IN THE SUPREME COURT OF FLORIDA
CASE NO. SC15-67

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

Petitioners,

v. L.T. Case No. 5D14-0759

LUALHATI CRESPO and
JOSE CRESPO,

Respondents.
_____/

RESPONDENTS' ANSWER BRIEF ON THE MERITS

On Discretionary Review from the District Court of Appeal,
Fifth District, State of Florida

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUES

OTHER

STATEMENT OF THE CASE AND FACTS

Respondents, Lualhati and Jose Crespo (the "Crespos"), largely agree with Petitioners' statement of the case and facts. However, Petitioners have omitted the following facts:

The Arbitration Agreement

Before Physicians would treat Mrs. Crespo, they required her (but not Mr. Crespo) to sign the Arbitration Agreement ("Agreement"). (Appx. 113, 119-121.)[1] In paragraph 5 of the Agreement, titled "ARBITRATION PROCEDURES," Mrs. Crespo and Physicians "agree[d] and recognize[d] that the provisions of Florida Statutes, Chapter 766, governing medical malpractice claims shall apply to the parties and/or claimant(s) in all respects" with one exception. (Appx. 89.) Chapter 766 is also commonly referred to as the Florida Medical Malpractice Act (MMA). *See Franks v. Bowers*, 116 So. 3d 1240, 1241-42 (Fla. 2013). Given that the Agreement adopted the MMA's dispute-resolution provisions, we first explain those

[1]The Crespos have cited only to their appendix to the initial brief in the Fifth District, which is designed Appx. #. As they did below (see Fifth District Reply Brief at 15), the Crespos ask this Court to disregard the extra-record materials in Physicians' appendix, and references thereto in the brief. Specifically, Physicians have included (1) documents not presented to the trial court (Pet. Appx. 12-29); and (2) the brief from another appellate proceeding (Pet. Appx. 49-59). (*See* IB at 5, 12 n.5, 13 n.6.) It is improper to present evidence to this Court that was never placed in the record below. *Brayton v. Brayton*, 46 So. 3d 142, 143 n.1 (Fla. 5th DCA 2010). Moreover, the appellate brief is not "other authority" properly included in an appendix. *Hillsborough Cnty. Bd. of Cnty. Comm'rs v. Pub. Emps. Relations Comm'n*, 424 So. 2d 132, 135 (Fla. 1st DCA 1982).

provisions. We then explain the Agreement's exception to the MMA's dispute-resolution provisions.

The MMA's Dispute-Resolution Provisions

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

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

investigation, the doctor may reject the claim, make a settlement offer, or offer to arbitrate under the MMA, in which "liability is deemed admitted and arbitration will be held only on the issue of damages." § 766.106(3)(b), Fla. Stat. (2011).

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

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

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

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

. . .

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

(f) The defendant shall pay the claimant's reasonable attorney's fees and costs, as determined by the arbitration panel, but in no event more than 15 percent of the award, reduced to present value.

(g) The defendant shall pay all the costs of the arbitration proceeding and the fees of all the arbitrators other than the administrative law judge.

(h) Each defendant who submits to arbitration under this section shall be jointly and severally liable for all damages assessed pursuant to this section.

. . .

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

§ 766.207, Fla. Stat (2011).

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

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

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

> 5. ARBITRATION PROCEDURES. The parties agree and recognize that the provisions of Florida Statutes, Chapter 766, governing medical malpractice claims shall apply to the parties and/or the claimant(s) in all respects **except that at the conclusion of the pre-**

> **suit screening period,** and provided there is no mutual agreement to arbitrate under [the MMA,] Florida Statutes, 766.106 or 766.207, **the parties and/or claimant(s) shall resolve any claim through arbitration pursuant to this Agreement.** Accordingly, any demand for arbitration shall not be made until the conclusion of the pre-suit screening period under Florida Statutes, Chapter 766. Within (20) twenty days after a party to this Agreement has given written notice to the other of a demand for arbitration of said dispute or controversy, the parties to the dispute or controversy shall each have an absolute and unfettered right to appoint an arbitrator of its choice and shall give notice of such appointment to the other. Within a reasonable time after such notices have been given the two arbitrators so selected shall select a neutral arbitrator and give notice of the selection thereof to the parties. . . .

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

Procedural History

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

Subsequently, the Crespos learned that Dr. Hernandez was not present when Mrs. Crespo was turned away from her appointment. (Appx. 67, 109.) Accordingly, on August 30, 2013, the Crespos served Dr. Hernandez with a supplemental notice

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

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

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

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

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

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

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

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

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

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

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

Agreement's scheme would be $250 to $500 per hour and thus the arbitration would cost $6,000 to $12,000 per day; and (iii) the arbitration in this case likely would take five days and thus cost, under the Agreement, $30,000 to $60,000. (Appx. 63.)[2] Because of the differences between the Agreement and the MMA, the Crespos argued that the Agreement was void as against public policy. (Appx. 227-28.)

The Crespos also argued that the Agreement was void because Mr. Crespo could not be bound to an agreement he did not sign. (Appx. 44.) Mr. Crespo attested that he was not present when Mrs. Crespo signed the Agreement, that he did not sign the Agreement, and that Mrs. Crespo did not have the authority to bind him to the Agreement or waive his statutory or constitutional rights. (Appx. 58.) Mrs. Crespo also attested to similar facts. (Appx. 60.) Physicians' own witness testified that their "office policy" was to permit only the patient to sign the Agreement and thus the "office policy" did not permit Mr. Crespo to sign the Agreement. (Appx. 117-20.) Nevertheless, Physicians argued that Mr. Crespo was bound by the Agreement because he was a spouse with a consortium claim. (Appx. 111-12.)

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

SUMMARY OF ARGUMENT

This Court should approve of the Fifth District's opinion in this case invalidating the Agreement and disapprove of *Santiago v. Baker*, 135 So. 3d 569 (Fla. 2d DCA 2014), which upheld the validity of an indistinguishable arbitration agreement. The Agreement is invalid for two independent reasons:

I. *Public Policy Argument/Certified Conflict Issue*: The Agreement violates the public policy established in the MMA and, therefore, is unenforceable.

II. *Non-Signatory Argument/Non-Certified Conflict Issue*: The Agreement cannot be enforced against Mr. Crespo because he did not sign it and he has an independent claim; it cannot be enforced against Mrs. Crespo because the provision requiring Mr. Crespo's participation goes to the essence of the Agreement and cannot be severed.

Public Policy Argument/Certified Conflict Issue

The Agreement's dispute resolution provisions cannot be reconciled with the MMA's dispute resolution provisions. Under this Court's jurisprudence, an agreement that selectively incorporates the MMA's dispute-resolution provisions and that creates an arbitration scheme inconsistent with the MMA's arbitration scheme is void as against public policy. The Agreement specifically incorporates the MMA. But it does not require Physicians to admit liability, it rewrites the selection

process for arbitrators, it makes arbitration more expensive for the Crespos, it does not provide a mechanism for recovery of attorney's fees, and it denies the Crespos their statutory right to pursue an appeal. The Crespos would have enjoyed all of these benefits and rights under the MMA's arbitration scheme. Accordingly, the Agreement is void as against public policy, as the Fifth District correctly recognized.

Non-Signatory Argument/Non-Certified Conflict Issue

Alternatively and in its discretion, this Court should also find that the trial court erred when it found that Mr. Crespo was bound by the Agreement. He has not brought consortium or any other derivative claims. Rather, he is pursuing negligent stillbirth causes of action in his own name for the emotional distress of losing his unborn child. Mrs. Crespo had no authority to sign away Mr. Crespo's constitutional right to a trial by jury for his independent claims. The trial court erred in holding otherwise. Because the requirement in the Agreement that all claims must be arbitrated by all parties cannot be severed from the rest of the Agreement, the entire Agreement must fail.

ARGUMENT

Section I addresses the public policy argument, first by explaining how the Agreement upsets the balance of interests crafted by the Legislature (section I.A., *infra* at 12), then by explaining how this Court's decision in *Franks v. Bowers* supports the conclusion that the Agreement is void (section I.B., *infra* at 16), and

finally by explaining why the Second District's decision in *Baker v. Santiago* is incorrect (section I.C., *infra* at 25). Section II explains that Mr. Crespo, a non-signatory with independent claims, cannot be compelled to arbitrate (section II.A., *infra* at 29), and, because Mr. Crespo's participation in arbitration goes to the essence of the Agreement, it cannot be severed, rendering the entire Agreement unenforceable (section II.B., *infra* at 37.)

I. THE AGREEMENT VIOLATES THE LEGISLATIVE PUBLIC POLICY OF THE MMA AND IS VOID.

The Fifth District correctly held that the Agreement is void as against public policy. *Crespo v. Hernandez*, 151 So. 3d 495, 496 (Fla. 5th DCA 2014). The Agreement is void because its dispute-resolution and arbitration scheme contravenes the dispute-resolution and arbitration scheme required by the Medical Malpractice Act ("MMA"), Chapter 766, Florida Statutes. "[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." *Franks*, 116 So. 3d at 1247.

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

In enacting the MMA's dispute-resolution procedures, the Legislature carefully balanced the rights of patients and the needs of doctors to address an "overpowering public necessity" – the medical malpractice crisis. *Franks*, 116 So. 3d at 1247. The Legislature expressly found that the "high cost of medical

negligence claims in the state can be substantially alleviated by requiring early determination of the merit of claims, by providing for early arbitration of claims, thereby reducing delay and attorney's fees, and by imposing reasonable limitations on damages, while preserving the right of either party to have its case heard by a jury." § 766.201(1)(d), Fla. Stat. (2011). The Legislature's plan for prompt non-judicial resolution of disputes "consist[ed] of two separate components, presuit investigation and arbitration." §766.201(2), Fla. Stat. (2011). However, if a medical malpractice dispute could not be resolved without judicial intervention either in the presuit investigation stage or under the MMA's voluntary arbitration scheme, then the Legislature directed that the dispute would be resolved at a judicial trial – not under some other arbitration scheme designed in a form agreement drafted by a medical provider. *See* § 766.209, Fla. Stat. (2011).

The Physicians in the Agreement agreed that their dispute with the Crespos would be resolved under the MMA's dispute-resolution procedures. (Appx. 93 at ¶ 5.) However, the Agreement does not comply with the MMA's procedures and runs afoul of the MMA's public policy. Instead of allowing a judicial trial when the parties do not settle at the presuit investigation stage or mutually agree to the MMA's arbitration scheme, the Agreement substitutes its own arbitration scheme that is very different from the MMA scheme.

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

- Physicians will not have to concede liability; thus, the Crespos will not save the litigation costs and attorney's fees necessary to prove liability (*see* § 766.201(2)(b), Fla. Stat.);
- The arbitration panel will be composed of three arbitrators, none of whom will be an administrative law judge and who do not have to be independent of the parties (*compare* Appx. 93-94 at ¶ 5 *with* § 766.207(4)-(5), Fla. Stat.);
- The amount paid to the arbitrators will not be capped (*compare* Appx. 94 at ¶ 7 *with* § 766.207(6), Fla. Stat.);
- The Crespos will have to share the considerably more expensive cost of a three-lawyer arbitration panel under the Agreement's arbitration scheme rather than Physicians bearing the lower costs of an MMA arbitration panel (*compare* Appx. 63, 94 at ¶ 7 *with* § 766.207(7)(g), Fla. Stat.);

- Physicians will not have to pay interest on the award (*compare* Appx. 94 at ¶ 8 (substantive Florida law applies) *with* § 766.207(7)(e), Fla. Stat.);
- Physicians will not have to pay the Crespo's attorney's fees, up to fifteen percent of the award (*compare* Appx. 94 at ¶ 8 (substantive Florida law applies) *with* § 766.207(7)(f), Fla. Stat.);
- Physicians will not be jointly and severally liable for the award (*compare* Appx. 94 at ¶ 8 (substantive Florida law applies) *with* § 766.702(7)(h), Fla. Stat.); and
- The Crespos' appellate rights will be more limited (*compare* Appx. 95 at ¶ 11c *with* § 766.212, Fla. Stat.).

Accordingly, contrary to Physician's position, far more differences exist between the MMA and the Agreement than simply the parties' "voluntarily agree[ment] to waive a jury trial and resolve their disputes through contractual arbitration." (IB at 21.)

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

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

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

1. The Application of *Franks* to the Instant Case.

The MMA is a remedial statute that sets forth procedures designed to promptly resolve medical malpractice claims. *See* § 766.201, Fla. Stat. (2011). As explained in section I.A., *supra*, the Legislature created a two-step resolution process: presuit investigation and arbitration. The presuit investigation places substantial burdens on claimants before filing suit. *See supra* at 2. Presuit investigation of claims is mandatory; arbitration is voluntary and "shall provide [s]ubstantial incentives for both claimants and defendants to submit their cases to binding arbitration, thus reducing attorney's fees, litigation costs, and delay." § 766.201(2)(b)1, Fla. Stat. (2011). Because the Agreement adopts the MMA's presuit, dispute-resolution burdens, while removing the MMA's incentives to arbitrate, the Agreement is void as against public policy. This conclusion is supported by this Court's decision in *Franks*, 116 So. 3d at 1240.

In *Franks*, Mr. Franks signed an agreement before undergoing surgery. *Id.* at 1241. As alleged, Dr. Bowers' malpractice during surgery caused Mr. Franks' death.

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

The contractual arbitration provision in *Franks* also capped the amount of non-economic damages recoverable. *Id.* While this Court held that this limitation on damages provision contravened the public policy expressed in Chapter 766, the Court also found the agreement's rejection of other incentives to patients to be against public policy. *Id.* at 1243, 1248. Specifically, this Court listed all of the incentives provided under Chapter 766 to claimants and physicians to engage in arbitration. *Id.* at 1243-45. Incentives relevant to the instant case (because they are absent from the Agreement) are: (a) the "defendant shall be responsible for the payment of interest on all accrued damages"; (b) the "defendant shall pay the claimant's reasonable attorney's fees and costs, as determined by the arbitration panel, but in no event more than 15 percent of the award"; (c) the "defendant shall pay all costs of the arbitration proceeding and the fees of all the arbitrators other than

the administrative law judge";[3] (d) "[e]ach defendant who submits to arbitration under this section shall be jointly and severally liable for all damages pursuant to this section"; and (e) the defendant's concession of liability. *Id.* at 1243-44 (quoting § 766.207(2), (7), Fla. Stat. (2008)).

As with the Agreement in this case, the agreement in *Franks* required the parties to submit to arbitration "and therefore meets the first stated goal of the MMA." *Id.* However, both in this case and in *Franks*, "the 'substantial incentives' for the claimants to submit to the arbitration have been removed under the agreement.'" *Id.* This Court explained that these incentives – particularly the concession of liability – are necessary provisions of the MMA. *Franks*, 116 So. 3d at 1248. Because the agreement in *Franks* did not require the defendants to concede liability, it "contravene[d] the intent of the statute and, accordingly, the public policy of this state." *Id.* The Court continued: "Because the Legislature explicitly found that the MMA was necessary to lower the costs of medical care in this State, we find that any contract that seeks to enjoy the benefits of the arbitration provisions under the statutory scheme must necessarily adopt all of its provisions." *Id.* (emphasis added). Here, the Agreement seeks to enjoy the benefits of arbitrating a medical malpractice lawsuit, as well as the MMA's other dispute-resolution procedures, but it fails to

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

adopt the MMA's substantial incentives to arbitrate that the Legislature found were necessary for claimants to arbitrate.

In short, both parties in this medical malpractice case sought arbitration. The Crespos were willing to arbitrate under the MMA arbitration rules that are mandated by the Legislature and tailored specifically for medical malpractice cases. (Appx. 110.) Physicians, too, adopted the MMA in their form Agreement (Appx. 34 at ¶ 5), but they declined to arbitrate under the MMA's arbitration rules. Instead, they wanted to supersede the will of the Legislature and arbitrate by a different set of rules. (Appx. 35 at ¶ 8.) Because the Physicians sought medical malpractice arbitration without adopting the burdens of MMA arbitration, under the rationale of *Franks*, the Agreement is void as against public policy. 116 So. 3d at 1248.

2. Physicians' Arguments to the Contrary Do Not Withstand Scrutiny.

Physicians raise three reasons they believe the Agreement does not run afoul of the public policy established in the MMA and reaffirmed in *Franks*:

a. The only difference between the MMA and the Agreement purportedly is the forum for resolving disputes. (IB at 20-21.)

b. The MMA purportedly provides parties with the option of arbitration if they do not agree to MMA arbitration. (IB at 22.)

c. *Franks* is purportedly distinguishable because the agreement there did not permit MMA arbitration. (IB at 18-20.)

Physicians are wrong on all three arguments, as is explained next.

a. *The Agreement does more than change the forum*.

Physicians argue that the Agreement leaves intact all of the MMA arbitration incentives, but merely changes the forum from a trial court to an arbitration panel should the parties not agree to participate in MMA arbitration. (IB at 20-21.) This argument ignores that the Agreement forces the Crespos to arbitrate after undergoing the costly presuit dispute-resolution process and without following the MMA's comprehensive dispute-resolution and arbitration scheme, including the Physicians' concession of liability. Physicians effectively argue that by obtaining Mrs. Crespo's signature on the Agreement, they could ignore the rights, remedies, and limitations crafted by the MMA's dispute-resolution and arbitration scheme. Physicians claim that they may compel the Crespos to arbitrate under Chapter 682, ignoring altogether the MMA, once the presuit period is over. Physicians are wrong for two reasons.

First, Chapter 682, which generally governs all types of arbitration, does not provide a vehicle for making an end-run around the MMA's comprehensive scheme, which is specifically tailored to govern arbitration of medical malpractice disputes. "[A] specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms." *E.g.*, *Maggio v. Fla. Dep't of Labor & Emp't Sec.*, 899 So. 2d 1074, 1079-80 (Fla. 2005) (internal quotations omitted). In this case, the MMA's comprehensive arbitration scheme and

Chapter 682's arbitration code are in conflict with one another. This is demonstrated by the multiple provisions in the Agreement (which would be authorized under Chapter 682) that cannot be reconciled with the MMA's arbitration scheme. (*E.g.*, *compare* Appx. 94 at ¶ 6 *with* § 766.207(7)(g), Fla. Stat.) Accordingly, because Chapter 766 governs specifically the arbitration of medical malpractice disputes, it must control Chapter 682, which speaks generally to the arbitration of all disputes.

Second, because the MMA is a remedial statute, designed to further an important state interest, it provides the means for the parties to arbitrate a medical malpractice dispute. *Franks*, 116 So. 3d at 1248 (holding that "any contract that seeks to enjoy the benefits of the arbitration provisions under the statutory scheme must necessarily adopt all of its provisions."). "When an arbitration agreement contains provisions which defeat the remedial provisions of the statute, the agreement is not enforceable." *Romano ex rel. Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62 (Fla. 4th DCA 2003); *see also Franks*, 116 So. 3d at 1247; *Flyer Printing Co.*, 805 So. 2d at 833 (discussed *supra* at note 3).

Here, by failing to incorporate the MMA's incentives for the Crespos to arbitrate, the Agreement defeats the remedial arbitration scheme crafted by the Legislature and is void. In short, Physicians cannot selectively incorporate parts of the MMA and then arbitrate on terms different from those established in the MMA;

doing so would defeat the MMA's remedial provisions.[4] *See Franks*, 116 So. 3d at 1248.

b. *The MMA does not expressly permit contractual arbitration*.

Physicians argue that the MMA does not require them to litigate in court because section 766.209(2) provides: "If neither party requests or agrees to voluntary binding arbitration, the claim shall proceed to trial or any available legal alternative such as offer of and demand for judgment under s. 768.79 or offer of settlement under s. 45.061." (emphasis added) (IB at 22.) Physicians misread the emphasized language in subsection (2). Subsection (1) of the same statute explains that "[a] proceeding for voluntary binding arbitration[5] is an alternative to jury trial and shall not supersede the right of any party to a jury trial." Subsection (5) of that same statute further provides: "Jury trial shall proceed in accordance with existing principles of law." Thus, the Legislature expressed an intent that while parties may elect to

[4] Nor should the courts allow doctors to rewrite the remedial statutory rights of their patients as a precondition to providing care. Doctors hold a fiduciary position of trust with their patients. *See Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 206 (Fla. 2003); (Appx. 41.). This relationship of trust should require doctors to fully and fairly disclose to patients any rights the patients are forfeiting. In contrast, Physicians used a video to promote their alternative arbitration scheme as financially desirable for their patients, when, in fact, the alternative scheme is far more costly than litigation. (Appx. 62-63, 192, 196.)

[5] "Voluntary binding arbitration" is the phrase specifically used to describe MMA arbitration under section 766.207, where physicians admit liability. *See* § 766.207(2), Fla. Stat. (2011).

arbitrate under the MMA arbitration scheme, the parties otherwise maintain their constitutional right to trial by jury.

Physicians read the clause "or any available alternative" too broadly. Given the limited examples listed in subsection (2) involving proposals for settlement, the Legislature was expressly authorizing the use of settlement proposals and settlement outside of court, not an arbitration scheme wholly at odds with the MMA's arbitration scheme. Under the maxim of statutory construction known as *noscitur a sociis* (a word is known by the company it keeps), "one examines the other words used in a string of concepts to derive the legislature's overall intent." *Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 205 (Fla. 2003). Stated another way, "general and specific words capable of analogous meaning when associated together take color from each other so that the general words are restricted to a sense analogous to the less general." *State ex re. Wedgworth Farms, Inc. v. Thompson*, 101 So. 2d 381, 385 (Fla. 1958) (emphasis added).[6] Thus, the Legislature's use of limited settlement examples following the term "such as," restricts the more general phrase "available legal alternative." So, for example,

[6] *See also Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 576 (1995) (relying on the concept of *noscitur a sociis* "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, this giving 'unintended breadth to the Acts of Congress.'") (citation omitted).

settlement at mediation would be consistent with legislative intent; contractual arbitration that discards the MMA's incentives would not be.

Finally, the language used by the Legislature – "any available legal alternative" – begs the question. Arbitration schemes that violate public policy are neither "available" nor "legal." While the Legislature establishes public policy, this Court must decide whether specific agreements violate public policy. If this Court decides that the Agreement's arbitration scheme violates the Legislature's public policy as expressed in the MMA, then the Agreement's scheme is neither available nor legal.

c. Franks *is controlling even though the arbitration agreement there is not identical to the Agreement here*.

Physicians make much of the fact that the agreement in *Franks* did not permit the parties to request MMA arbitration whereas the Agreement here does. (IB at 18-20.) This is a distinction without a difference. If the instant Agreement is upheld, physicians in Florida no longer will be legislatively incentivized to agree to MMA arbitration. They instead will routinely reject the Legislature's MMA arbitration in favor of contractual arbitration that they can easily obtain through form agreements with their patients.

Moreover, a patient cannot unilaterally select MMA arbitration; the physician must also agree. *See* § 766.207(3), Fla. Stat. (2011). While the Agreement here may allow a patient to request MMA arbitration, Physicians are free to reject the request

and yet still proceed to arbitration under terms they created. This arrangement is just as much contrary to public policy as the arbitration agreement in *Franks*. Like the *Franks* agreement, the Agreement here strips away the legislatively-created incentives for physicians and patients to arbitrate their medical malpractice disputes. As Physicians admit, it was because the arbitration agreement in *Franks* "avoided the incentives to arbitrate under the MMA" that it contravened public policy. (IB at 18.) The same is true in this case.

C. This Court Should Not Follow the Reasoning in *Santiago*.

Physicians ask this Court to adopt the Second District's reasoning in *Santiago* on two specific points: (1) parties may arbitrate medical malpractice disputes outside of the MMA scheme; and (2) if plaintiffs do not request MMA arbitration, then they lose the benefit of the public policies established by the MMA. (IB at 12-17.) This Court should reject both arguments.

1. Contractual Medical Malpractice Arbitration Must Adopt the MMA Arbitration Scheme.

Santiago recognized that *Franks* does not prohibit all arbitration agreements under the MMA. 135 So. 3d at 751. While true, this argument does not support deviating from the reasoning or result in *Franks.* Although the Court's decision in *Franks* was limited to the agreement before it, no material distinction exists between the *Franks* agreement and the Agreement here. Both agreements upset the carefully balanced scheme enacted by the Legislature in the MMA. Both agreements

incorporate the MMA, but then effectively re-write the MMA by excising substantial incentives crafted by the Legislature. Therefore, the fact that arbitration agreement in *Franks* also adopted non-economic damages caps and did not require the defendants to engage in the presuit process is not dispositive. It was the agreement's failure to include the MMA's incentives – particularly the concession of liability – that caused the *Franks* agreement to be void as against public policy. *See* 116 So. 3d at 1248 ("The [concession of liability] incentive provided to claimants to encourage arbitration is a necessary provision of the MMA."); *id.* at 1253 (Pariente, J., specially concurring) ("[B]y requiring arbitration without in turn requiring the counter-balance of the defendant admitting liability, the [agreement] undermines the public policy set forth in the statute of reducing attorney's fees, litigation costs, and delay.")

Unlike the *Santiago* plaintiffs, the Crespos do not seek a categorical preclusion of all medical malpractice arbitration agreements. There are at least two types of enforceable private arbitration agreements that Physicians could have drafted. First, an agreement that did not adopt any of the MMA provisions could be enforceable. In *Franks*, this Court left open the possibility of enforcing private arbitration agreements to resolve medical malpractice disputes if the agreement did

not adopt any part of the MMA.[7] *See generally Franks*, 116 So. 3d at 1249-50 (discussing *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989)). Second, an arbitration agreement could be enforceable if it adopts all of the substantial incentives for arbitration created in the MMA. The parties could then add to the agreement terms not expressly covered by the MMA, so-called "gap fillers." "Gap fillers" would include terms like where the arbitration would take place, how soon the arbitration should be conducted, how long discovery will last, etc.

The Agreement here does not adopt either permissible scheme. Consistent with *Franks*, the Crespos seek to invalidate the Agreement because it incorporates the pro-physician parts of the MMA without adopting the pro-patient MMA provisions. *Franks*, 116 So. 3d at 1248.

2. Parties Need Not "Invoke" A Remedial Statute to be Entitled to its Protections.

Contrary to Physicians' argument, Plaintiffs are not required to "invoke the protections of section 766.207" to be protected from contracts that violate public policy. *Santiago*, 135 So. 3d at 570; (IB 12-13). The *Santiago* court suggested,

[7] This Court in *Franks* left open this possibility to ensure its decision complied with the Federal Arbitration Act (FAA). 116 So. 3d at 1249-50. The Physicians have never raised the FAA. They have relied exclusively on the Florida Arbitration Code in Chapter 682. Any argument based on the FAA has been waived. *See Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011).

without deciding, that an agreement cannot run afoul of the MMA arbitration scheme where a plaintiff never requested MMA arbitration. 135 So. 3d at 571. This suggestion is contrary to the holding in *Franks* that "any [agreement] that seeks to enjoy the benefits of the arbitration provisions under the statutory scheme must necessarily adopt all of its provisions." 116 So. 3d at 1248. Indeed, *Franks* does not indicate that the plaintiff there requested MMA arbitration before filing suit. 116 So. 3d at 1242-43.

Moreover, as explained *supra* at Sections I.A. and I.B.1, the Agreement's arbitration scheme runs afoul of public policy. "[I]f an arbitration agreement violates public policy, no valid agreement exists." *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456, 465 (Fla. 2011). It would turn the law on its head to require plaintiffs to invoke a particular public policy before litigation or be forced to arbitrate under an invalid agreement. Thus, whether the Crespos did or did not timely demand MMA arbitration is irrelevant.

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

If this Court concludes that the Agreement is valid under public policy, then, in the alternative and in the exercise of its discretion, it should consider two additional issues raised, but not decided, in the Fifth District. *See Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1261 (Fla. 2014) (finding that once Supreme Court has

jurisdiction, it may exercise its discretion to consider other issues which have been "properly briefed and argued and are dispositive of the case."). First, whether Mr. Crespo, who never signed or consented to the Agreement, can be compelled to arbitrate even though his claim is not derivative. Second, if the answer to the first question is "no," whether the Agreement is unenforceable as to both Mr. and Mrs. Crespo because it fails of its essential purpose, as all claims by all parties cannot be arbitrated in a single forum.

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

A non-signatory can be compelled to arbitrate only if, unlike Mr. Crespo in this case, his claims are purely derivative of a signatory's claims. As Judge Altenbernd observed in his concurrence in *Santiago*, while a doctor may intend that her patients forego their constitutional rights to a jury trial to receive medical services, parties with individual (not derivative) claims should not be compelled to arbitrate under an agreement they never signed. 135 So. 3d at 572 (Altenbernd, J., concurring).[8] Here, Mr. Crespo has brought only direct, not derivative, claims for the emotional distress he suffered as a result of losing his unborn child to stillbirth.

[8] The father in *Santiago* did not "challenge on appeal the extent to which he may be bound by the arbitration agreement." 135 So. 3d at 570 n.1. Due to a preservation issue, the Second District did not decide the issue of whether a non-signatory father with individual claims could be compelled to arbitrate.

(Appx. 10 at ¶ 43; 11 at ¶ 47; 12 at ¶ 51; 13 at ¶ 55; 15 at ¶ 59; 16 at ¶ 63; 17 at ¶ 67; 19 at ¶ 71; 21 at ¶ 77; 25 at ¶ 82; 26 at ¶ 87; 28 at ¶ 92.)

This Court has recognized that parents may bring a direct action for the negligent stillbirth of their child. *See Tanner v. Hartog*, 696 So. 2d 705, 708 (Fla. 1997) (holding that "public policy dictates that an action by the parents for negligent stillbirth should be recognized in Florida."). The Court explained that an action "for negligent stillbirth is a direct common law action by the parents which is different in kind from a wrongful death action." *Id.* (emphasis added). The damages in a negligent stillbirth case are "limited to mental pain and anguish and medical expenses incurred incident to the pregnancy," rather than the damages available to parents under the wrongful death statute. *Id.* at 708-09. Thus, while Mr. Crespo's claims would be derivative of the estate's claims in a wrongful death case, *see Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752, 762 (Fla. 2013), Mr. Crespo has his own independent cause of action for his damages in a negligent stillbirth case, *see Kammer v. Hurley*, 765 So. 2d 975, 977 (Fla. 4th DCA 2000), *receded from on other grounds*, *Special v. Baux*, 79 So. 3d 755 (Fla. 4th DCA 2011) (noting that

parents recovered direct damages for the mental anguish and medical expenses incident to stillbirth).[9]

Unlike a wrongful death cause of action, Mr. Crespo's right to recover is not statutorily predicated on the decedent's right to recover. *See Laizure*, 109 So. 3d at 760 (holding that "recovery is precluded is the decedent could not have maintained an action and recovered damages if death had no ensured."). Indeed, Mr. Crespo's claims cannot be derivative because he could bring his own, direct claim for negligent stillbirth even if Mrs. Crespo had waived her right to sue. In this respect, Mr. Crespo's claim is akin to a cause of action for negligent infliction of emotional distress. This Court specifically considered whether a claim for emotional distress "is a derivative claim flowing from the injuries and death of the minor or is a separate, direct, and independent claim." *Champion v. Gray*, 478 So. 2d 17, 22 (Fla. 1985) (*on rehearing*), *receded from on other grounds*, *Zell v. Meek*, 665 So. 2d 1048,

[9] In other jurisdictions allowing negligent stillbirth claims, courts have found that the father's claim is independent. *See e.g.*, *Spangler v. Bechtel*, 958 N.E.2d 458, 471-72 (Ind. 2011) (emotional distress suffered from delivering stillborn child results in direct, not derivative, claims); *Abdallah v. Callendar*, 1 F.3d 141, 148 (3d Cir. 1993) ("[A] father should have his own [negligent stillbirth] claim if he experiences that distress, provided he" meets certain conditions); *Carey v. Lovett*, 622 A.2d 1279, 1287-88 (N.J. 1993) (distinguishing between mother and father's claims for medical negligence resulting in injury or death to fetus); *Johnson v. Ruark Ob. And Gyn. Assoc., P.A.*, 395 S.E.2d 85, 99 (N.C. 1990) (in negligent stillbirth case, explaining that *each of the parents* had a claim for emotional distress); *Giardina v. Bennett*, 111 N.J. 412, 415 (N.J. 1988) (duty of care owed not only to pregnant woman and her unborn child, but to the expectant father).

1053 (Fla. 1996). The Court concluded that the emotional distress claim is both direct and distinct. *Id.* Although a claim for emotional distress requires a distinct physical injury, whereas a claim for negligent stillbirth does not, a separate and distinct duty still lies to fathers, like Mr. Crespo, who may foreseeably suffer an injury if a physician fails to use reasonable care. *See id.*[10]

Physicians' arguments for compelling Mr. Crespo to arbitrate are unavailing. Physicians erroneously contend that by simply invoking the phrase "arising out of related to," the Agreement can bind non-signatories. (IB at 25.) Yet, "no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate." *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999); *see also Technical Aid Corp. v. Tomaso*, 814 So. 2d 1259, 1261 (Fla. 5th DCA 2002) (holding that one "'who has not agreed, expressly or implicitly, to be bound by an arbitration agreement cannot be compelled to arbitrate.'") (citations omitted). The cases cited by Physicians are inapposite, either because they are factually distinguishable or

[10] *See also Finnegan ex rel. Skoglind v. Wisc. Patients Comp. Fund*, 263 Wis. 2d 574, 589-90 (2003) (plaintiff claiming emotional distress is victim of independent tort and claim is not derivative; claim has its own elements distinct from underlying negligence claim); *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462 (Mo. 2001) (claim for negligent infliction of emotional distress, unlike consortium claim, is not derivative); *Anthem Cas. Ins. Co. v. Miller*, 729 A.2d 1227, 1228 (Pa. Super. 1999) (claim for emotional distress does not arise from victim's injuries and therefore is not analogous to a derivative loss of consortium claim).

come from a jurisdiction that statutorily authorizes patients in medical malpractice cases to bind spouses and heirs to arbitration agreements.

For instance, *Cuningham Hamilton Quiter, P.A. v. B.L. of Miami, Inc.*, 776 So. 2d 940, 943 (Fla. 3d DCA 2000), and the cases upon which it relies,[11] arose from very different circumstances. In *Cuningham*, BL agreed to arbitrate any claim "arising out of or relating to" the construction agreement with its contractor. *Id.* at 941. BL also agreed that all necessary parties should participate in the arbitration and directed that subcontracts have similar arbitration requirements. *Id.* When BL subsequently had a dispute with a subcontractor, BL could be compelled to arbitrate its claims based on the express agreement *it* made to arbitrate all claims, even though it never directly contracted with the subcontractor. *Id.* at 942. *Cuningham* does not stand for the proposition that a non-party, who has never agreed to arbitrate claims arising out of his spouse's medical treatment, can be compelled to arbitrate because his *spouse* agreed to broad arbitration language.

[11] The cases on which *Cuningham* rely all required signatories, who had contractually agreed to arbitration, to arbitrate with willing non-signatories. *See Vic Potamkin Chevrolet, Inc. v. Bloom*, 386 So. 2d 286, 288 (Fla. 3d DCA 1980) (party who signed arbitration agreement compelled to arbitrate against dealership and its employees because contract was broad enough to include the non-signatory employees under the doctrine of *respondeat superior*); *Sas v. Phoenix Graphics, L.C.*, 700 So. 2d 422, 423 (Fla. 3d DCA 1997) (court would not deny non-signatories ability to participate in contractually-required arbitration where their alleged liability arose from legal representation of signatories); *Passerrello v. Robert L. Lipton, Inc.*, 690 So. 2d 610, 611 (Fla. 4th DCA 1997) (compelling signatory to arbitrate her claims against non-signatory, intended beneficiary of the contract).

The same is true of *Armas v. Prudential Sec., Inc.*, 842 So. 2d 210, 211 (Fla. 3d DCA 2003), a case in which a non-signatory was allowed to enforce an arbitration agreement. There, a principal and his corporation entered into an arbitration agreement with Prudential. *Id.* After another of the principal's corporations (Dole) issued a bad check, Prudential filed an arbitration proceeding against the signatories and a separate lawsuit against Dole. *Id.* Dole moved to transfer the case to the pending arbitration. *Id.* Because of the "arising out of or related to" language in the arbitration agreement between Prudential and the principal, and because the claims against Dole arose from the same controversy as the claims already in the arbitration, Dole was allowed to enforce the agreement. *Id.* at 212. Thus, Prudential, a signatory to the arbitration agreement, was forced to allow Dole, a non-signatory, to participate in the arbitration because of a broadly-worded arbitration agreement which *it had signed*.

Nothing in these cases suggests that a non-signatory, who does not want to arbitrate, can be compelled to arbitrate simply because his claims arise from the same controversy as a signatory's claims. Such a holding would be antithetical to the firmly-established rule that "no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate." *Seifert*, 750 So. 2d at 636; *see also Sovereign Healthcare of Tampa, LLC v. Estate of Yarawsky*, 150 So. 3d 873,

875 (Fla. 2d DCA 2014) (holding that wife, who had no authority to sign arbitration agreement on behalf of her husband, could not bind his estate).

Nor is Mr. Crespo an intended third-party beneficiary of the Agreement. (*See* IB at 28.) Under this doctrine, "a person is a third party beneficiary where a contract evinces a 'clear or manifest intent' to 'primarily and directly benefit'" another. *Foundation Health v. Westside EKG Assocs.*, 944 So. 2d 188, 197 (Fla. 2006); *see also Technical Aid*, 814 So. 2d at 1261 (holding contract binds third parties only if the contract expresses "an intent to primarily and directly benefit the third party.") For example, if "A contracts with B to pay a debt B owes to C," then C is an intended third party beneficiary. *Marianna Lime Prods. Co. v. McKay*, 147 So. 264, 278 (Fla. 1933). A person becomes a third party beneficiary where a promisor undertakes to benefit the third party as consideration to the promisee. *Id.* In contrast, here, the Agreement reveals no intent to primarily and directly benefit Mr. Crespo. (Appx. 93-95). Mr. Crespo received no direct benefit (be it services, money or chattel) from Physicians under the Agreement; nor have Physicians identified any such benefit. (IB at 28.)

Equally misplaced is Physicians' argument that this Court should follow the decisions of intermediate California appellate courts. (IB at 26-27.) Unlike Florida, California has a statute that allows a contract for medical services to require arbitration of any dispute as to professional negligence provided certain conditions

are met. *See* Cal. Civ. Proc. Code § 1295(West 2015). To effectuate the Legislative purpose of this statute, California courts allow one spouse to bind another to arbitration. *See Michaelis v. Schori*, 20 Cal.App.4th 133, 139 (Ct. App. 1993) (holding that, if agreement complies with statute, patient can bind non-signatories); *Gross v. Recabaren*, 206 Cal. App.3d 771, 781 (Ct. App. 1988) (same), *approved by Ruiz v. Podolsky*, 50 Cal.4th 838, 849 (2010). Florida has no similar statute. Thus, this California statute and the California cases interpreting it have no bearing on this Florida case.

Outside of medical malpractice, the California statute does not apply, and California courts continue to enforce the common law rule that non-signatories with independent claims cannot be compelled to arbitrate. *Daniels v. Sunrise Senior Living, Inc.*, 212 Cal.App.4th 674, 681-86 (Ct. App. 2013) (distinguishing arbitration agreements not entered into pursuant to section 1295). Other state courts have also rejected the argument that a mother can bind a father to an arbitration agreement that

he never signed, as shown in the footnote below.[12] These out-of-state decisions, grounded in the common law (not a unique statute like the California statute), are more akin to Florida law and more analogous to the instant case. This Court should follow these out-of-state decisions rather than the distinguishable California cases on which Physicians rely.

In summary, because "no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate," the trial court erred in compelling Mr. Crespo to arbitrate under the Agreement. *Seifert*, 750 So. 2d at 636. Thus, even if the Court concludes that the Agreement is not void as against public policy as argued in section I, *supra*, the claims of Mr. Crespo cannot be stayed and cannot be directed to arbitration; his claims must be allowed to proceed in the trial court. *See Tech. Aid Corp.*, 814 So. 2d at 1261 (affirming order compelling arbitration as to signatory to agreement but reversing the order compelling

[12] *See Ciaccio v. Cazayoux*, 519 So. 2d 799, 804 (La. Ct. App. 1987) (mother could not bind father to arbitration agreement because "ordinary contract principles govern the question of who is bound by an arbitration agreement, and a party cannot be required to submit to arbitration any dispute that he has not agreed to submit."); *Moore v. Woman to Woman Obstetrics & Gyn., L.L.C.*, 416 N.J.Super. 30, 45 (Ct. App. 2010) (wrongful birth action by father was direct, not derivative, and court was "not aware of any legal theory that would permit one spouse to bind another to an agreement waiving the right to trial on his or her claim without securing his consent to the agreement."); *see also Ex parte Dickinson*, 711 So. 2d 984 (Ala. 1998) (non-signatory spouse cannot be compelled to arbitrate contract dispute based on agreement entered into by other spouse).

arbitration as to a non-signatory); *Liberty Commc'ns, Inc. v. MCI Telecomms. Corp.*, 733 So. 2d 571, 576 (Fla. 5th DCA 1999) (same).

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

The Agreement specifically states:

> 4. ALL CLAIMS MUST BE ARBITRATED BY ALL CLAIMANTS. All claims based upon the same occurrence, incident, or care shall be arbitrated in one proceeding. It is the intention of the parties that this Agreement bind all parties whose claims may arise out of or relate to treatment or services provided by the provider of medical services, including the patient, the patient's estate, any spouse or heirs of the patient … at the time of the occurrence giving rise to the claim. …

(Appx. 93 (emphasis added).) The Agreement also states: "[i]f any provision of this Agreement is held invalid or unenforceable, the remaining provisions shall remain in full force and shall not be affected by the invalidity of any other provision." (Appx. 95 at ¶ 10.) While Physicians argued in this Court and below that any offending provision of the Agreement could be severed (Appx. 202; IB at 29-30), the clear language of the Agreement to address all claims, by all claimants, in one forum, expresses an intention not to arbitrate except upon these terms.

Contrary to Physician's representation, the Crespos do not assert that inclusion of Paragraph 4 is an illegal provision that automatically voids the entire Agreement. (IB at 29.) Rather, the Crespos maintain that the requirement of

Paragraph 4 (*i.e.*, that all parties arbitrate all claims) goes to the very essence of the agreement. Because Mr. Crespo's participation in arbitration is necessary to fulfill the intent of the parties, Paragraph 4 cannot be severed.

This Court explained in *Shotts v. OP Winter Haven, Inc.* the test for determining whether a contractual provision can be severed:

> As to when an illegal portion of a bilateral contract may or may not be eliminated leaving the remainder of the contract in force and effect, the authorities hold generally that a contract should be treated as entire when, by a consideration of its terms, nature, and purpose, each and all of its parts appear to be interdependent and common to one another and to the consideration. Stated differently, a contract is indivisible where the entire fulfillment of the contract is contemplated by the parties as the basis of the arrangement. On the other hand, a bilateral contract is severable where the illegal portion of the contract does not go to its essence, and where, with the illegal portion eliminated, there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other.
>
> Whether a contract is entire or divisible depends upon the intention of the parties. And this is a matter which may be determined by a fair construction of the terms and provisions of the contract itself, and by the subject matter to which it has reference.

86 So. 3d at 475 (quoting *Local No. 234 v. Henley & Beckwith, Inc.*, 66 So. 2d 818, 821-22 (Fla. 1953)) (emphasis added); *see also Franks*, 116 So. 3d at 1249 (quoting Williston on Contracts, rev. ed., Vol. 6, sec. 1782) (same).

Here, Paragraph 4 of the Agreement expresses a clear intent not to engage in more than one proceeding. (Appx. 93.) In fact, Paragraph 4 is the only paragraph in the entire Agreement that sets forth words to the effect of "it is the intention of the

parties . . . ." (Appx. 93-95). Of all of the provisions in the Agreement, Paragraph 4 is the most clear and unequivocal in expressing the parties' intent and what is essential to their Agreement. As dictionaries and thesauruses teach, if something is "of the essence," it is "of such vital importance that a sufficient performance of the contract cannot be had without exact compliance with it." *Black's Law Dictionary* 546 (6th ed. 1990). Here, the essence of the Agreement – as drafted by Physicians – was that all claims, by all claimants, must be included in one arbitration proceeding. (Appx. 34 at ¶ 4) The parties bargained to litigate all claims only one time.

But Mr. Crespo cannot be forced to arbitrate under an Agreement he never signed and from which he received no benefit. Physicians could have fulfilled the intent of the Agreement by offering Mr. Crespo the option of entering into the Agreement. They did not do so. (Appx. 117-20.) Thus, due directly to the Physicians' omission, the intent to bring all claimants into one forum has failed, meaning the essence of the Agreement has failed. Indeed, the Court "would be hard pressed to conclude with reasonable certainty that, with the illegal provision gone, 'there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other,' – particularly, when those legal promises are viewed through the eyes of the contracting parties." *Shotts,* 86 So. 3d at 478 (internal citation omitted).

If this Court concluded that the intent to bind Mr. Crespo could be severed from the Agreement, then the parties would be left to address nearly identical claims in separate forums, possibly with inconsistent results. The Court should not conclude that the parties agreed to proceed in this manner given the mandatory language of the Agreement. (Appx. 34 at ¶ 4.) Rather, the Court should conclude that once Mr. Crespo's claims are severed from the arbitration proceeding, the Agreement no longer contains mutually-binding promises in the eyes of the contracting parties. *See Shotts*, 86 So. 3d at 478; *see also FL-Carrollwood Care, LLC v. Gordon*, 72 So. 3d 162, 167 (Fla. 2d DCA 2011) ("'Severance is appropriate where the void provision can be severed without affecting the intent of the parties to arbitrate.'") (citation omitted). There is no indication in the Agreement that the parties intended to engage in piecemeal litigation of nearly identical claims; the intent is to the contrary. Thus, the requirement that Mr. Crespo participate in the arbitration cannot be severed without destroying the essence of the Agreement.

In short, the parties promised that they would resolve all claims, even those of non-signatories, in one arbitral forum. Because Mr. Crespo's claims cannot be arbitrated, the entire agreement must fail because the essence of the agreement can no longer be fulfilled. *See Franks*, 116 So. 3d at 1249; *Shotts*, 86 So. 3d at 477 ("contractual provisions are severable, where the illegal portion of the contract <u>does not</u> go to its essence . . . .") (citation omitted) (emphasis added). This Court should

conclude that it cannot sever the portion of Paragraph 4 improperly requiring Mr. Crespo's participation in arbitration and find the Agreement to be invalid.

CONCLUSION

This Court should affirm the decision and reasoning of the Fifth District in this case that the Agreement is void for public policy under the MMA. It should reject the contrary decision and reasoning in *Santiago v. Baker*, 135 So. 3d 569 (Fla. 2d DCA 2014). Alternatively, if this Court concludes the Agreement is not void for public policy, it should, in the exercise of its discretion, hold the Agreement is unenforceable against Mr. Crespo, a non-signatory, and that, as a result, the Agreement as a whole must fail because, contrary to the essence of the Agreement, it is not possible to arbitrate all claims by all parties in a single forum.

Respectfully submitted,

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

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