less favorable to them as

Petitioners did in this case and as defendants did in *Santiago*, thereby disrupting the balance of incentives the Legislature carefully crafted to encourage arbitration.

V. CONCLUSION

Based on the foregoing, we find the agreement between Mrs. Crespo and Petitioners void as against public policy, approve the district court below, disapprove the Second District's decision in *Santiago*, and remand to the Fifth District Court of Appeal for further proceedings consistent with this opinion.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and PERRY, JJ., concur.

PARIENTE, J., concurs with an opinion.

CANADY, J., dissents with an opinion, in which POLSTON, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PARIENTE, J., concurring.

I write to respond to Justice Canady's dissent criticizing what he perceives to be inconsistencies between the approach to whether there is a current medical malpractice crisis in the majority's opinion in this case

and our opinion in *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014), as well as my concurring in result opinion in *McCall*.[13] The majority opinion in this case is based on this Court's reasoning in *Franks v. Bowers*, 116 So. 3d 1240 (Fla. 2013), which held a similar arbitration agreement void as against public policy. Just like in this case, Justice Canady dissented in both *McCall* and *Bowers*.

Unlike *McCall*, this case does not involve an attempt to declare the entire medical malpractice statute unconstitutional; nor does it involve an attack on statutory caps on noneconomic damages.[14] In those contexts, whether a medical malpractice crisis existed or currently exists would be a very relevant consideration.

Rather, at issue in this case is the same type of arbitration agreement that this Court held void as

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[13] *See McCall*, 134 So. 3d at 916 (Pariente, J., concurring in result).

[14] This was the issue in *McCall*, in which this Court concluded that the statutory cap on wrongful death noneconomic damages under "section 766.118 violates the Equal Protection Clause of the Florida Constitution under the rational basis test." 134 So. 3d at 905. This is also the issue of another case pending before this Court based on the Fourth District having held the caps on noneconomic damages to be unconstitutional. *N. Broward Hosp. Dist. v. Kalitan*, 174 So. 3d 403 (Fla. 4th DCA 2015) (pending case No. SC15-1858). The Second District Court of Appeal recently agreed with "the Fourth District's conclusion that the statutory cap on noneconomic damages is unconstitutional" in *Port Charlotte HMA, LLC v. Suarez*, No. 2D15-3434, 2016 WL 6246703 (Fla. 2d DCA Oct. 26, 2016).

against public policy in *Bowers*, 116 So. 3d 1240. As I explained in my concurrence in *Bowers:*

> It is therefore clear from a full review of the Medical Malpractice Statute that the legislative quid pro quo for patients in exchange for both a substantial limitation on noneconomic damages to a maximum of $250,000 per incident and the right to a jury trial was that a defendant would be required to admit liability. This clearly expressed public policy in the statute, however, has been expressly contravened by the Financial Agreement in this case, which eviscerates statutory rights without providing the injured patient with any of the added benefits or incentives provided for by the Legislature. Further, by requiring arbitration without in turn requiring the counterbalance of the defendant admitting liability, the Financial Agreement undermines the public policy set forth in the statute of reducing attorney's fees, litigation costs, and delay.

Id. at 1254 (Pariente, J., concurring). The existence or non-existence of a medical malpractice crisis, therefore, does not affect whether an arbitration agreement is void as against public policy. Instead, as the majority concludes in this case, and we held in *Bowers*, the arbitration agreement at issue is invalid as against public policy because it "change[s] the cost, award, and fairness incentives of the MMA statutory provisions," which "the Legislature specifically created." Majority op. at 15, 9.

For all these reasons, I concur with the majority opinion.

CANADY, J., dissenting.

Because I adhere to my dissenting view in *Franks v. Bowers*, 116 So. 3d 1240 (Fla. 2013), I would quash the decision on review and approve the result reached by the Second District in *Santiago v. Baker*, 135 So. 3d 569 (Fla. 2d DCA 2014), on the conflict issue.

As I explained in *Bowers:*

> Nothing in the [Medical Malpractice Act] can be read to support the conclusion that the purpose of the statute is thwarted by voluntary pre-dispute agreements . . . designed to limit the cost of litigation and the amount of paid claims. Instead, such voluntary agreements are designed to cure the same mischief that the statute seeks to address.

Bowers, 116 So. 3d at 1255 (Canady, J., dissenting). It is no less true now than when *Bowers* was decided that "the public policy" animating the Court's decision "is an unprecedented judicial policy that contravenes" not only "the declared objective of the Legislature set forth in section 766.201" but also "the public policy embodied in the Florida Arbitration Code." *Id.* at 1256.

Bowers involved "an astonishing irony" because it employed a "line of judicial reasoning that condemns as invalid a voluntary agreement designed to limit the

expense of medical malpractice litigation and grounds that condemnation on the purpose of a statute expressly designed to limit the expense of medical malpractice litigation." *Id.* Here, the irony is joined with blatant self-contradiction. The foundation of the legislative public policy articulated in *Bowers* – the case on which the majority (incorrectly) hangs its hat – was the existence of a medical malpractice crisis. *See id.* at 1247 (majority opinion) ("[W]e have clarified the stated policy and intent of the Act – to address the 'overpowering public necessity' created by the medical malpractice insurance crisis."). But since *Bowers* was decided, that policy has been (incorrectly) rejected by a majority of the Court. *See Estate of McCall v. United States*, 134 So. 3d 894, 914 (Fla. 2014) (plurality opinion) (stating that "even if there had been a medical malpractice crisis in Florida at the turn of the century, the current data reflects that it has subsided"); *id.* at 921 (Pariente, J., concurring in result) (stating that "[t]here is no evidence of a continuing medical malpractice crisis"). In condemning the arbitration agreement based on the reasoning of *Bowers*, the majority relies on a crisis that the majority has said is nonexistent.

POLSTON, J., concurs.

Application for Review of the Decision of the District Court of Appeal – Certified Direct Conflict of Decisions

Fifth District – Case No. 5D14-759

(Orange County)

Dinah Stein and Mark Hicks of Hicks, Porter, Ebenfeld & Stein, P.A., Miami, Florida; and Thomas Earle Dukes, III, and Ruth C. Osborne of McEwan, Martinez & Dukes, P.A., Orlando, Florida,

for Petitioners

Bryan Scott Gowdy and Jessie Leigh Harrell of Creed & Gowdy, P.A., Jacksonville, Florida,

for Respondents

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

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

LUALHATI CRESPO
AND JOSE CRESPO,

Appellants,

v.

EILEEN HERNANDEZ, M.D. AND WOMEN'S CARE FLORIDA, LLC D/B/A PARTNERS IN WOMEN'S HEALTHCARE

Appellees. /

Case No. 5D14-759

Opinion filed October 24, 2014

Non Final Appeal from the Circuit Court for Orange County, Patricia A. Doherty, Judge.

Jessie L. Harrell and Bryan S. Gowdy, of Creed & Gowdy, P.A., Jacksonville, for Appellants.

Thomas E. Dukes, III, and Ruth C. Osborne, of McEwan, Martinez, & Dukes, P.A., Orlando, for Appellees.

PER CURIAM.

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.

REVERSED; REMANDED; CONFLICT CERTIFIED.

TORPY, C.J., SAWAYA and LAMBERT, JJ., concur.

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

LUALHATI CRESPO
and. JOSE CRESPO,

Plaintiffs,

vs.

EILEEN HERNANDEZ, M.D. AND WOMEN'S CARE FLORIDA, LLC D/B/A PARTNERS IN WOMEN'S HEALTHCARE,

Defendants.
_____/

CASE NO.:
2013-CA-6610-0

ORDER ON DEFENDANTS EILEEN HERNANDEZ, M.D. AND WOMEN'S CARE FLORIDA, LLC D/B/A PARTNERS IN WOMEN'S HEALTHCARE MOTION TO STAY PROCEEDINGS AND COMPEL BINDING ARBITRATION

(Filed Jan. 31, 2014)

WHEREAS this matter came to be considered by the Court on Tuesday, January 28, 2014, and the Court being duly advised in the premises, it is hereby

ORDERED as follows:

1. The Defendants, EILEEN HERNANDEZ, M.D. and WOMEN'S CARE FLORIDA, LLC D/B/A PARTNERS IN WOMEN'S HEALTHCARE's, Motion to Stay Proceedings and Compel Binding Arbitration

is granted, The Court finds that the arbitration agreement is valid and binding on the parties and refers the matter to arbitration consistent with the agreement.

2. In reaching this decision the Court has considered the pleadings, oral and written argument of counsel, testimony of the witnesses appearing at the evidentiary hearing, the two arbitration agreements signed by the patient, the video regarding arbitration and various presuit correspondence presented at the hearing to the Court.

3. In reaching its decision, the Court considered the following cases:

a. *Franks v. Bowers MD.*, 116 So. 3d 1240 (Fla. 2013) (holding a financial agreement that sought benefits of the Medical Malpractice Act (MMA) arbitration scheme without adopting all of its provisions was void as against public policy). This court finds the MMA benefits and incentives remain intact under the Arbitration Agreement at issue.

b. *Henderson v. Idowu*, 828 So. 2d 451 (Fla. 4th DCA 2002) (holding a spouse's derivative claim for loss of consortium was subject to an arbitration agreement). Accordingly, this court finds the Plaintiff's husband's loss of consortium claim is subject to the parties' Arbitration Agreement.

c. *Bachus & Stratton v. Mann*, 639 So. 2d 35, 36 (Fla. 4th DCA 1994) (noting that arbitration procedures serve a valid public policy by expediting claims and reducing litigation in overburdened courts).

d. *Frantz v. Shedden*, 974 So. 2d 1193, 1198 (Fla. 2d DCA 2008) (arbitration agreement did not conflict with patient's statutory right to appeal so as to be void as against public policy). The Arbitration Agreement at issue provides . . . there will **generally** be no right to appeal an adverse decision (paragraph 11. c., emphasis added) and that . . . the arbitration shall be governed by the Florida Arbitration Code, Florida Statutes, Sec. 682.01 et. seq. paragraph 8.). Accordingly, the Arbitration Agreement does not limit or eliminate the Plaintiff's right to seek vacation or appeal of the award under Chapter 682 of the Florida Statutes.

e. *Gainesville Health Care Center, Inc. v. Weston*, 857 So. 2d 278 (Fla. 1st DCA 2003) (evidence was insufficient to establish the arbitration provision was procedurally unconscionable). The court finds the Agreement at issue was not procedurally unconscionable. The Plaintiff freely entered into the Agreement with sufficient opportunity to read, understand and consider the Agreement.

DONE AND ORDERED in Chambers in Orlando, Orange County, Florida this 31st day of January, 2014)

Patricia A. Doherty
Circuit Judge

[Certificate Of Service Omitted]

Supreme Court of Florida

MONDAY, FEBRUARY 27, 2017

Corrected Order[1]
CASE NO.: SC15-67
Lower Tribunal No(s).:
5D14-759; 482013CA006610A001OX

EILEEN HERNANDEZ, M.D., ET AL.	vs.	LUALHATI CRESPO, ET AL.
Petitioner(s)		Respondent(s)

Petitioners' Motion for Rehearing is hereby denied.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
CANADY and POLSTON, JJ., dissent.
LAWSON, J., did not participate.

A True Copy
Test:

/s/ John Tomasino [SEAL]
John A. Tomasino
Clerk, Supreme Court

two
Served:

[1] Corrected to show proper service to Clerk.

DINAH STEIN
RUTH C. OSBORNE
BRYAN SCOTT GOWDY
MARK HICKS
THOMAS EARLE DUKES, III
JESSIE LEIGH HARRELL
CARLOS R. DIEZ-ARGUELLES
HON. PATRICIA A. DOHERTY
WILBERT RHULX VANCOL
HON. JOANNE P. SIMMONS, CLERK
HON. TIFFANY M. RUSSELL, CLERK
MARIA DOLORES TEJEDOR

Supreme Court of Florida

MONDAY, FEBRUARY 27, 2017

CASE NO.: SC16-1471
Lower Tribunal No(s).:
5D15-332;
482013CA007676A001OX

WOMEN'S CARE FLORIDA, LLC, ETC., ET AL.	vs. A.G., ET AL.
Petitioner(s)	Respondent(s)

Petitioner shall show cause on or before March 14, 2017, why this Court's decision *Hernandez v. Crespo*, 41 Fla. L. Weekly S625 (Fla. Dec. 22, 2016), is not controlling in this case and why the Court should not decline to exercise jurisdiction in this case. Respondent may serve a reply on or before March 24, 2017.

A True Copy
Test:

/s/ John Tomasino [SEAL]
John A. Tomasino
Clerk, Supreme Court

ca
Served:

MARIA DOLORES TEJEDOR
DINAH STEIN
MARK HICKS
BRADLEY P. BLYSTONE
BRYAN SCOTT GOWDY
THOMAS EARLE DUKES, III
RUTH C. OSBORNE

Supreme Court of Florida

FRIDAY, MARCH 31, 2017

CASE NO.: SC16-1471
Lower Tribunal No(s).:
5D15-332; 482013CA007676A001OX

WOMEN'S CARE FLORIDA, LLC, ETC., ET AL. vs. A.G., ET AL.

Petitioner(s) Respondent(s)

Upon review of the responses to this Court's order to show cause dated February 27, 2017, the Court has determined that it should decline to exercise jurisdiction in this case. *See Hernandez v. Crespo*, 41 Fla. L. Weekly S625 (Fla. Dec. 22, 2016). The petition for discretionary review is, therefore, denied. No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

LABARGA, C.J., and PARIENTE, QUINCE, CANADY, and POLSTON, JJ., concur.

A True Copy
Test:

/s/ John Tomasino [SEAL]
John A. Tomasino
Clerk, Supreme Court

ca
Served:

MARIA DOLORES TEJEDOR
THOMAS EARLE DUKES III
JESSIE LEIGH HARRELL
HON. JOANNE P. SIMMONS, CLERK
HON. PATRICIA A. DOHERTY, JUDGE
HON. TIFFANY MOORE RUSSELL, CLERK

MARK HICKS
DINAH STEIN
BRYAN SCOTT GOWDY
BRADLEY P. BLYSTONE
RUTH C. OSBORNE

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

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

WOMEN'S CARE FLORIDA, LLC ETC., ET AL.,

Appellants,

v.

Case No. 5D15-332

A.G. AND P.G., INDIVIDUALLY, ETC., ET AL,

Appellees. /

Opinion filed July 29, 2016

Non-Final Appeal from the Circuit Court for Orange County, Patricia A. Doherty, Judge.

Dinah S. Stein, of Hicks, Porter, Ebenfeld & Stein, P.A., Miami, Thomas Dukes, III, and Ruth C. Osborne, of McEwan, Martinez & Dukes, P.A., Orlando, for Appellants.

Jessie L. Harrell and Bryan S. Gowdy, of Creed & Gowdy, P.A., Jacksonville, for Appellees, A.G. and P.G.

No Appearance for other Appellees.

PER CURIAM.

AFFIRMED. *See Crespo v. Hernandez*, 151 So. 3d 495 (Fla. 5th DCA 2014), *review granted*, 171 So. 3d 116 (Fla. 2015). We certify conflict with *Santiago v. Baker*, 135 So. 3d 569 (Fla. 2d DCA 2014).

ORFINGER, TORPY and COHEN, JJ., concur.

IN THE CIRCUIT COURT OF THE NINTH
JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA

A[redacted] G[redacted] and P[redacted] G[redacted],
individually and on behalf of
P[redacted] G[redacted], a minor,

Plaintiffs,

CASE NO.: 2013-CA-007676-O

vs.

ORLANDO HEALTH, INC. d/b/a WINNIE PALMER HOSPITAL FOR WOMEN AND BABIES; WOMEN'S CARE FLORIDA, LLC d/b/a DELANEY OBSTETRICS & GYNECOLOGY and THE WOMEN'S CENTRE FOR EXCELLENCE; STEPHEN SNOW, M.D.; PARMELEE THATCHER, M.D.; APRIL MERRITT, M.D.; and CHERISE CHAMBERS, M.D.,

Defendants.
_____/

ORDER ON DEFENDANTS WOMEN'S CARE FLORIDA, LLC d/b/a DELANDEY [sic] OBSTETRICS & GYNECOLOGY AND THE WOMEN'S CENTRE FOR EXCELLENCE, STEPHEN SNOW, M.D., PARMELEE THATCHER, M.D., APRIL MERRITT, M.D. AND CHERISE CHAMBERS, M.D.'S AMENDED MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

(Filed Dec. 29, 2014)

WHEREAS THIS MATTER came to be considered by the Court on Wednesday, December 3, 2014, and the Court being duly advised of the premises, and having considered the proffer of testimony of Debbie Cacciatore, Office Administrator, and having considered the stipulation of parties and the matters filed of record and the case law cited, it is hereby

ORDERED and ADJUDGED as follows:

1. The motion is denied. See *Crespo v. Hernandez*, No. 5D14-759, _So. 3d_2014WL 5392937 (Fla. 5th DCA October 24, 2014).

DONE AND ORDERED in Chambers in Orlando, Orange County, Florida, this ___ day of _____, 2014.

Original signed by:
Patricia A. Doherty,
Circuit Judge, this
DEC 29 2014
and conformed copies
were furnished by Judicial
Assistant

Patricia A. Doherty
Circuit Judge

[Certificate Of Service Omitted]

Supreme Court of Florida

MONDAY, FEBRUARY 27, 2017

CASE NO.: SC16-568
Lower Tribunal No(s).:
5D14-2926;
482013CA011011A001OX

WOMEN'S CARE FLORIDA, LLC, A/K/A DELANEY OBSTETRICS & GYNECOLOGY	vs.	A.K., ET AL.
Petitioner(s)		Respondent(s)

Petitioner shall show cause on or before March 14, 2017, why this Court's decision *Hernandez v. Crespo*, 41 Fla. L. Weekly S625 (Fla. Dec. 22, 2016), is not controlling in this case and why the Court should not decline to exercise jurisdiction in this case. Respondent may serve a reply on or before March 24, 2017.

A True Copy
Test:

/s/ John Tomasino [SEAL]
John A. Tomasino
Clerk, Supreme Court

ca
Served:

THOMAS EARLE DUKES, III
MARK HICKS
BRYAN SCOTT GOWDY
BRADLEY P. BLYSTONE
DINAH STEIN
JESSIE LEIGH HARRELL
RUTH C. OSBORNE
MARIA DOLORES TEJEDOR

Supreme Court of Florida

FRIDAY, MARCH 31, 2017

CASE NO.: SC16-568
Lower Tribunal No(s).:
5D14-2926;
482013CA011011A001OX

WOMEN'S CARE FLORIDA, LLC A/K/A DELANEY OBSTETRICS & GYNECOLOGY	vs.	A.K., ET AL.
Petitioner(s)		Respondent(s)

Upon review of the responses to this Court's order to show cause dated February 27, 2017, the Court has determined that it should decline to exercise jurisdiction in this case. See *Hernandez v. Crespo*, 41 Fla. L. Weekly S625 (Fla. Dec. 22, 2016). The petition for discretionary review is, therefore, denied. No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d)(2).

LABARGA, C.J., and PARIENTE, QUINCE, CANADY, and POLSTON., JJ., concur.

A True Copy
Test:

/s/ John Tomasino [SEAL]
John A. Tomasino
Clerk, Supreme Court

ca
Served:

RUTH C. OSBORNE
JESSIE LEIGH HARRELL
THOMAS EARLE DUKES III
HON. JOANNE P. SIMMONS, CLERK
HON. DONALD E GRINCEWICZ, JUDGE
HON. TIFFANY MOORE RUSSELL, CLERK

BRYAN SCOTT GOWDY
DINAH STEIN
MARK HICKS
BRADLEY P. BLYSTONE
MARIA DOLORES TEJEDOR

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

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

A.K. AND W.K.,
INDIVIDUALLY, ETC.

Appellants,

v. Case No. 5D14-2926

ORLANDO HEALTH, INC.,
ETC., ET AL.,

Appellees, /

Opinion filed March 4, 2016

Non-Final Appeal from the Circuit
Court for Orange County,
Donald E. Grincewicz, Judge.

Jessie L. Harrell and Bryan S.
Gowdy, of Creed & Gowdy, P.A.,
Jacksonville, for Appellants.

Dinah S. Stein, of Hicks, Porter,
Ebenfeld & Stein, P.A., Miami
and Thomas Dukes, III, of McEwan,
Martinez & Dukes, P.A., Orlando,
for Appellees.

PER CURIAM.

A.K. and W.K., individually and on behalf of their son, N.K., appeal from a nonfinal order compelling contractual arbitration. The arbitration provision in this case is substantially similar to the one we addressed in *Crespo v. Hernandez*, 151 So. 3d 495 (Fla. 5th DCA 2014), *review granted*, 171 So. 2d [sic] 116 (Fla. 2015). As in *Crespo*, we hold that the arbitration agreement at issue here 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. Accordingly, we reverse the order compelling arbitration and remand to the trial court for further proceedings. We also certify that this decision conflicts with *Santiago v. Baker*, 135 So. 3d 569 (Fla. 2d DCA 2014).

REVERSED AND REMANDED; CONFLICT CERTIFIED

LAWSON, C.J., COHEN and LAMBERT, JJ., concur.

IN THE CIRCUIT COURT OF THE NINTH
JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA

A[redacted] K[redacted] and W[redacted] K[redacted], individually and on behalf of N[redacted] K[redacted], a minor,

Plaintiffs,

vs.

ORLANDO HEALTH, INC. d/b/a WINNIE PALMER HOSPITAL, WOMEN'S CARE FLORIDA, LLC a/k/a DELANEY OBSTETRICS & GYNECOLOGY, STEPHEN P. SNOW, M.D., EMMA FRITZ, M.D., RONALD A. EASTON, M.D., and WILLIAM THOMAS SCOTT, M.D.,

Defendants.
_____/

CASE NO.: 2013-CA-011011-O

ORDER ON DEFENDANTS' EMMA FRITZ, M.D., WILLIAM T. SCOTT, M.D., STEPHEN P. SNOW, M.D., and WOMEN'S CARE FLORIDA, LLC AMENDED MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS, AND MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

(Filed Jul. 15, 2014)

WHEREAS this matter came to be considered by the Court on Monday, June 16, 2014, and the Court being duly advised in the premises, it is hereby

ORDERED and ADJUDGED as follows:

1. That Defendants, EMMA FRITZ, M.D., WILLIAM T. SCOTT, MD., STEPHEN P. SNOW, M.D., and WOMEN'S CARE FLORIDA, LLC's, Amended Motion to Compel Arbitration and Stay Proceedings, and Motion to Dismiss Plaintiffs' Amended Complaint is granted. The Court finds that the arbitration agreement is valid and binding on the parties and refers the matter to arbitration consistent with the agreement.

2. In reaching this decision the Court has considered the pleadings, oral and written argument of counsel, testimony of the witnesses appearing at the evidentiary hearing, the arbitration agreement signed by A[redacted] K[redacted] and the video regarding arbitration, presented to the Court. The Court has also considered the transcript from the hearing on the identical agreement filed with the Court in *Crespo v.*

Hernandez, et. al. Finally, the Court has considered the following stipulations agreed to by the parties:

a. Plaintiff, A[redacted] K[redacted], agrees that her signature appears on the arbitration agreement attached as Exhibit "A" to Defendant's Motion;

b. Plaintiff, A[redacted] K[redacted], agrees that she saw the video presentation "Arbitration Agreement Instruction Video for Claims Arising Out of Or Related To Medical Care and Treatment" and the parties stipulate that the video may be viewed by the Court and considered as evidence and the parties stipulate that the video and/or transcript may be viewed or read by the Court;

c. The parties agree that the arbitration agreement referenced as Exhibit "A" to the Defendant's Motion is admissible as evidence in the evidentiary hearing;

d. The parties agree that no live testimony shall be required or presented at the hearing as to the authenticity of the agreement, the circumstances under which it was signed, and the capacity of Ms. K[redacted] to understand the agreement;

e. Plaintiffs waive arguments surrounding execution of the agreement and rely on the case on the [sic] *Franks v. Bowers*,

116, So.3d 1240 (Fla. 2013) to demonstrate that the agreement is unenforceable, along with the evidence presented at the hearing and the memorandums provided by the parties;

f. The parties agree that testimony on costs of arbitration provided by counsel on both sides at the hearing in *Crespo v. Hernandez, etc.* before Judge Doherty on January 28, 2014 Case No. 2013-CA-6610-0 will be provided to the Court for consideration and Plaintiff will offer brief evidence on costs of arbitration to which the defense shall have an opportunity to respond.

3. In reaching its decision, the Court considered the following cases:

a. *Franks v. Bowers, M.D.*, 116 So. 3d 1240 (Fla. 2013) (holding a financial agreement that sought benefits of the Medical Malpractice Act (MMA) arbitration scheme without adopting all of its provisions was void as against public policy). The Court finds the MMA benefits and incentives remain intact under the Arbitration Agreement at issue.

b. *Santiago v. Baker*, 135 So. 3d 569 (Fla. 2d DCA 2014) (considering a materially identical agreement, and finding the agreement valid and enforceable.) The Court finds that with no contrary appellate law, this decision is controlling on this Court.

c. *Henderson v. Idowu*, 828 So. 2d 451 (Fla. 4th DCA 2002) (holding a spouse's derivative claim for loss of consortium was subject to an arbitration agreement). Accordingly, this Court finds the Plaintiff's husband's loss of consortium claim is subject to the parties' Arbitration Agreement.

d. *Bachus & Stratton v. Mann*, 639 So. 2d 35, 36 (Fla. 4th DCA 1994) (noting that arbitration procedures serve a valid public policy by expediting claims and reducing litigation in overburdened courts).

e. *Frantz v. Shedden*, 974 So. 2d 1193, 1198 (Fla. 2d DCA 2008) (arbitration agreement did not conflict with patient's statutory right to appeal so as to be void as against public policy). The Arbitration Agreement at issue provides. . . . there will **generally** be no right to appeal an adverse decision (paragraph 11. c., emphasis added) and that . . . the arbitration shall be governed by the Florida Arbitration Code, Florida Statutes, Sec. 628.01 et. seq. paragraph 8.). Accordingly, the Arbitration Agreement does not limit or eliminate the Plaintiff' s right to seek vacation or appeal of the award under Chapter 682 of the Florida Statues.

f. *Gainesville Health Care Center, Inc. v. Weston*, 857 So. 2d 278 (Fla. 1st DCA 2003) (evidence was insufficient to establish the arbitration agreement provision

was procedurally unconscionable). The Court finds the Agreement at issue was not procedurally unconscionable. The Plaintiff freely entered into the Agreement with sufficient opportunity to read, understand and consider the Agreement.

DONE AND ORDERED in Chambers in Orlando, Orange County, Florida, this 15th day of July, 2014.

/s/ D E G
Donald E. Grincewicz
Circuit Judge

[Certificate Of Service Omitted]

THE SUPREME COURT OF FLORIDA

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

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

Petitioners,

v.

LUALHATI CRESPO
and JOSE CRESPO,

Respondents.
_____/

PETITIONERS', EILEEN HERNADEZ [sic], M.D. AND WOMEN'S CARE FLORIDA, LLC d/b/a PARTNERS IN WOMEN'S HEALTHCARE, MOTION FOR REHEARING

Petitioners, Eileen Hernandez, M.D. and Women's Care Florida, LLC d/b/a Partners in Women's Healthcare, pursuant to Fla. R. App. P. 9.330, respectfully move for rehearing of the Court's decision in this cause. A five-member majority of this Court effectively held that all contractual arbitration agreements between a patient and a physician are void as against public policy unless they include each and every substantive aspect of the voluntary binding arbitration provisions found in the Medical Malpractice Act (MMA), Florida Statutes, Chapter 766. *See Hernandez v. Crespo*, ___ So. 3d ___, 2016 WL 7406537 *7 (Fla. Dec. 22, 2016)

(the "Opinion"). In other words, the majority's application of the perceived public policy behind the MMA's arbitration provisions means that, as a practical matter, patients and physicians in Florida are not free to craft the terms of their own arbitration agreements that apply once the pre-suit period under the MMA has passed. Instead, with respect to such arbitration agreements, the MMA now essentially dictates the specific terms and conditions that patients and physicians must include in their private contracts, and any substantive variation therefrom results in outright invalidity.

In effecting this outcome, a majority of this Court overlooked and/or misapprehended controlling points of law and fact. First, the majority's application of the MMA to contractual arbitration agreements in Florida results in an interpretation of the MMA that is fundamentally inconsistent with, and therefore preempted by, the Federal Arbitration Act (FAA). The FAA prohibits its courts from invalidating arbitration agreements under state laws applicable only to arbitration agreements. The majority has done just this, by applying a law applicable only to medical malpractice arbitration (the MMA) so as to destroy and invalidate all contractual medical malpractice arbitration agreements that do not incorporate every single substantive term contained in the statute.

Likewise, the majority's decision applies the MMA and Florida's public policy in such a way that it violates both the state and federal constitutions by improperly impairing contract rights. *See* U.S. Const. Art.

I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . "); Fla. Const., Art. I, § 10 ("No . . . law impairing the obligation of contracts shall be passed."). The Opinion impairs private arbitration contracts between patients and physicians by altering such contracts to include all of the substantive provisions of the MMA arbitration scheme, even if the parties' voluntary contract had provided for an alternative (or even slightly different) substantive arbitration procedure.

ARGUMENT

I. The Court's Opinion interprets and applies the MMA is [sic] such a way that it necessarily becomes preempted by the FAA.

The Opinion interprets the MMA in such a way as to prevent parties from entering into private contracts for arbitrating medical malpractice suits, if such contracts differ in any substantive way from the arbitration provisions contained in the MMA. It does so even though the contractual agreement in this case operates entirely separate from the MMA, and creates a private arbitration scheme that is only triggered once statutory arbitration has failed to occur during the presuit period of the parties' own accord. Such an interpretation of the MMA impermissibly prevents the enforcement of voluntary, private agreements to arbitrate as they are written, in contravention of the FAA. Indeed, under the majority's decision, parties are affirmatively barred from attempting to arbitrate medical malpractice claims outside of the confines of the MMA's

scheme, even if the case is months or years beyond the presuit screening period. As a result, the FAA precludes the result reached by the Opinion, and the MMA, as interpreted by the majority, is preempted by the FAA.

The FAA was enacted "in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The FAA "reflects a strong public policy favoring enforcement of agreements to arbitrate." *Franks v. Bowers*, 116 So. 3d 1240, 1250 (Fla. 2013). It provides, in pertinent part, that a written agreement to arbitrate disputes arising out of a contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In other words, agreements to arbitrate can be "invalidated by 'generally accepted contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility*, 563 U.S. at 339, *quoting Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), the U.S. Supreme Court held that the FAA did not preempt a California law which permitted a state court to stay the parties' contractual arbitration pending the resolution of related litigation involving third parties not bound by the arbitration agreement, where the parties to the agreement had agreed to abide by

state rules of arbitration. In so doing, the Court observed that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476. Moreover, it stated that arbitration under the FAA "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Id.* at 479. Specifically, the parties must be able to "specify by contract the rules under which [their] arbitration will be conducted." *Id.*

In *AT&T Mobility*, the U.S. Supreme Court expanded on these concepts, and held that that [sic] the FAA preempted California's judicial rule that class arbitration waivers in consumer contracts were *per se* unconscionable, and that the FAA required the enforcement of arbitration agreements that contained such waivers despite California's judicial rule to the contrary.[1] The Court held that California's judicial rule was pre-empted by the FAA, even though it applied to all contracts and not just arbitration agreements, because it unduly disfavored arbitration and stood as an "obstacle" to one of the main purposes of the FAA, which is to enforce all arbitration agreements according to their terms. *See id.* at 342-44. The Court held

[1] A class arbitration waiver is a clause contained in a contract that requires bilateral arbitration and precludes multiple consumers from joining together and engaging in class action arbitration.

that "[r]equiring the availability of classwide arbitration [under California judicial rule] interferes with fundamental attributes of arbitration and thus creates a schemed [sic] inconsistent with the FAA." *Id.* at 344. The Court concluded that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 351.

Two years later, this Court decided *Franks*, finding that the private arbitration agreement between the patient and the defendant physicians in that case was void as against public policy. This Court reached this conclusion based on the key fact that the contractual arbitration agreement specifically incorporated some provisions of the MMA's arbitration scheme, while ignoring or changing others. As a result, this Court concluded 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.* at 1248.

This Court then discussed whether this interpretation of Florida public policy to void the private arbitration agreement in *Franks* ran afoul of the FAA. The Court concluded that there was no preemption, because "the MMA does not preclude all arbitration" and in fact "encourages arbitration under the specific guidelines," and because the Court's ruling did not "prohibit all arbitration agreements under the MMA." *Id.* at 1249-50. The Court held that "the FAA does not preempt this Court's determination that the arbitration provision must follow the rules outlined in chapter 766 because our conclusion does not impede

the general enforceability of agreements to arbitrate." *Id.* at 1251 (emphasis added).

Thus, this Court's conclusion that the FAA did not preempt its holding in *Franks* was predicated on the fact that the arbitration agreement in that case (unlike the agreement here, as discussed below) attempted to "pick and choose" certain portions of the MMA's scheme, while discarding others. As a result, an implicit corollary in *Franks* that was necessary to avoid FAA preemption was that a contractual agreement to arbitrate after the presuit period had concluded of its own natural course, and which operated entirely separate from the MMA arbitration scheme (as exists here), remained valid and enforceable.

By voiding the arbitration agreement in this case even though the contractual arbitration between the parties could only occur "at the conclusion of the presuit screening period and provided there is no mutual agreement to arbitrate under [the MMA]," the Opinion here overlooks this necessary corollary that kept the MMA safe from FAA preemption. *Hernandez*, 2016 WL 7406537 at *2.[2] Instead, the Opinion sweeps too

[2] The Second District recognized that this limiting condition was key to *Franks*' viability, holding in *Santiago v. Baker*, 135 So. 3d 569 (Fla. 2d DCA 2014), that *Franks* merely 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 571 (emphasis in original). Because in the medical malpractice case before it (like here) "the parties never invoked the statutory arbitration scheme" during the presuit period, the Second District held that *Franks* did not compel the invalidation of the parties' arbitration agreement. *Id.*

broadly to be compatible with the FAA, holding that ***all*** arbitration agreements "which change the cost, award and fairness incentives of the MMA statutory provisions" are "void as against public policy." *Id.* at *7.

This runs directly contrary to the FAA and U.S. Supreme Court precedent, which consistently preempt state statutes or judicial rules which invalidate otherwise valid arbitration agreements based on grounds that derive their sole bases from the fact that "an agreement to arbitrate is at issue." *AT&T Mobility*, 563 U.S. at 339. *See also Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (vacating decision by West Virginia Supreme Court which declined to enforce arbitration agreement between nursing home and patient's family members "as a matter of public policy under West Virginia law"); *Triad Health Mgmt. of Georgia, III, LLC v. Johnson*, 679 S.E.2d 785, 790 (Ga. Ct. App. 2009) (applying federal law and finding preemption of state statute requiring that medical malpractice arbitration agreements can only be executed subsequent to alleged malpractice, because the statute "singles out a specific class of arbitration agreement and restricts the enforcement thereof"); *Basura v. U.S. Home Corp.*, 120 Cal. Rptr. 2d 328 (Ct. App. 2002), *as modified* (June 27, 2002) (holding that a state statute was preempted because it "is a state law applicable only to arbitration agreements, allowing a purchaser to pursue a construction and design defect action against a developer in court, despite having signed an agreement to convey real property containing an arbitration clause").

Here, the parties' arbitration agreement was invalidated because it did not exactly track the specific procedures and rules for arbitration contained in the MMA, even though it created a totally separate arbitration scheme that was ***only*** triggered ***after*** the pre-suit period had concluded and no voluntary arbitration under the MMA had occurred. To the extent that the Opinion asserts that the arbitration agreement at issue here "incorporate[d] the statutory scheme" but attempted to "pick and choose" among its provisions, *Hernandez*, 2016 WL 7406537 at *6-*7, the majority misapprehended the true terms of the contract. In actuality, the private arbitration agreement here (and in *Santiago*) applied only if the parties went through the pre-suit phase of the MMA ***without*** invoking the statutory arbitration scheme. If the private arbitration agreement here (and in *Santiago*) is voided on this basis, it is hard to imagine ***any*** private arbitration agreement in a medical malpractice case that could possibly be crafted that ***would not*** be similarly voided.

In support of its mistaken theory that the arbitration agreement here does not operate wholly independently of the MMA, the majority's decision points to a clause in the arbitration agreement where each party is given the right to appoint an arbitrator of its choice within twenty days after one party "has given notice to the other of a demand for arbitration." *Id.* at *2. As a means of conflating the MMA's scheme and the contract's arbitration provisions, the Opinion then makes the ***incorrect*** statement that the agreement "does not specify whether this provision applies to

demands for arbitration under Florida Statutes." *Id.* at *6.

However, this twenty-day provision is directly preceded by the following sentence: "[A]ny demand for arbitration shall not be made until the conclusion of the pre-suit screening period under Florida Statutes, Chapter 766." *Id.* at *2. Moreover, arbitration under Section 766.207 is not initiated by a "demand," but instead by a "request" for "voluntary" arbitration. § 766.207(2) & (3), Fla. Stat. (2003). For both these reasons, it is absolutely clear that the "demand" and the subsequent twenty-day period set out in the contractual arbitration agreement applies only to post-MMA arbitration, and has absolutely no application whatsoever to the initiation of arbitration under the MMA, as the majority's decision apparently misapprehends.

Essentially, the MMA, as interpreted by the Opinion, is now a statute that mandates the exact content and provisions of all medical malpractice arbitration agreements, and declares any such agreement that varies in any substantive way from those MMA provisions to be invalid and unenforceable. The Opinion's application of the MMA clearly "stand[s] as an obstacle to the accomplishment of the FAA's objectives," and "creates a scheme inconsistent with the FAA." *AT&T Mobility*, 563 U.S. at 343-44. As a result, the Opinion's holding is precluded because it inexorably leads to the MMA being preempted by the FAA.

II. The Court's Opinion interprets and applies the MMA in such a way as to violate constitutional prohibitions against impairment of contracts.

By interpreting the MMA in such a way as to invalidate every contractual arbitration agreement in a medical malpractice case that does not incorporate every single substantive provision of the MMA, the Opinion impermissible [sic] encroaches on the right to contract, thereby violating both the United States and Florida Constitutions. "The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law." *Chiles v. United Faculty of Florida*, 615 So. 2d 671, 673 (Fla. 1993). In Florida, this right is protected through article I, section 10 of our state constitution: "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." The Contract Clause of the United States Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. This Court's Opinion violates both provisions.

The "threshold inquiry" of a Contract Clause analysis under both federal and state law is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Energy Reserves Group, Inc. v. Kansas Power & Light*, 459 U.S. 400, 411 (1983) (citation omitted). "An impairment occurs, in the context of [these] provision[s], when a contract is made worse or is diminished in quantity, value, excellence or strength." *Lawnwood Med. Ctr., Inc. v. Seeger*,

959 So. 2d 1222, 1224 (Fla. 1st DCA 2007), *aff'd*, 990 So. 2d 503 (Fla. 2008).

Here, there can be no doubt that the parties' contractual arbitration agreement has been "substantially impaired," as it has been effectively eviscerated by this Court's application of public policy under the MMA. The Opinion "dramatically alters many of the rights and obligations specified in the contract," and this clearly constitutes contract "impairment" under both the federal and state constitutions. *Id.* This must necessarily be the case here, particularly given that this Court has long "applied the well-accepted principle that virtually no degree of contract impairment is tolerable in this state." *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 780 (Fla. 1979).

Petitioners and Respondents voluntarily entered into a contract that was intended to provide an efficient remedy to any medical malpractice dispute between them as an alternative to a jury trial, in the event voluntary arbitration under the MMA was not undertaken. The Opinion destroys this freely bargained-for contractual remedy. "Any subsequent law which so affects the remedy existing at the time a contract is made as substantially to impair and lessen the value of the contract is forbidden by the Constitution and void." *Springer v. Colburn*, 162 So. 2d 513, 515 (Fla. 1964). Such is the case here.

This Court's exhortation in *Pomponio* that "virtually" no impairment is tolerable "necessarily implies that some impairment is tolerable," although such

situations are rare in Florida and certainly "not so much as would be acceptable under traditional federal contract clause analysis." 378 So. 2d at 780. This involves a "balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective." *Id.*

Here, the Court has identified the state's objective in enacting the voluntary arbitration provisions of the MMA as a way to "entice claimants and defendants to enter into arbitration" as a means of "reducing attorney's fees, litigation costs, and delay," thereby "remedying the medical malpractice insurance crisis." *Hernandez*, 2016 WL 7406537 at *5-*7. However, to achieve this objective, the Opinion counterintuitively works to ***impair*** contractual arbitration agreements that ***accomplish these same goals***. As Justice Canady observed in his dissent, the Opinion produces "an astonishing irony" because it employs a "line of judicial reasoning that condemns as invalid a voluntary agreement designed to limit the expense of medical malpractice litigation and grounds that condemnation on the purpose of a statute expressly designed to limit the expense of medical malpractice litigation." *Id.* at *9, *quoting Franks*, 116 So. 3d at 1255 (Canady, J, dissenting).

In the context of constitutional contract impairment, this ironic outcome means that the interference with the parties' contract right here cannot possibly be

"constitutionally tolerable in light of the importance of the state's objective," but must instead be found to be an "unreasonable intrusion" into the parties' bargain "to a degree greater than is necessary to achieve that objective." *Pomponio*, 378 So. 2d at 780. Far from "achieving" the objective of the MMA, this Court's intrusion actually undermines that objective. Such an intrusion cannot be justified, particularly where the change to the parties' contract here, and countless others across the State, will be "severe, permanent, and immediate." *Cohn v. Grand Condo. Ass'n, Inc.*, 26 So. 3d 8, 11 (Fla. 3d DCA 2009), *aff'd*, 62 So. 3d 1120 (Fla. 2011).

If the purpose of the contract impairment in the Opinion is to decrease malpractice awards and insurance premiums by encouraging settlement of medical malpractice claims prior to litigation, as the majority claims, then private contracts that accomplish this goal just as well (or better) that the MMA's scheme should not be impaired at all. Therefore, the Opinion's significant and drastic impairment of the parties' contract "substantially" and "unreasonably" intrudes on that contract to the point of unconstitutionality.

III. Petitioners are not precluded from raising the arguments set out above in this motion for rehearing.

The Opinion's overly broad interpretation of the MMA, beyond the bounds of what even the *Franks* decision should have dictated, is what ultimately led that

Opinion to run afoul of both the FAA and the constitutional prohibitions against impairment of contracts. However, Petitioners anticipate that Respondents may claim that the arguments set out above in Sections I and II have purportedly been waived and cannot form the basis of a motion for rehearing in this matter, even if such arguments could not reasonably have been fully anticipated until following the Opinion's issuance. To the extent that this argument is raised by Respondents, it lacks merit and should not be relied upon by this Court.

While typically matters not previously raised are not the proper subject of a motion for rehearing, Florida courts may nevertheless consider an argument first raised on a motion for rehearing when to do so would be in the interest of justice. In other words, an exception is made for matters that are "fundamental and jurisdictional," and which [sic] "which vitally affect[ ] the essential rights" of a party. *O'Steen v. State*, 111 So. 725, 729 (Fla. 1926). Where there are "extraordinary circumstances" impacting on "fundamental principles governing the administration of justice," this Court should not hesitate to address such matters if they are raised for the first time in a motion for rehearing. *Regan v. ITT Indus. Credit Co.*, 469 So. 2d 1387, 1390 n.3 (Fla. 1st DCA 1984), *approved*, 487 So. 2d 1047 (Fla. 1986); *see also U.S. Sugar Corp. v. Henson*, 787 So. 2d 3, 21 (Fla. 1st DCA 2000), *as corrected* (Apr. 5, 2001), *approved*, 823 So. 2d 104 (Fla. 2002) (same).

For example, in *Regan*, the First District considered for the first time on rehearing the argument that the principal decision relied upon in the court's original opinion had been specifically disapproved of by the Legislature in the preamble to a statute that had not been previously brought to the court's attention. 469 So. 2d at 1389-90. Under such circumstances, the First District held that its consideration of this new argument was "not precluded" by the fact that it was raised for the first time on rehearing.

Similarly, in *Delmonico v. State*, 155 So. 2d 368 (Fla. 1963), this Court on rehearing addressed an argument that the statute under which the defendants had been prosecuted for illegal spearfishing had not been passed in a constitutional manner, even though it involved "a circumstance not heretofore made known in either the trial or appellate consideration of this proceeding." *Id.* at 369. Because of the constitutional nature of the argument, this Court considered it "advisable" to nonetheless address the merits of this argument. *Id.*

There are numerous other examples of Florida courts considering arguments raised for the first time on rehearing when such arguments involve constitutional or other fundamental principles, and the refusal to consider such arguments would lead to manifest injustice. *See, e.g.*, *Braggs v. State*, 13 So. 3d 505, 508 (Fla. 3d DCA 2009) (considering new argument on rehearing based on corrected voir dire transcript, because "the discovery of the transcription errors is dispositive of the issue on appeal" and "because the justice of the

cause persuades us to do so"); *Fender v. State*, 980 So. 2d 516, 517 (Fla. 4th DCA 2007) (considering statutory argument that "was not part of the State's argument in its appellate brief, nor the defense's below, and is being raised for the first time in this motion for rehearing"); *Perez v. State*, 717 So. 2d 605, 606 (Fla. 3d DCA 1998) (holding that the court will consider new arguments made for the first time on rehearing when "the justice of the cause persuade us to do so"); *Cauley v. State*, 444 So. 2d 964, 964-65 (Fla. 1st DCA 1984) (allowing "dispositive" issue to be brought for the first time on rehearing); *Walker v. State*, 284 So. 2d 415, 416 (Fla. 2d DCA 1972) (addressing issue raised for first time on rehearing because of its "fundamental nature").

This motion for rehearing involves similarly weighty constitutional and federal preemption issues, which are of a fundamental nature and would lead to manifest injustice if ignored. Unless these arguments are considered and adopted, contractual arbitration agreements between patients and physicians will continue to be found void even though such an outcome is precluded by the FAA and violative of the state and federal constitutional right to contract. Under such circumstances, there is nothing that should prevent this Court from considering the merits of these arguments, even though they have been raised for the first time in this motion.

CONCLUSION

The Opinion, as it currently stands, creates an outcome that runs afoul of the FAA's principle purpose of ensuring that private arbitration agreements are enforced according to their terms, and violates constitutional prohibitions against unwarranted impairment of the right to freely contract. Therefore, Petitioners respectfully request that this Court grant rehearing, reverse the Fifth District's decision below, and approve the Second District's decision in *Santiago*.

Respectfully submitted,

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