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APPENDIX 1

IN THE FLORIDA SUPREME COURT

CASE NO.: SC16-1353

5th DCA Case No.: 5D15-2574
L.T. Case No.: 2014-781-CA-G

[Filed March 20, 2017]

KINDRED HOSPITALS EAST, LLC d/b/a KINDRED HOSPITAL OCALA,
Petitioner,

v.

ESTATE OF MARIANNE KLEMISH, etc., et al.,
Respondents.

RESPONDENTS' REPLY TO RESPONSE TO SHOW CAUSE ORDER

Despite Petitioner's protestations to the contrary, the Court's decision in *Hernandez v. Crespo*, Case No. SC-15-67, 41 Fla. L. Weekly S625, 2016 WL 7406537 (Fla. Dec. 22, 2016), is controlling. *Crespo* resolved the same conflict issue certified in this case, and Petitioner has not provided any other basis for the Court to exercise jurisdiction over this case. Accordingly, because the grounds previously asserted for jurisdiction have been adjudicated against

Petitioner and no longer exist, and because *Crespo* is controlling, this Court should deny review.

No basis exists for this Court to exercise jurisdiction.

1. Petitioner's basis for invoking the Court's discretionary jurisdiction was the conflict certified by the Fifth District in the opinion below. *See Klemish v. Villacastin*, Case No. 5D15-2574, 2016 WL 3768981 at *3 (Fla. 5th DCA July 15, 2016) ("As we did in *Crespo* and *A.K.*, 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)).

2. Because this case and *Crespo* involved the identical legal conflict, the Court stayed this case pending its decision in *Crespo*. *See* Mt. to Stay ¶ 5 ("This case will involve the same legal issues presented in the *Crespo* case…"); Aug. 8, 2016 Order.

3. In *Crespo*, the Court resolved the conflict by approving the Fifth District's opinion and disapproving the Second District's decision in *Santiago*. 2016 WL 3768981 at * 7. The conflict between the Fifth and Second Districts having been resolved, there is no longer any basis for this Court to exercise conflict jurisdiction.

4. Petitioner has not identified any other grounds that would allow this Court to exercise its discretionary jurisdiction. Although Petitioner urges the Court to accept jurisdiction to clarify an "important" issue (Resp. ¶¶ 3, 20), the Fifth District did not certify a question of great public importance. *See Klemish*, 2016 WL 3768981 at *3. This Court's discretionary jurisdiction on matters of great public importance is

dependent on the act of certification by the district court. *See* Art. V, § 3(b)(4); *Floridians for a Legal Playing Field v. Floridians Against Expanded Gambling*, 967 So. 2d 832, 833 (Fla. 2007).

5. Because there are no constitutional grounds for this Court to exercise its discretionary jurisdiction, the Court must deny review.

Klemish and _Crespo_ are grounded on the same reasoning; the arbitration agreements are not materially different under that reasoning.

6. Putting aside the absence of jurisdiction, Petitioner argues that the Court should accept review of this case because the terms of its arbitration agreement allegedly differ from the agreement in *Crespo*. Yet, Petitioner argues distinctions without a difference.

7. In *Klemish*, the Fifth District considered only one provision of the agreement material: "in paragraph 5 of the parties' agreement, [Petitioner] incorporated the [Medical Malpractice Act's ("MMA")] presuit requirements…." 2016 WL 3768981 at * 3. Because it adopted the MMA, Petitioner "was required to incorporate all of the MMA's provisions in order for the arbitration agreement to be valid. [Petitioner] failed to do so and, thus, the arbitration agreement is invalid." *Id.*

8. Similarly, in *Crespo*, this Court held that an agreement that incorporates the MMA, but then provides a way for medical providers to arbitrate on terms less favorable than those in the MMA, is void as against public policy. 2016 WL 7406537 at * 6.

9. Despite the fact that Petitioner's agreement incorporates the MMA, Petitioner argues that *Crespo* is not controlling because of alleged differences between its arbitration agreement and the agreement in *Crespo*. (Resp. at 2-10.) Of course, having distinguishable facts is not a basis for the Court to exercise jurisdiction.

10. Regardless, the two arbitration agreements are not materially different. Both agreements incorporate the MMA into their terms. *Crespo* at *2, 6; *Klemish* at *1. Both agreements allow the parties to arbitrate under the MMA. *Crespo* at *2, 6; *Klemish* at *1. If the parties do not agree to MMA arbitration, both agreements require the parties to arbitrate on terms that are different from those set forth in the MMA. *Crespo* at *1-3; *Klemish* at *1. Thus, the fact that Petitioner's agreement retains the rights afforded to the parties under the MMA *if* they agree to MMA arbitration, but *not* if they engage in contractual arbitration, is no different than *Crespo.* (*Compare* Resp. ¶ 6.)

11. For example, Petitioner argues that the agreement in *Crespo* was found void, in part, because in contractual arbitration, the parties would share arbitration costs instead of the medical provider paying those costs, as required under the MMA. (Resp. ¶ 12.) Petitioner incorrectly contends that its agreement is different because "if the parties had agreed to participate in the MMA's statutory arbitration process (which they didn't), paragraph 6 of the parties' arbitration agreement clearly required Petitioner to comply with all provisions of Chapter 766, including the fees and costs provisions…." (*Id.*) However, the

Crespo agreement also allowed the parties to arbitrate under the MMA, which would have required the medical provider to pay all arbitration costs. 2016 WL 7406537 at *2. Put simply, there is no material difference between the agreements.

12. Just as in *Crespo*, by incorporating the MMA into its arbitration agreement, Petitioner was required to arbitrate under all of the MMA terms or not at all. It could not set up an alternative arbitration scheme that is less favorable to patients. *See Crespo* at *6.

13. In addition to the terms expressly considered by the Fifth District, Petitioner cites additional terms that do not appear in the Fifth District's opinion and asks this Court to go behind the Fifth District's reasoning to apply the law differently here. (Resp. n.1, ¶¶ 7, 11, 16, 17.) However, Petitioner has not explained how those omitted terms would change the outcome. Moreover, disagreement with the Fifth District's analysis is not a basis for jurisdiction. In short, Petitioner has not articulated any reason why *Crespo* is not controlling, nor identified any grounds for this Court to exercise its discretionary jurisdiction. Review must be denied.

The Federal Arbitration Act is not a ground to exercise jurisdiction.

14. Petitioner also suggests that this Court should hear the case because, if *Crespo* is applied to invalidate its agreement, that result would violate the Federal Arbitration Act (FAA). (Resp. ¶ 19.) This argument lacks merit for three reasons: (1) Petitioner waived any FAA preemption argument by not raising it below; (2) supposed conflict with federal law is not a basis for this Court to exercise jurisdiction under Article V,

section 3 of the Florida Constitution; and (3) this Court implicitly rejected the FAA preemption argument when it denied the petitioner's rehearing motion in *Crespo.*

15. First, Petitioner never argued FAA preemption in either the trial or appellate courts below. An issue may be raised in this Court for the first time only if there is fundamental error that is equivalent to the denial of due process. *See State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993). Petitioner has not argued that applying *Crespo* to invalidate its agreement would amount to a denial of due process.

16. Second, the Court does not have jurisdiction to consider cases simply because one party alleges that the result may run afoul of federal law. Article V, section 3 of the Florida Constitution articulates the specific grounds on which this Court can exercise its discretionary jurisdiction. Potential federal preemption is not one of those grounds.

17. Third, the petitioners in *Crespo* moved for rehearing on the ground that the decision allegedly violated the FAA. *See Crespo*, Case No. SC15-67, docketed Jan. 6, 2017. The Court implicitly rejected these arguments when it denied the rehearing motion. *Hernandez v. Crespo*, Case No. SC15-67, 2017 WL 786846 (Feb. 27, 2017). Indeed, *Crespo* does not foreclose contractual arbitration in medical malpractice disputes. (*Compare* Resp. ¶ 19.) Rather, *Crespo* provides that medical providers who contractually agree to be bound by the MMA must accept all of the MMA's terms, not merely cherry-pick those terms favorable to providers. 2016 WL 7406537 at *6. Where parties agree to be bound by state law, the FAA does not preempt that state law. *See Volt Info. Scis., Inc. v.*

Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 479 (1989).

The Court should not hold the case in abeyance pending U.S. Supreme Court review of an unrelated case.

18. Finally, Petitioner asks that even if the Court declines to accept jurisdiction, that it hold the case in abeyance until the U.S. Supreme Court determines *Kindred Nursing Centers Limited Partnership v. Clark*. (Resp. ¶ 21.) As with the other arguments, this argument is meritless. *Clark* will be of no precedential value in this case because it is reviewing FAA preemption in the context of a judge-made rule on agency law, not a state statutory scheme. *See* https://www.supremecourt.gov/qp/16-00032qp.pdf ("The question presented is: Whether the FAA preempts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement.").

19. Petitioner identified four other Supreme Court cases that it contends already support its federal preemption argument. (*Id*.) It has not explained how the result in *Clark* will change that law or have any impact on this case. To the contrary, nothing about the issue in *Clark* suggests that it will change the law in the U.S. Supreme Court's 1989 *Volt* decision – that is, parties are bound by the state laws they incorporate into their arbitration agreements. 489 U.S. at 479. And even were the *Clark* decision relevant, Petitioner has not explained how the decision would confer jurisdiction upon the Court. Accordingly, there is no

reason for the Court to hold this case in abeyance pending the decision in *Clark*.

Conclusion

Because there is no basis for this Court to exercise its discretionary jurisdiction, the Court should neither hear the case nor hold it in abeyance pending the U.S. Supreme Court's decision in an unrelated case.

Respectfully submitted,

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[*Certificate of Service Omitted in Printing of this Appendix*.]

APPENDIX 2

IN THE FLORIDA SUPREME COURT

CASE NO.: SC16-1353

5th DCA Case No.: 5D15-2574
L.T. Case No.: 2014-781-CA-G

[Filed June 12, 2017]

KINDRED HOSPITALS EAST, LLC d/b/a KINDRED HOSPITAL OCALA, Petitioner,	)
v.	)
ESTATE OF MARIANNE KLEMISH, etc., et al., Respondents.	)

RESPONDENTS' RESPONSE TO PETITIONER'S MOTION FOR REINSTATEMENT OF APPEAL

Kindred Hospitals East, LLC, d/b/a Kindred Hospital Ocala ("Petitioner") improperly moves for reinstatement of its appeal on the grounds that the Supreme Court of the United States recently decided a case involving the Federal Arbitration Act ("FAA"). The motion is improper and unmeritorious for four reasons: (1) reinstatement is not appropriate; Petitioner's motion is an unauthorized motion for rehearing; (2) the Supreme Court's decision contains no new law and

would not change the outcome here; (3) there is no basis for this Court to exercise jurisdiction; and (4) Petitioner waived its argument that the FAA preempts this Court's application of state law by failing to raise it below. Accordingly, Petitioner's motion for reinstatement must be denied.

I. Reinstatement is not appropriate.

Petitioner's motion for reinstatement is actually an unauthorized motion for rehearing. When this Court declined to exercise jurisdiction, its order specifically provided: "No motion for rehearing will be entertained by the Court." *See* Order dated May 5, 2017. Likely in response to this language, Petitioner moved for "reinstatement" of its appeal, but noted that its motion was filed within 15 days of the order, just as would be required for rehearing. *See* Mt. at ¶ 10; Fla. R. App. P. 9.330(a) ("A motion for rehearing … may be filed within 15 days of an order….). Petitioner's attempted end-run around the Court's order is unavailing because reinstatement is not an appropriate remedy here.

Petitioner cites several cases for the proposition that the Court has *authority* to reinstate an appeal that was previously dismissed. *See* Mt. at ¶ 9. However, authority to reinstate an appeal is not the issue. The issue is whether reinstatement is appropriate where the Court has declined to exercise jurisdiction on the merits, as opposed to a case where an appeal was dismissed for procedural technicalities. Every case cited by Petitioner involves reinstatement following a procedural dismissal. *See Johnson v. Thompkins*, Case No. SC17-244 (appeal dismissed for failing to submit filing fee; motions to proceed in forma pauperis and for reinstatement granted); *Rudoy v. Rodoy*, No. SC16-

1903 (same); *Knize v. Guenther*, No. SC16-471 (same); *Carrasco v. Fla. Dep't of Corr.*, No. SC15-758 (appeal dismissed for failing to submit appendix; reinstated on motion); *Waters v. State*, No. SC12-1131 (appeal dismissed for failing to timely file jurisdictional brief; reinstated on motion); *White v. Deutsche Bank Nat'l Trust Co.*, No. SC13-609 (dismissed because notice to invoke appeared untimely; reinstated when timeliness demonstrated); *Harris v. State*, Case No. SC06-2396 (appeal reinstated upon showing that case was dismissed due to ineffectiveness of appellate counsel); *Anderson v. Munoz*, No. SC07-1896 (reinstatement ordered following dismissal for failing timely to file jurisdictional brief and appendix).[1]

Petitioner has failed to identify any case where this Court has reinstated an appeal after having considered the parties' arguments and declined to exercise jurisdiction. Rather, as the above cases demonstrate, reinstatement is appropriate only for those limited cases where an appeal is dismissed for procedural deficiencies. Because this Court declined to exercise jurisdiction after a merits review, reinstatement is not an appropriate remedy. Petitioner's motion should be denied on this basis alone.

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[1] Petitioner also cited *Ayala v. State*, No. SC16-472, 2016 WL 3405870 (June 21, 2016). Because the docket is sealed, Respondents are unable to determine the circumstances leading to the dismissal and reinstatement. Respondents requested that Petitioner provide copies of the docket, but Petitioner was unable to do so.

II. The Supreme Court's decision does not announce new law and does not change the outcome in this case.

A. A brief procedural history.

This case involves the question of whether a medical malpractice arbitration agreement is void as against public policy where it incorporates some, but not all, of the Medical Malpractice Act (MMA) provisions. Before Petitioner filed its notice to invoke, this Court had already accepted jurisdiction to answer this question in *Hernandez v. Crespo*, Case Number SC15-67. *Crespo* was before this Court on a certified conflict from the Fifth District Court of Appeal. 211 So. 3d 19, 20 (Fla. 2016), *petition for cert. filed,* (U.S. June 7, 2017) (No. 16-1458). When the Fifth District issued its opinion in the instant case, it again certified conflict. *See Klemish v. Villacastin*, No. 5D15-2574, 2016 WL 3768981 at *3 (July 15, 2016) (*Klemish LT*). This Court stayed the instant case pending the outcome in *Crespo*. Then in *Crespo*, this Court resolved the inter-district conflict by holding that "arbitration agreements which purport to incorporate the statutory scheme [of the MMA] but have terms clearly less favorable to one party … contravene the substantial incentives for both claimants and defendants to submit their cases to binding arbitration." 211 So. 3d at 26 (internal quotations omitted). Thus, the agreement in *Crespo* was declared void as against public policy. *Id.* at 27.

The petitioner in *Crespo* moved for rehearing, arguing that the decision was preempted by the FAA. The motion for rehearing was denied. *Hernandez v. Crespo*, No. SC15-67, 2017 WL 786846 (Feb. 27, 2017).

The next day, this Court ordered Petitioner to show cause why *Crespo* was not controlling and why it should not decline to exercise jurisdiction. *See* Order dated Feb. 28, 2017. Petitioner responded and argued, among other things, that this Court should hold the case in abeyance pending resolution of the Supreme Court of the United States' decision in *Kindred Nursing Centers Limited Partnership v. Clark*. Respondents filed a reply, arguing that *Kindred Nursing* would not impact the case. *See* Reply at ¶¶ 18-19. Having considered the responses, the Court declined to exercise jurisdiction, citing *Crespo. See* Order dated May 5, 2017.

B. The *Kindred Nursing* decision does not change this Court's rejection of the FAA preemption argument that was raised in *Crespo.*

Petitioner bases its motion for reinstatement on the Supreme Court's decision in *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017). In a 7-1 decision,[2] the Supreme Court reaffirmed the long-standing principle that a rule of law which singles out arbitration agreements for disfavored treatment violates the FAA. *Id.* at 1425. A court may, however, announce a generally applicable rule of law in an arbitration case. *Id.* at 1428 n.2. This is not a new or ground-breaking opinion. *See id.* at 1429 ("we once again 'reach a conclusion that … falls well within the confines of (and goes no further than) present well-

[2] Justice Thomas dissented on the view that the FAA does not apply to proceedings in state courts. 137 S. Ct. at 1429. Justice Gorsuch did not participate in the decision.

established law.'"). Indeed, in its Response to Show Cause Order (which predates *Kindred Nursing*), Petitioner argued that two decades of Supreme Court precedent provides that the FAA preempts state laws that do not place arbitration agreements on equal footing with other contracts. (Resp. at 10-12.)

Respondents countered that the Court implicitly rejected the FAA preemption argument when it denied rehearing in *Crespo*. (Reply at 6-7.) As argued in *Crespo*, the FAA does not preempt state laws where the parties agree in the arbitration agreement to be bound by those laws. *Id.* at 7 (citing *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) ("application of the California statute is not pre-empted by the [FAA] 9 U.S.C. § 1 *et seq.,* in a case where the parties have agreed that their arbitration agreement will be governed by the law of California.") (Emphasis added). This is because "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011).[3] The *Kindred Nursing* Court did not consider this issue, nor did it even mention the *Volt* decision, because the parties there did not incorporate state laws into their agreements. Thus, the holding in *Kindred Nursing* reiterates, rather than changes, long-existing law, and does not change the outcome here.

Indeed, just as in *Crespo*, Petitioner incorporated the MMA into its arbitration agreement, but did not incorporate the FAA. *See Klemish LT*, 2016 WL

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[3] Justice Scalia in *Concepcion*'s majority opinion expressly cited *Volt* with approval. 563 U.S. at 344.

3768981 at *2. Consistent with the Supreme Court's precedent in *Volt*, the *Crespo* decision held that if medical providers expressly agree in their arbitration agreement to follow the MMA, then, as a matter of state law, they must follow all of the MMA. 211 So. 3d at 26.Medical providers could just as easily agree to arbitration contracts that do not incorporate the MMA, in which case they are free to select the procedures and rules under which they arbitrate.

The question, then, is whether *Crespo* "places arbitration contracts 'on equal footing with all other contracts.'" *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463, 468 (2015). The answer is "yes." This Court has struck non-arbitration contracts as being void against public policy when the contract terms conflict with statutes enacted for the benefit of the public. *See Am. Cas. Co. v. Coastal Caisson Drill Co.*, 542 So. 2d 957, 958 (Fla. 1989) (party to a non-arbitration contract cannot waive statutory requirement enacted for the public's benefit); *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 229 (Fla. 1971) (finding void an insurance contract that attempted to limit uninsured motorist coverage required by statute). Thus, the Supreme Court's decision in *Kindred Nursing* has no impact on *Crespo*, and therefore no impact here, because it does not change the law with respect to FAA preemption. Yet, by asking this Court to reinstate its appeal, Petitioner asks this Court to consider overturning its one-month-old decision in *Crespo*. This Court should decline such an invitation.

III. There is no basis for this Court to exercise jurisdiction.

Another reason this Court should deny Petitioner's motion to reinstate the appeal is because there is no longer any basis for this Court to exercise jurisdiction. The conflict once certified by the Fifth District was resolved in *Crespo.* Petitioner argues that the *Crespo* decision is in conflict with the U.S. Supreme Court's decision *Kindred Nursing*. Mt. at ¶ 7. However, even if there were a conflict with *Kindred Nursing* (which there is not), conflict with a federal court's decision is not one of the specific jurisdictional bases articulated in Article V, section 3 of the Florida Constitution. This Court's express-and-direct-conflict jurisdiction is limited to conflicts between "decision[s] of another district court of appeal or of the [state] supreme court on the same question of law." Fla. Const. Art. V, § 3(b)(3) (emphasis added).

Nor is there any express-and-direct conflict between the Fifth District's decision in this case and the state cases cited by Petitioner. *See* Mot. ¶ 8. The cases cited by Petitioner all deal with FAA preemption. *See id.* Because Kindred waived the preemption argument by not raising it below or arguing preemption in the Fifth District (*see infra*), the Fifth District did not address whether invalidating the arbitration agreement runs afoul of the FAA. Accordingly, there can be no express and direct conflict between the Fifth District's decision in *Klemish LT* and any case in which FAA preemption was appropriately raised. *See e.g. State v. Vickery*, 961 So. 2d 309, 311 (Fla. 2007) (noting that under Article V, §3(b)(3) of the Florida Constitution, the Court's "jurisdiction to review the case depends on whether the

decision actually 'expressly and directly' conflicts with the decision of another court."). Thus, reinstating the appeal would be an exercise in futility because there is no constitutional basis for this Court to assert jurisdiction.

IV. Petitioner waived the FAA preemption argument by not raising it below.

In addition to the reasons argued *supra*, the Court should deny the motion to reinstate appeal because Petitioner did not previously raise FAA preemption in the Fifth District Court of Appeal or the trial court. *See Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) ("As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal.") To be preserved, "'an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation.'" *Id.* (quoting *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985)). Petitioner did not preserve any argument that the FAA prevents the Court from finding Petitioner's arbitration agreement void as against public policy under the MMA.

More particularly, Petitioner cited or alluded to the FAA only twice below – neither of which presented the "specific legal argument or ground" that it would now argue. On pages 12 and 13 of its Answer Brief before the Fifth District, in a section titled "Introduction," Petitioner cites only general propositions about arbitration being favored and the FAA being enacted to prevent state legislatures from restricting the enforceability of arbitration agreements. Not once did Petitioner argue that the FAA prevents Florida courts

from applying the public policy of the MMA to invalidate an arbitration agreement.

And in the trial court, Petitioner did not even mention the FAA, instead alluding only to the "strong national policy" favoring arbitration agreements. (5th DCA Appx. 75-76.) Providing the courts with a general background that arbitration is a favored means of dispute resolution does not preserve the issue of FAA preemption because such platitudes do not state the specific ground or argument that Petitioner is now attempting to raise. *See Sunset Harbour Condo*, 914 So. 2d at 928.

In addition to the general prohibition on raising new issues for the first time on appeal, there is another reason that Petitioner's failure to invoke the FAA in the trial court should preclude reliance on it now. By failing to raise FAA preemption below, Petitioner failed to develop a factual record to support the application of the FAA. "To be included within the coverage of the [FAA], an arbitration provision must be contained in a 'contract evidencing a transaction involving commerce,' 9 U.S.C. § 2." *E.g., Goodwin v. Elkins & Co.*, 730 F.2d 99, 108 (3d Cir. 1984). This interstate-commerce determination is a factual one that must be made in the trial court. *See id.* at 109. Petitioner failed to establish any facts in the record suggesting that the arbitration agreement applied to a transaction in interstate commerce as opposed to the provision of medical services by Florida physicians to their Florida patient. The absence of any factual findings by the trial court that the agreement related to a transaction in interstate commerce precludes this Court from determining that the FAA even applies. *Id.*; *see also*

Featured Props., LLC v. BLKY, LLC, 65 So. 3d 135, 137 (Fla. 1st DCA 2011) (appellate court cannot make factual findings in the first instance). In short, Petitioner has failed to preserve the FAA preemption argument it would now raise. The Court should not reinstate Petitioner's appeal.

V. Conclusion

For all of the foregoing reasons, Respondents respectfully request that this Court deny Petitioner's motion to reinstate appeal.

Respectfully submitted,

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[*Certificate of Service Omitted in Printing of this Appendix*.]

APPENDIX 3

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**IN THE CIRCUIT COURT OF
THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA**

Case No. 2014-CA-000781

[Filed February 2, 2015]

MARIANNE KLEMISH, Individually and as Legal Guardian of Skyla Klemish, a Minor, and FRANK KLEMISH,	)
Plaintiffs,	)
vs.	)
KINDRED HOSPITALS EAST, LLC d/b/a KINDRED HOSPITAL OCALA, et al.	)
Defendants.	)

DEFENDANT'S REPLY TO PLAINTIFFS' RESPONSES TO MOTION TO DISMISS AND FOR MORE DEFINITE STATEMENT AND MOTION TO ORDER ARBITRATION AND STAY DISCOVERY

Defendant, Kindred Hospitals East, LLC d/b/a Kindred Hospital – Ocala (hereinafter, "Kindred"), hereby replies to Plaintiffs' Responses to Kindred's Motion to Dismiss Second Amended Complaint or to Stay Proceedings Pending Arbitration and Alternative Motion to Dismiss and for More Definite Statement and Motion to Order Arbitration and Stay Discovery:

I. MOTION TO DISMISS OR STAY BASED ON ARBITRATION AGREEMENT

A. Arbitration Generally.

Plaintiffs treat the arbitration agreement as if it were some one-sided, prejudicial, and Draconian relinquishment of rights. Plaintiffs are wrong. In Florida, the use of arbitration agreements is generally favored by the courts. *See, Seifert v. U.S. Home. Corp.*, 750 So.2d 633, 636 (Fla. 1999). The United States Supreme Court's recent opinion in *Nitro-Lift Technologies, L.L.C. v. Howard*, reflects the strong national policy in favor of enforcing arbitration agreements. *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S.Ct. 500, 503 (2012) (stating that there is "a national policy favoring arbitration"). An arbitration agreement simply constitutes a prospective choice of forum which "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 628 (1985).

Arbitration agreements are contractual in nature and courts are directed to place arbitration agreements on equal footing with other contracts. *See, Seifert*, 750 So.2d at 636; *Global Travel Marketing, Inc., v. Shea*,

908 So.2d 392, 397 (Fla. 2005), citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 28 (2002). Arbitration agreements are given the same force and effect as other contracts. *See, Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367-68 (11th Cir. 2005).

B. The Alternative Dispute Resolution Agreement is not void or substantively unconscionable.

Plaintiffs contend that the parties' arbitration agreement (the "ADR") is unconscionable and unenforceable. This is meritless. "It is now an axiom of federal and Florida law that written agreements to arbitrate are binding and enforceable, ..." *Bill Heard Chevrolet Corp., Orlando v. Wilson,* 877 So.2d 15, 17 (Fla. 5th DCA 2004). "Public policy favors arbitration as an efficient means of settling disputes. . . [and] all questions concerning the scope or waiver of the right to arbitrate should be resolved in favor of arbitration rather than against it." *Id.* Plaintiffs, relying on *Franks v. Bowers*, 116 So. 3d 1240 (Fla. 2013), claim that the ADR they entered into with Kindred is unconscionable. Therefore they must prove that it is both procedurally and substantively unconscionable. *Zephyr Haven Health & Rehab Center, Inc. v. Hardin ex rel Hardin,* 122 So.3d 916, 920 (Fla. 2d DCA 2013). Substantive unconscionability "requires an assessment of the contract's terms to 'determine whether they are so 'outrageously unfair' as to 'shock the judicial conscience.'" *Id.*

Plaintiffs' argument on substantive unconscionability proceeds from a fundamental misapprehension of the subject ADR, Florida law, and

the Florida Supreme Court's holding in *Franks.*[1] Florida's Medical Malpractice Act, Chapter 766 ("MMA") provides for voluntary binding arbitration on damages as an alternative to a jury trial. § 766.209(1), Fla. Stat. (2014). If neither party requests or agrees to voluntary binding arbitration under the Act, the claim shall proceed to trial "or to any available legal alternative. . . ." *Id.* at § 766.209(2). Contractual agreements to arbitrate, such as the ADR here, are an available legal alternative. In this instance, no party requested or agreed to voluntary binding arbitration under the Act so the MMA's voluntary binding arbitration provisions do not apply.

Nonetheless, although neither party took advantage of it in this case, the ADR provides for submission of the dispute to voluntary binding arbitration on damages under the MMA. *See* ADR at ¶6. If the parties agreed to this type of arbitration, "the Parties shall arbitrate damages in accordance with Chapter 766. . . and the other terms and conditions of this Agreement shall not apply to such claim." *Id.* Thus if the parties had elected to proceed with damages arbitration under the MMA, all of the MMA's provisions would apply including the defendant's admission of liability, a non-

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[1] Plaintiffs also cite *Crespo v. Hernandez, MD.,* -- So. 3d--, 5D14-759, 2014 WL 5392937 (Fla. 5th DCA Oct. 24, 2014), which relied on *Franks* in holding a particular arbitration agreement violated public policy. *Crespo*, however, recites neither the facts nor the relevant provisions of the arbitration agreement at issue. Thus *Crespo* is not instructive. The *Franks* decision of the Florida Supreme Court that *Crespo* relies on, however, is both controlling and instructive.

economic damages cap, interest, and attorney's fees. *See* § 766.207(7), Fla. Stat. (2014).

The MMA also specifies what happens if one party offers to arbitrate under the MMA but the other party refuses. For instance, if the claimant refuses, he is subject to a damages cap (albeit higher) and loses the right to attorney's fees and interest. If the defendant refuses, it loses the damages cap and may be liable for higher attorney's fees and costs. *Id.* at § 766.209. Again, in this case, neither party offered to arbitrate under the MMA so these provisions are inapplicable. Nonetheless, the ADR likewise specifies what happens if one party offers to arbitrate under the MMA and the other party refuses. In that case the provisions of the ADR remain in full force and effect – in other words, the parties' dispute will be resolved by a panel of arbitrators rather than by a court. *See* ADR at ¶6. Other than that difference in forum, all other applicable provisions of the law, including the MMA, apply.

Plaintiffs, however, claim that the ADR has adopted some, but not all of the MMA's voluntary binding arbitration provisions, and is therefore unconscionable. Specifically, Plaintiffs claim:

> Thus, while the MMA sets forth two paths to resolve disputes (MMA Arbitration or Trial), (See § 766.209, Fla. Stat. (2012)), the Kindred contract 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.

In support of their argument, Plaintiffs cite, but misconstrue, *Franks.* The arbitration agreement in *Franks* contained a provision titled, "Limitation of Damages" under which non-economic damages were capped at $250,000, without requiring the defendant to admit liability. This, the *Franks* court held, violated the public policy of the MMA. *Franks,* 116 So. 3d at 1248. The *Franks* court made clear, however, that its decision was limited to the particular agreement in that case and did not prohibit all arbitration agreements. *Id.* at 1249-50.

Unlike *Franks,* the ADR in this case does not selectively incorporate provisions of the MMA that are favorable to only to Kindred. The ADR contains no caps on Plaintiffs' damages beyond those that apply under the MMA, and it does not take away any right to pre-judgment interest or attorneys' fees. All legal remedies available to the parties by Florida law are available under the ADR. For instance, the ADR states that the parties each bear their own attorneys' fees and costs, "except as otherwise permitted by law." *See* ADR at ¶8. Thus to the extent the law permits a shifting of attorney's fees, such as under the MMA, that is permitted under the ADR. By suggesting the ADR should be read to conflict with the MMA or selectively incorporate some provisions without others, Plaintiffs are improperly asking the Court to interpret the ADR in a manner that would render it illegal. "An interpretation of a contract which gives a reasonable, lawful and effective meaning to all of the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect." *Whitley v. Royal Trails Prop. Owners' Ass'n, Inc.*, 910 So.2d 381, 385 (Fla. 5th DCA 2005).

In short, the ADR follows the MMR with the only difference being the forum in which the claim is to be resolved. By claiming that the ADR is invalid because it provides for trial by arbitrators rather than a court, Plaintiffs' argument is in direct conflict with the Florida Supreme Court's holding in *Franks,* in which the Court observed: "the MMA does not preclude all arbitration" and "our decision here is fact-specific pertaining only to the particular agreement before us and does not prohibit all arbitration agreements under the MMA ... ." *Franks,* 116 So. 3d at 1249-50. Given Florida's policy of favoring arbitration, the *Franks* court's explicit refusal to invalidate all contractual arbitration agreements, and the fair and balanced nature of this ADR which is consistent with the MMA, the agreement is binding and enforceable and this matter should be dismissed and sent to arbitration as the parties agreed. Nothing in *Franks* requires a finding otherwise.

Finally, even if paragraph 6 of the ADR, providing for the possibility of a stipulation to liability and arbitration of damages, could be deemed substantively unconscionable, it is severable and the remainder of the ADR should be enforced. The ADR expressly provides that "[i]f any provision of this Agreement is determined by an arbitrator or a court of competent jurisdiction to be invalid or unenforceable, in whole or in part, the remaining provisions, ... shall nevertheless be binding and valid and enforceable. *See* ADR at ¶12. The option to conduct voluntary binding damages arbitration under the MMA can be readily eliminated from the ADR while leaving intact the essence of the contract, which is an agreement to arbitrate all disputes in accordance with the NAF Mediation Rules

and Code of Procedure and the Florida Arbitration Code, Chapter 682. *See* ADR at ¶1; *see, e.g., Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham,* 953 So.2d 574, 579 (Fla. 1st DCA 2007) (affirming severance of provision of arbitration agreement and enforcement of remainder because offending provision could be eliminated without impacting parties' ability to arbitrate underlying dispute and agreement contained severability clause). Accordingly, even if paragraph 6 of the ADR is problematic, it can be severed. The remaining agreement is not substantively unconscionable and should be enforced.

C. The ADR is not procedurally unconscionable.

Plaintiffs submit the affidavit of Mrs. Klemish asserting that she was unable to understand the ADR at the time she signed it. Plaintiffs claim that this establishes "procedural unconscionability." The ADR specifically represents that Mrs. Klemish understood the agreement and voluntarily entered into it:

> By signing this Agreement, Patient acknowledges that he/she understands the following: (i) Patient has the right to seek legal counsel concerning this Agreement; (ii) the execution of this Agreement by Patient is voluntary and optional and is not a precondition to treatment at or admission to the Hospital; (iii) Patient may rescind this Agreement in the manner described above within five (5) business days of execution of this Agreement; and (iv) nothing in this Agreement shall prevent Patient or any other person from reporting alleged violations of law to the appropriate

> administrative, regulatory or law enforcement agency.

In any event, this affidavit is insufficient to establish procedural unconscionability. There is no claim that Kindred was in any way deceptive in presenting the proposed ADR to Mrs. Klemish.

A similar claim of procedural unconscionability was rejected in *SA-PG Sun City Center, LLC v. Kennedy,* 79 So. 3d 916 (Fla. 2d DCA 2012). There the trial court found that the nursing home resident's wife, who signed the arbitration agreement, did not have the ability to know and understand its terms. The trial court found that she was physically unable to read the document, that it was not explained to her, that she had no meaningful opportunity to have the agreement reviewed by anyone who could explain it to her, and that the facility's director had an inadequate understanding of the arbitration agreement himself. *Id.* at 919. In reversing, the appellate court noted that the party seeking to avoid the arbitration on the ground of unconscionability has the burden to present evidence sufficient to support that claim. Given the absence of evidence that the facility told the prospective resident that the document had to be signed in order for him to be admitted, and the lack of evidence demonstrating that the wife was coerced into signing it, the evidence failed to establish unconscionability. The *SA-PG Sun City Center* court specifically noted that the absence of evidence demonstrating that the resident's wife was coerced into signing the agreement or preventing from understanding it. Further, the court confirmed that a party's alleged inability to understand an agreement

does not vitiate assent to that agreement, absent evidence that the party was actually prevented from knowing its contents. Under Florida law, a party is conclusively presumed to know and understand the contents, terms and conditions of the contract. *Id.* at 920.

Plaintiffs' claim of procedural unconscionability here is without merit and they have failed to make a prima facie case in this regard. Even if the Plaintiffs were to be considered to have made a prima facie case on this issue, Kindred would be entitled to an opportunity to present evidence opposing this claim. However, given that the Plaintiffs' affidavit is insufficient on its face, no such hearing should be required.

II. ALTERNATIVELY, PLAINTIFFS' SECOND AMENDED COMPLAINT SHOULD BE DISMISSED

A. Count X of the Second Amended Complaint Should be Dismissed for Failure to State a Cause of Action.

Kindred moved to dismiss on the alternative grounds that in Count X Plaintiffs fail to allege ultimate facts to state a cause of action under *Fla. Stat.* §415.1111, The Adult Protective Services Act (the, "Act"). In response Plaintiffs merely state legal conclusions that Mrs. Klemish was a vulnerable adult under section 415.1111 and the "perpetrators" were Kindred "by and through its nursing and ancillary staff." Plaintiffs fail to point to any allegations of the Second Amended Complaint that set forth any acts constituting abuse, neglect or exploitation under the

Act except for iterations of Plaintiffs' claims of medical malpractice.

This is insufficient. As the First District held in, *Bohannon v. Shands Teaching Hosp. and Clinics, Inc.*, 983 So.2d 717 (Fla. 1st DCA 2008) Chapter 415 does not to serve as an alternative to Chapter 766, Florida's medical negligence law. A complaint that merely asserts medical negligence, with added recitations tracking statutory definitions from Chapter 415, is insufficient to state a cause of action under Chapter 415. *Id. See also, Tenet South Florida Health Systems v. Jackson*, 991 So.2d 396 (Fla. 3d DCA, 2008). This is all that Plaintiffs do in Count X.

While Plaintiffs correctly state that it is possible for a corporate entity, such as the hospital defendant here, to be a "perpetrator" under the Act, a hospital is not normally considered a "caregiver" under the Act. Thus, in order to state a claim against a hospital for violating the Act, the plaintiff must plead ultimate facts to establish that there was some commitment on the part of the hospital to be a "caregiver," as defined by the Act, over and above providing hospital services. *Tenet South Florida Health Systems v. Jackson*, 991 So.2d 396, 398-399 (Fla. 3d DCA 2008).

Even if a corporate defendant can be a "perpetrator" under the Act, it can only be held liable if the violation is committed by one of its employees acting within the course and scope of his employment. To hold a corporation liable for an intentional tort, plaintiff must allege at a minimum which employee allegedly committed the tort, that the act was committed during the course of the employment and to further a purpose or interest of the employer. *See, e.g., Iglesia Cristiana*

La Cas Del Senor, Inc., v. L.M., 783 So.2d 353 (Fla. 3d DCA 2001); *Garcia v. Duffy,* 492 So.2d 435, 437-38 (Fla. 2d DCA 1986). Plaintiffs made no such allegations here.

Finally, Count X also violates Florida's ultimate fact pleading requirements as it alleges no facts showing: (1) how the decedent qualified for protection under the act; (2) how Kindred is a statutory "caregiver"; (3) who the "perpetrators" were, (4) their relation to Kindred, (5) how Kindred is vicariously liable for their actions, (6) what their actions were and (7) how Plaintiffs were injured and/or damaged by any such actions. The Count contains mere conclusions of law as opposed to allegations of fact. Kindred is in no way on notice or made aware of the claims against it. As such, Count X should be dismissed on these grounds as well.

Plaintiffs' claim that Kindred is somehow on notice of their claims based on a pre-suit Notice of Intent and discovery is meritless. Pre-suit notices and discovery are not substitutes for proper pleadings. Plaintiffs are required to place Kindred on notice of their claims in a pleading that alleges sufficient ultimate facts to state valid causes of action so that Kindred can properly respond.

B. Kindred's Motion to Dismiss or for More Definite Statement of Plaintiffs' Claims Should be Granted.

Kindred has also sought dismissal or a more definite statement as to Counts X, XII and XIII. Plaintiffs have not provided any substantive response to the arguments that their pleading is a "shotgun" pleading that is impermissibly internally inconsistent

and multifarious. For example, Count XII purports to state a claim by Frank Klemish but its only allegations are made by Marianne Klemish. Count XIII purports to state a claim by Sylvia Klemish, but again its allegations are only made by Marianne Klemish and only Marianne Klemish seeks damages on this claim. Plaintiffs should be required to plead their claims properly and without ambiguity. Plaintiffs' argument that other defendants chose to answer the allegations as framed is patently immaterial.

III. CONCLUSION

The Court should dismiss or stay this action and order the parties to submit to arbitration in accordance with their ADR. Alternatively the Court should dismiss the Second Amended Complaint for failure to state a claim or, at a minimum, direct Plaintiffs to replead their claims to allege a more definite statement as set forth in Kindred's motion.

Respectfully submitted,

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[*Certificate of Service Omitted in Printing of this Appendix*.]

APPENDIX 4

Fifth District Court of Appeal Case Docket

Case Number: 5D15-2574

Non-Final Civil Other Notice from Marion County

MARIANNE KLEMISH, INDIVIDUALLY, ETC., ET AL vs. ALEX VILLACASTIN, M.D., ET AL.

Lower Tribunal Case(s): 2014-781-CA-G

Date Docketed	Description	Date Due	Filed By	Notes
07/23/2015	Case Filing Fee			
07/23/2015	Order to pay filing fee - Civil appeal (300)			
07/23/2015	Notice of Appeal Filed		Appellant	
07/23/2015	Acknowledge-ment Letter 1			
07/24/2015	Case Filing Fee			
07/27/2015	Notice		Appellant	
07/27/2015	Notice		Appellant	
07/29/2015	Notice of Appearance		Appellee	

Date Docketed	Description	Date Due	Filed By	Notes
07/29/2015	Miscellaneous Docket Entry			
09/04/2015	Notice		Appellant	
10/09/2015	Initial Brief on Merits		Appellant	
10/09/2015	Appendix for Initial Brief		Appellant	
10/09/2015	Miscellaneous Docket Entry			
10/09/2015	ORD-Dispensing Oral Argument			
10/13/2015	Motion For Rehearing/ Interim Order		Appellant	
10/26/2015	Notice		Appellee	
12/02/2015	Appellee's Answer Brief		Appellee	
12/23/2015	Appellant's Reply Brief		Appellant	
12/23/2015	Motion For Leave To File Amended Brief		Appellant	
12/28/2015	ORD-Granting Amended Brief			

Date Docketed	Description	Date Due	Filed By	Notes
12/28/2015	Amended Reply Brief		Appellant	
07/06/2016	Order Deny Rehearing Interim Order			
07/15/2016	Reversed - Authored Opinion			
07/26/2016	Motion To Stay Issuance of Mandate		Appellee	
07/26/2016	NOTICE OF DISCRETN. JURISDICTN			
07/28/2016	Review Sent to Supreme Court			
07/28/2016	Acknowledged Receipt from Supreme Court			
08/12/2016	Order Denying Motion to Stay Issue Mandate			
08/16/2016	Motion For Rehearing/ Interim Order		Appellee	

Date Docketed	Description	Date Due	Filed By	Notes
08/31/2016	Order Deny Rehearing Interim Order			
09/14/2016	Miscellaneous Docket Entry			
02/28/2017	Supreme Court - Other			
05/05/2017	Supreme Court Disposition			
05/23/2017	Returned Records			
05/23/2017	Mandate			
06/20/2017	Supreme Court - Other			
06/20/2017	Supreme Court - Other			

http://jweb.flcourts.org/pls/ds/ds_docket

APPENDIX 5

Fla. Stat. § 682.03 (2011)

682.03 Proceedings to compel and to stay arbitration.—

(1) A party to an agreement or provision for arbitration subject to this law claiming the neglect or refusal of another party thereto to comply therewith may make application to the court for an order directing the parties to proceed with arbitration in accordance with the terms thereof. If the court is satisfied that no substantial issue exists as to the making of the agreement or provision, it shall grant the application. If the court shall find that a substantial issue is raised as to the making of the agreement or provision, it shall summarily hear and determine the issue and, according to its determination, shall grant or deny the application.

(2) If an issue referable to arbitration under an agreement or provision for arbitration subject to this law becomes involved in an action or proceeding pending in a court having jurisdiction to hear an application under subsection (1), such application shall be made in said court. Otherwise and subject to s. 682.19, such application may be made in any court of competent jurisdiction.

(3) Any action or proceeding involving an issue subject to arbitration under this law shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only.

When the application is made in such action or proceeding, the order for arbitration shall include such stay.

(4) On application the court may stay an arbitration proceeding commenced or about to be commenced, if it shall find that no agreement or provision for arbitration subject to this law exists between the party making the application and the party causing the arbitration to be had. The court shall summarily hear and determine the issue of the making of the agreement or provision and, according to its determination, shall grant or deny the application.

(5) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

****

Fla. Stat. § 682.06 (2011)

682.06 Hearing.—Unless otherwise provided by the agreement or provision for arbitration:

(1)(a) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered or certified mail not less than 5 days before the hearing. Appearance at the hearing waives a party's right to such notice. The arbitrators may adjourn their hearing from time to time upon their own motion and shall do so upon the request of any party to the arbitration for good cause shown, provided that no adjournment or postponement of their hearing shall extend beyond the date fixed in the agreement or provision for making the award

unless the parties consent to a later date. An umpire authorized to hear and decide the cause upon failure of the arbitrators to agree upon an award shall, in the course of his or her jurisdiction, have like powers and be subject to like limitations thereon.

(b) The arbitrators, or umpire in the course of his or her jurisdiction, may hear and decide the controversy upon the evidence produced notwithstanding the failure or refusal of a party duly notified of the time and place of the hearing to appear. The court on application may direct the arbitrators, or the umpire in the course of his or her jurisdiction, to proceed promptly with the hearing and making of the award.

(2) The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

(3) The hearing shall be conducted by all of the arbitrators but a majority may determine any question and render a final award. An umpire authorized to hear and decide the cause upon the failure of the arbitrators to agree upon an award shall sit with the arbitrators throughout their hearing but shall not be counted as a part of their quorum or in the making of their award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator, arbitrators or umpire appointed to act as neutrals may continue with the hearing and determination of the controversy.

****

Fla. Stat. § 682.08 (2011)

682.08 Witnesses, subpoenas, depositions.—

(1) Arbitrators, or an umpire authorized to hear and decide the cause upon failure of the arbitrators to agree upon an award, in the course of her or his jurisdiction, may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the court by a party to the arbitration or the arbitrators, or the umpire, enforced in the manner provided by law for the service and enforcement of subpoenas in a civil action.

(2) On application of a party to the arbitration and for use as evidence, the arbitrators, or the umpire in the course of her or his jurisdiction, may permit a deposition to be taken, in the manner and upon the terms designated by them or her or him of a witness who cannot be subpoenaed or is unable to attend the hearing.

(3) All provisions of law compelling a person under subpoena to testify are applicable.

(4) Fees for attendance as a witness shall be the same as for a witness in the circuit court.

****

Fla. Stat. § 682.09 (2011)

682.09 Award.—

(1) The award shall be in writing and shall be signed by the arbitrators joining in the award or by the

umpire in the course of his or her jurisdiction. They or he or she shall deliver a copy to each party to the arbitration either personally or by registered or certified mail, or as provided in the agreement or provision.

(2) An award shall be made within the time fixed therefor by the agreement or provision for arbitration or, if not so fixed, within such time as the court may order on application of a party to the arbitration. The parties may, by written agreement, extend the time either before or after the expiration thereof. Any objection that an award was not made within the time required is waived unless the objecting party notifies the arbitrators or umpire in writing of his or her objection prior to the delivery of the award to him or her.

****

Fla. Stat. § 682.10 (2011)

682.10 Change of award by arbitrators or umpire.—On application of a party to the arbitration, or if an application to the court is pending under s. 682.12, s. 682.13 or s. 682.14, on submission to the arbitrators, or to the umpire in the case of an umpire's award, by the court under such conditions as the court may order, the arbitrators or umpire may modify or correct the award upon the grounds stated in s. 682.14(1)(a) and (c) or for the purpose of clarifying the award. The application shall be made within 20 days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the other party to the arbitration, stating that he or she must serve his or her objections thereto, if any, within 10 days from the notice. The

award so modified or corrected is subject to the provisions of ss. 682.12-682.14.

****

Fla. Stat. § 682.12 (2011)

682.12 Confirmation of an award.—Upon application of a party to the arbitration, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in ss. 682.13 and 682.14.

****

Fla. Stat. § 682.13 (2011)

682.13 Vacating an award.—

(1) Upon application of a party, the court shall vacate an award when:

(a) The award was procured by corruption, fraud or other undue means.

(b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party.

(c) The arbitrators or the umpire in the course of her or his jurisdiction exceeded their powers.

(d) The arbitrators or the umpire in the course of her or his jurisdiction refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the

provisions of s. 682.06, as to prejudice substantially the rights of a party.

(e) There was no agreement or provision for arbitration subject to this law, unless the matter was determined in proceedings under s. 682.03 and unless the party participated in the arbitration hearing without raising the objection.

But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(2) An application under this section shall be made within 90 days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within 90 days after such grounds are known or should have been known.

(3) In vacating the award on grounds other than those stated in paragraph (1)(e), the court may order a rehearing before new arbitrators chosen as provided in the agreement or provision for arbitration or by the court in accordance with s. 682.04, or, if the award is vacated on grounds set forth in paragraphs (1)(c) and (d), the court may order a rehearing before the arbitrators or umpire who made the award or their successors appointed in accordance with s. 682.04. The time within which the agreement or provision for arbitration requires the award to be made is applicable to the rehearing and commences from the date of the order therefor.

(4) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

****

Fla. Stat. § 682.15 (2011)

682.15 Judgment or decree on award.—Upon the granting of an order confirming, modifying or correcting an award, judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the court.

****

Fla. Stat. § 682.20 (2011)

682.20 Appeals.—

(1) An appeal may be taken from:

(a) An order denying an application to compel arbitration made under s. 682.03.

(b) An order granting an application to stay arbitration made under s. 682.03(2)-(4).

(c) An order confirming or denying confirmation of an award.

(d) An order modifying or correcting an award.

(e) An order vacating an award without directing a rehearing.

(f) A judgment or decree entered pursuant to the provisions of this law.

(2) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

****

Fla. Stat. § 766.106 (2011)

766.106 Notice before filing action for medical negligence; presuit screening period; offers for admission of liability and for arbitration; informal discovery; review.—

(1) DEFINITIONS.—As used in this section, the term:

(a) "Claim for medical negligence" or "claim for medical malpractice" means a claim, arising out of the rendering of, or the failure to render, medical care or services.

(b) "Self-insurer" means any self-insurer authorized under s. 627.357 or any uninsured prospective defendant.

(c) "Insurer" includes the Joint Underwriting Association.

(2) PRESUIT NOTICE.—

(a) After completion of presuit investigation pursuant to s. 766.203(2) 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. Notice to each prospective defendant must include, if available, a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers during the 2-year period prior to the alleged act of negligence who treated or evaluated the claimant, copies of all of the

medical records relied upon by the expert in signing the affidavit, and the executed authorization form provided in s. 766.1065.

(b) Following the initiation of a suit alleging medical negligence with a court of competent jurisdiction, and service of the complaint upon a defendant, the claimant shall provide a copy of the complaint to the Department of Health and, if the complaint involves a facility licensed under chapter 395, the Agency for Health Care Administration. The requirement of providing the complaint to the Department of Health or the Agency for Health Care Administration does not impair the claimant's legal rights or ability to seek relief for his or her claim. The Department of Health or the Agency for Health Care Administration shall review each incident that is the subject of the complaint and determine whether it involved conduct by a licensee which is potentially subject to disciplinary action, in which case, for a licensed health care practitioner, the provisions of s. 456.073 apply and, for a licensed facility, the provisions of part I of chapter 395 apply.

(3) PRESUIT INVESTIGATION BY PROSPECTIVE DEFENDANT.—

(a) No suit may be filed for a period of 90 days after notice is mailed to any prospective defendant. During the 90-day period, the prospective defendant or the defendant's insurer or self-insurer shall conduct a review as provided in s. 766.203(3) to determine the liability of the defendant. Each insurer or self-insurer shall have a procedure for the prompt investigation, review, and evaluation of claims during the 90-day period. This procedure shall include one or more of the following:

1. Internal review by a duly qualified claims adjuster;

2. Creation of a panel comprised of an attorney knowledgeable in the prosecution or defense of medical negligence actions, a health care provider trained in the same or similar medical specialty as the prospective defendant, and a duly qualified claims adjuster;

3. A contractual agreement with a state or local professional society of health care providers, which maintains a medical review committee;

4. Any other similar procedure which fairly and promptly evaluates the pending claim.

Each insurer or self-insurer shall investigate the claim in good faith, and both the claimant and prospective defendant shall cooperate with the insurer in good faith. If the insurer requires, a claimant shall appear before a pretrial screening panel or before a medical review committee and shall submit to a physical examination, if required. Unreasonable failure of any party to comply with this section justifies dismissal of claims or defenses. There shall be no civil liability for participation in a pretrial screening procedure if done without intentional fraud.

(b) At or before the end of the 90 days, the prospective defendant or the prospective defendant's insurer or self-insurer 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. This offer may be made contingent upon a limit of general damages.

(c) The response shall be delivered to the claimant if not represented by counsel or to the claimant's attorney, by certified mail, return receipt requested. Failure of the prospective defendant or insurer or self-insurer to reply to the notice within 90 days after receipt shall be deemed a final rejection of the claim for purposes of this section.

(d) Within 30 days of receipt of a response by a prospective defendant, insurer, or self-insurer to a claimant represented by an attorney, the attorney shall advise the claimant in writing of the response, including:

1. The exact nature of the response under paragraph (b).

2. The exact terms of any settlement offer, or admission of liability and offer of arbitration on damages.

3. The legal and financial consequences of acceptance or rejection of any settlement offer, or admission of liability, including the provisions of this section.

4. An evaluation of the time and likelihood of ultimate success at trial on the merits of the claimant's action.

5. An estimation of the costs and attorney's fees of proceeding through trial.

(4) SERVICE OF PRESUIT NOTICE AND TOLLING.—The notice of intent to initiate litigation shall be served within the time limits set forth in s. 95.11. However, during the 90-day period, the statute of limitations is tolled as to all potential defendants. Upon stipulation by the parties, the 90-day period may be extended and the statute of limitations is tolled during any such extension. Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.

(5) DISCOVERY AND ADMISSIBILITY.—A statement, discussion, written document, report, or other work product generated by the presuit screening process is not discoverable or admissible in any civil action for any purpose by the opposing party. All participants, including, but not limited to, physicians, investigators, witnesses, and employees or associates of the defendant, are immune from civil liability arising from participation in the presuit screening process. This subsection does not prevent a physician licensed under chapter 458 or chapter 459 or a dentist licensed under chapter 466 who submits a verified written expert medical opinion from being subject to denial of a license or disciplinary action under s. 458.331(1)(oo), s. 459.015(1)(qq), or s. 466.028(1)(ll).

(6) INFORMAL DISCOVERY.—

(a) Upon receipt by a prospective defendant of a notice of claim, the parties shall make discoverable information available without formal discovery. Failure to do so is grounds for dismissal of claims or defenses ultimately asserted.

(b) Informal discovery may be used by a party to obtain unsworn statements, the production of documents or things, and physical and mental examinations, as follows:

1. Unsworn statements.—Any party may require other parties to appear for the taking of an unsworn statement. Such statements may be used only for the purpose of presuit screening and are not discoverable or admissible in any civil action for any purpose by any party. A party desiring to take the unsworn statement of any party must give reasonable notice in writing to all parties. The notice must state the time and place for taking the statement and the name and address of the party to be examined. Unless otherwise impractical, the examination of any party must be done at the same time by all other parties. Any party may be represented by counsel at the taking of an unsworn statement. An unsworn statement may be recorded electronically, stenographically, or on videotape. The taking of unsworn statements is subject to the provisions of the Florida Rules of Civil Procedure and may be terminated for abuses.

2. Documents or things.—Any party may request discovery of documents or things. The documents or things must be produced, at the expense of the requesting party, within 20 days after the date of receipt of the request. A party is required to produce discoverable documents or things within that party's possession or control. Medical records shall be produced as provided in s.766.204.

3. Physical and mental examinations.—A prospective defendant may require an injured claimant to appear for examination by an appropriate health

care provider. The prospective defendant shall give reasonable notice in writing to all parties as to the time and place for examination. Unless otherwise impractical, a claimant is required to submit to only one examination on behalf of all potential defendants. The practicality of a single examination must be determined by the nature of the claimant's condition, as it relates to the liability of each prospective defendant. Such examination report is available to the parties and their attorneys upon payment of the reasonable cost of reproduction and may be used only for the purpose of presuit screening. Otherwise, such examination report is confidential and exempt from the provisions of s.119.07(1) and s. 24(a), Art. I of the State Constitution.

4. Written questions.—Any party may request answers to written questions, the number of which may not exceed 30, including subparts. A response must be made within 20 days after receipt of the questions.

5. Unsworn statements of treating health care providers.—A prospective defendant or his or her legal representative may also take unsworn statements of the claimant's treating health care providers. The statements must be limited to those areas that are potentially relevant to the claim of personal injury or wrongful death. Subject to the procedural requirements of subparagraph 1., a prospective defendant may take unsworn statements from a claimant's treating physicians. Reasonable notice and opportunity to be heard must be given to the claimant or the claimant's legal representative before taking unsworn statements. The claimant or claimant's legal representative has the right to attend the taking of such unsworn statements.

(c) Each request for and notice concerning informal presuit discovery pursuant to this section must be in writing, and a copy thereof must be sent to all parties. Such a request or notice must bear a certificate of service identifying the name and address of the person to whom the request or notice is served, the date of the request or notice, and the manner of service thereof.

(d) Copies of any documents produced in response to the request of any party must be served upon all other parties. The party serving the documents or his or her attorney shall identify, in a notice accompanying the documents, the name and address of the parties to whom the documents were served, the date of service, the manner of service, and the identity of the document served.

(7) SANCTIONS.—Failure to cooperate on the part of any party during the presuit investigation may be grounds to strike any claim made, or defense raised, by such party in suit.

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Fla. Stat. § 766.201 (2011)

766.201 Legislative findings and intent.—

(1) The Legislature makes the following findings:

(a) Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased medical care costs for most patients and functional unavailability of malpractice insurance for some physicians.

(b) The primary cause of increased medical malpractice liability insurance premiums has been the

substantial increase in loss payments to claimants caused by tremendous increases in the amounts of paid claims.

(c) The average cost of a medical negligence claim has escalated in the past decade to the point where it has become imperative to control such cost in the interests of the public need for quality medical services.

(d) 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.

(e) The recovery of 100 percent of economic losses constitutes overcompensation because such recovery fails to recognize that such awards are not subject to taxes on economic damages.

(2) It is the intent of the Legislature to provide a plan for prompt resolution of medical negligence claims. Such plan shall consist of two separate components, presuit investigation and arbitration. Presuit investigation shall be mandatory and shall apply to all medical negligence claims and defenses. Arbitration shall be voluntary and shall be available except as specified.

(a) Presuit investigation shall include:

1. Verifiable requirements that reasonable investigation precede both malpractice claims and defenses in order to eliminate frivolous claims and defenses.

2. Medical corroboration procedures.

(b) Arbitration shall provide:

1. Substantial incentives for both claimants and defendants to submit their cases to binding arbitration, thus reducing attorney's fees, litigation costs, and delay.

2. A conditional limitation on noneconomic damages where the defendant concedes willingness to pay economic damages and reasonable attorney's fees.

3. Limitations on the noneconomic damages components of large awards to provide increased predictability of outcome of the claims resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims.

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Fla. Stat. § 766.203 (2011)

766.203 Presuit investigation of medical negligence claims and defenses by prospective parties.—

(1) APPLICATION OF PRESUIT INVESTIGATION.—Presuit investigation of medical negligence claims and defenses pursuant to this section and ss. 766.204-766.206 shall apply to all medical negligence claims and defenses. This shall include:

(a) Rights of action under s. 768.19 and defenses thereto.

(b) Rights of action involving the state or its agencies or subdivisions, or the officers, employees, or agents thereof, pursuant to s. 768.28 and defenses thereto.

(2) PRESUIT INVESTIGATION BY CLAIMANT.—Prior to issuing notification of intent to initiate medical negligence litigation pursuant to s. 766.106, the claimant shall conduct an investigation to ascertain that there are reasonable grounds to believe that:

(a) Any named defendant in the litigation was negligent in the care or treatment of the claimant; and

(b) Such negligence resulted in injury to the claimant.

Corroboration of reasonable grounds to initiate medical negligence litigation shall be provided by the claimant's submission of a verified written medical expert opinion from a medical expert as defined in s. 766.202(6), at the time the notice of intent to initiate litigation is mailed, which statement shall corroborate reasonable grounds to support the claim of medical negligence.

(3) PRESUIT INVESTIGATION BY PROSPECTIVE DEFENDANT.—Prior to issuing its response to the claimant's notice of intent to initiate litigation, during the time period for response authorized pursuant to s. 766.106, the prospective defendant or the defendant's insurer or self-insurer shall conduct an investigation as provided in s. 766.106(3) to ascertain whether there are reasonable grounds to believe that:

(a) The defendant was negligent in the care or treatment of the claimant; and

(b) Such negligence resulted in injury to the claimant.

Corroboration of lack of reasonable grounds for medical negligence litigation shall be provided with any response rejecting the claim by the defendant's submission of a verified written medical expert opinion from a medical expert as defined in s. 766.202(6), at the time the response rejecting the claim is mailed, which statement shall corroborate reasonable grounds for lack of negligent injury sufficient to support the response denying negligent injury.

(4) PRESUIT MEDICAL EXPERT OPINION.—The medical expert opinions required by this section are subject to discovery. The opinions shall specify whether any previous opinion by the same medical expert has been disqualified and if so the name of the court and the case number in which the ruling was issued.

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Fla. Stat. § 766.204 (2011)

766.204 Availability of medical records for presuit investigation of medical negligence claims and defenses; penalty.—

(1) Copies of any medical record relevant to any litigation of a medical negligence claim or defense shall be provided to a claimant or a defendant, or to the attorney thereof, at a reasonable charge within 10 business days of a request for copies, except that an independent special hospital district with taxing authority which owns two or more hospitals shall have 20 days. It shall not be grounds to refuse copies of such medical records that they are not yet completed or that a medical bill is still owing.

(2) Failure to provide copies of such medical records, or failure to make the charge for copies a reasonable charge, shall constitute evidence of failure of that party to comply with good faith discovery requirements and shall waive the requirement of written medical corroboration by the requesting party.

(3) A hospital shall not be held liable for any civil damages as a result of complying with this section.

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Fla. Stat. § 766.207 (2011)

766.207 Voluntary binding arbitration of medical negligence claims.—

(1) Voluntary binding arbitration pursuant to this section and ss. 766.208-766.212 shall not apply to rights of action involving the state or its agencies or subdivisions, or the officers, employees, or agents thereof, pursuant to s. 768.28.

(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. Such election may be initiated by either party by serving a request for voluntary binding arbitration of damages within 90 days after service of the claimant's notice of intent to initiate litigation upon the defendant. 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).

(3) Upon receipt of a party's request for such arbitration, the opposing party may accept the offer of

voluntary binding arbitration within 30 days. However, in no event shall the defendant be required to respond to the request for arbitration sooner than 90 days after service of the notice of intent to initiate litigation under s. 766.106. Such acceptance within the time period provided by this subsection shall be a binding commitment to comply with the decision of the arbitration panel. The liability of any insurer shall be subject to any applicable insurance policy limits.

(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. In the event of multiple plaintiffs or multiple defendants, the arbitrator selected by the side with multiple parties shall be the choice of those parties. If the multiple parties cannot reach agreement as to their arbitrator, each of the multiple parties shall submit a nominee, and the director of the Division of Administrative Hearings shall appoint the arbitrator from among such nominees.

(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.

(c) Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to s. 766.202(9) and shall be offset by future collateral source payments.

(d) Punitive damages shall not be awarded.

(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.

(i) The defendant's obligation to pay the claimant's damages shall be for the purpose of arbitration under this section only. A defendant's or claimant's offer to arbitrate shall not be used in evidence or in argument during any subsequent litigation of the claim following the rejection thereof.

(j) The fact of making or accepting an offer to arbitrate shall not be admissible as evidence of liability in any collateral or subsequent proceeding on the claim.

(k) Any offer by a claimant to arbitrate must be made to each defendant against whom the claimant has made a claim. Any offer by a defendant to arbitrate must be made to each claimant who has joined in the notice of intent to initiate litigation, as provided in s. 766.106. A defendant who rejects a claimant's offer to arbitrate shall be subject to the provisions of s. 766.209(3). A claimant who rejects a defendant's offer to arbitrate shall be subject to the provisions of s.766.209(4).

(l) The hearing shall be conducted by all of the arbitrators, but a majority may determine any question of fact and render a final decision. The chief arbitrator shall decide all evidentiary matters.

The provisions of this subsection shall not preclude settlement at any time by mutual agreement of the parties.

(8) Any issue between the defendant and the defendant's insurer or self-insurer as to who shall control the defense of the claim and any responsibility for payment of an arbitration award, shall be determined under existing principles of law; provided that the insurer or self-insurer shall not offer to arbitrate or accept a claimant's offer to arbitrate without the written consent of the defendant.

(9) The Division of Administrative Hearings is authorized to promulgate rules to effect the orderly and efficient processing of the arbitration procedures of ss. 766.201-766.212.

(10) Rules promulgated by the Division of Administrative Hearings pursuant to this section, s.120.54, or s. 120.65 may authorize any reasonable sanctions except contempt for violation of the rules of the division or failure to comply with a reasonable order issued by an administrative law judge, which is not under judicial review.

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Fla. Stat. § 766.209 (2011)

766.209 Effects of failure to offer or accept voluntary binding arbitration.—

(1) A proceeding for voluntary binding arbitration is an alternative to jury trial and shall not supersede the right of any party to a jury trial.

(2) If neither party requests or agrees to voluntary binding arbitration, the claim shall proceed to trial or to any available legal alternative such as offer of and demand for judgment under s.768.79 or offer of settlement under s. 45.061.

(3) If the defendant refuses a claimant's offer of voluntary binding arbitration:

(a) The claim shall proceed to trial, and the claimant, upon proving medical negligence, shall be entitled to recover damages subject to the limitations in s. 766.118, prejudgment interest, and reasonable attorney's fees up to 25 percent of the award reduced to present value.

(b) The claimant's award at trial shall be reduced by any damages recovered by the claimant from arbitrating codefendants following arbitration.

(4) If the claimant rejects a defendant's offer to enter voluntary binding arbitration:

(a) The damages awardable at trial shall be limited to net economic damages, plus noneconomic damages not to exceed $350,000 per incident. The Legislature expressly finds that such conditional limit on noneconomic damages is warranted by the claimant's refusal to accept arbitration, and represents an

appropriate balance between the interests of all patients who ultimately pay for medical negligence losses and the interests of those patients who are injured as a result of medical negligence.

(b) Net economic damages reduced to present value 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.

(c) Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to s. 766.202(9), and shall be offset by future collateral source payments.

(5) Jury trial shall proceed in accordance with existing principles of law.