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Fla. Couple Wants Door Shut On Med Mal Ruling

By **Christopher Crosby**

Law360, New York (July 10, 2017, 5:49 PM EDT) -- A Florida couple renewed pleas Monday to the Florida Supreme Court not to rethink its ruling voiding two medical malpractice arbitration agreements between doctors and patients, arguing that a recent U.S. Supreme Court ruling does not invalidate its findings, as a women's health care provider contends.

Lualhati and Jose Crespo told the state's high court not to change its **December decision** regarding two lower court cases in their medical malpractice suit against Women's Care Florida LLC. The Crespos said that the court's mandate is unaffected by a recent U.S. Supreme Court decision, which they claimed simply restated existing precedent rather than creating a new one.

The Crespos objected that May's decision by the high court in *Kindred Nursing Centers v. Clark*, where a voided arbitration agreement in Kentucky was reinstated because the court ruled federal law preempted Kentucky public policy, does not create a new conflict between Florida's Medical Malpractice Act and the Federal Arbitration Act when parties agree upfront to work under state law.

"A court, however, may announce a generally applicable rule of law in an arbitration case," the Crespos wrote. "This is not a new or ground-breaking opinion."

The Crespos' opposition comes after Women's Care asked Florida's high court to retract their mandate Wednesday, arguing that the Supreme Court emphasized arbitration agreements can't be singled out for "disfavored treatment."

The health care provider argued its case changed when the high court ruled in the Kentucky case that federal arbitration law preempted state in instances where the arbitration rules previously agreed upon by the parties were not enforced.

"The U.S. Supreme Court condemned the discriminatory application of state law to undermine arbitration agreements in contravention of the FAA," Women's Care wrote.

This is Women's Care's second bid for Florida's high court to reexamine **the case**. In February, the court **refused to rehear** the case, affirming a ruling by the Fifth District in the Crespo case and also reversing a Second District decision in a similar case, *Santiago v. Baker*, which also involves Women's Care Florida.

At the time, the high court said the arbitration agreement in the Crespo case violates public policy since it includes terms only favorable for the doctors, and runs counter to the legislative intent of the MMA in a way that is "clearly injurious to the public good."

The Crespo case stemmed from events in August 2011 when Lualhati Crespo, who was 39 weeks pregnant and having contractions at the time, was turned away from her doctor's appointment because she was a few minutes late and given a new appointment for four days later. One day before the new appointment date, she delivered her stillborn son, Joseph Crespo.

In *Santiago v. Baker*, parents Leydiana Santiago and Armando Ocasio sued for medical malpractice after their baby suffered severe birth defects allegedly caused by a drug that Santiago resumed taking to treat a chronic disease after she became a patient of Dr. Marisa Baker and Women's Care

Florida.

On Monday, the Crespos reiterated that those decisions should stand, arguing Women's Care failed to preserve its FAA preemption argument because it was only brought up for the first time during the appeal. They also argued that since the original arbitration agreement did not involve interstate commerce, the FAA can't apply.

Women's Health has asked the U.S. Supreme Court to review its case, according to court records.

Representatives and counsel for the parties did not immediately return requests for comment Monday.

Women's Care Florida is represented by Dinah Stein and Mark Hicks of Hicks Porter Ebenfeld & Stein PA, and Thomas E. Dukes III and Ruth C. Osborne of McEwan Martinez & Dukes PA.

The Crespos are represented by Bryan Gowdy and Jessie Leigh Harrell of Creed & Gowdy PA.

The case is Eileen Hernandez, M.D., et al. v. Lualhati Crespo et al., case number SC15-67, in the Supreme Court of Florida.

--Additional reporting by Y. Peter Kang and Shayna Posses. Editing by Breda Lund.

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