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It's My Party and I'll Arbitrate if I Want to: Are we Signing Away Our Right to Litigate Tort Claims?

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IT'S MY PARTY AND I'LL ARBITRATE IF I WANT TO: ARE WE SIGNING AWAY OUR RIGHT TO LITIGATE TORT CLAIMS?

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I. INTRODUCTION

Court congestion in the United States has long been a prominent issue in the lion's share of judicial branches at various levels of government.¹ However, as America develops into a more litigious society, courts are bu-

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1. See S. 2027, 101st Cong. § 2 (1990) (enacted). Additionally, the author interned with Judge Robert W. Lee, a County Court Judge of the Seventeenth Judicial Circuit of Florida, in Fort Lauderdale, Florida, who regularly expressed concern over the dire state of the judicial docket.

ried by a deluge of complaints that reach near cataclysmic levels.² Congestion is the root of enduring legal conflicts³ and hence skyrocketing legal fees.⁴ Fortunately, disputes which cannot be resolved by the parties have means of alternative legal resolution.⁵

Arbitration is a technique of alternative dispute resolution outside the standard judicial process, whereby legal disputes—situations requiring a binding decision—are taken before neutral third parties, either an arbiter or panel of arbitrators, whose decision will be binding upon the parties.⁶ The intent of arbitration is to have a more efficient and simpler, thus cheaper, process relative to traditional litigation.⁷ Arbitration can be either voluntary or mandatory.⁸ Mandatory arbitration can arise from state statute, as well as freely be entered via valid contract,⁹ where parties agree to resolve prospective confrontations with arbitral proceedings.¹⁰

Generally, arbitration is utilized in commercial transactions both international and domestic,¹¹ yet nothing limits arbitration use to a specific area of law.¹² Unfortunately, as arbitration becomes more popular, courts are chal-

2. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 7–8 (1983). While it may be hyperbole to say that courts are prone to suffer disaster from a tidal wave of cases being litigated, the increased workload of courts has made a seemingly slow bureaucratic process move at a snail's pace. See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT at x, 317–18 (1989).

3. See Anemona Hartocollis, *A Judge Gets Manhattan's Oldest Divorce Cases Moving*, N.Y. TIMES, Aug. 19, 1997, at B1.

4. See *The Costs of the Most Expensive Litigation*, CARL E. PERSON, <http://www.carlperson.com/expensive.php> (last visited Oct. 28, 2012).

5. George H. Friedman, *Dispute Resolution Clauses in Insurance Contracts*, in THE AMERICAN ARBITRATION ASSOCIATION INSURANCE ADR MANUAL 102, 103, 110 (1993).

6. *Arbitration Defined*, U.S. ARB. ASS'N, <http://usadr.com/arbitration-defined> (last visited Oct. 28, 2012).

7. *Id.*

8. *Id.*; see Paul T. Milligan, *Who Decides the Arbitrability of Construction Disputes?*, CONSTRUCTION LAW., Spring 2011, at 23, 29.

9. FLA. STAT. § 682.02 (2012); *Arbitration Defined*, *supra* note 6.

10. FLA. STAT. § 682.02; *Arbitration Defined*, *supra* note 6.

11. See Milligan, *supra* note 8, at 23 (citing 9 U.S.C. § 2 (2006)); Safina Lakhani, *Careers in International Commercial Arbitration*, 1 INT'L COM. ARB. BRIEF 5, 5 (2011); ROBERT V. MASSEY, JR., W. VA. UNIV. EXTENSION SERV., HISTORY OF ARBITRATION AND GRIEVANCE ARBITRATION IN THE UNITED STATES para. 2 (2003), available at <http://www.laborstudiesandresearch.ext.wvu.edu/r/download/32003>.

12. *What Types of Disputes Can Be Arbitrated?*, ARB. FAQ, <http://www.arbitrationfaq.com/disputesandarbitration.html> (last visited Oct. 28, 2012). Under the common law, no area of law was prohibited from using arbitration. MASSEY, *supra* note 11, para. 3; *What Types of Disputes Can Be Arbitrated?*, *supra*. However, bills that would limit arbitration of family law

lenged by the legality of such arrangements.¹³ Particularly, in Florida, there is currently a split among the district courts of appeal regarding the extent of applicability of arbitration clauses in contracts between parties regarding tort claims.¹⁴ In other words, does a broad and general arbitration clause apply to a complaint in a tort which may have *arisen* from a contract but only tenuously touches it? The Supreme Court of Florida recently heard oral arguments in *Jackson v. Shakespeare Foundation, Inc. (Jackson II)*¹⁵ on this exact issue.¹⁶ The Shakespeare Foundation, a Florida company, and its real estate developer complained in a lawsuit that George Jackson and Kerry Jackson, along with their real estate company, committed fraud in a property deal between the parties.¹⁷ The complaint alleged the Jacksons misrepresented the presence of wetlands on the property.¹⁸ The Jacksons argued that the case must be dismissed because the sales contracts contained an arbitration provision.¹⁹ Although the trial court agreed, the First District Court of Appeal reversed the trial court's ruling.²⁰ Furthermore, the First District Court of Appeal certified that its opinion was in direct conflict with an opinion issued in a substantially similar case from the Fifth District Court of Appeal.²¹

Florida courts have struggled with the application of the Florida Arbitration Code to arbitration provisions in commercial contracts since it was enacted by the Florida Legislature in 1957.²² Unfortunately, the assembly of

matters have recently been proposed in Florida. Fla. CS for SB 963 (2012) (Dispute Resolution), available at <http://www.flsenate.gov/Session/Bill/2012/0963> (last visited Oct. 28, 2012); see also FLA. STAT. § 44.104(14).

13. See, e.g., *Shakespeare Found., Inc. v. Jackson (Jackson I)*, 61 So. 3d 1194, 1196 (Fla. 1st Dist. Ct. App.), review granted, 74 So. 3d 1083 (Fla. 2011). This argument reached the court via an arbitration clause in a boiler-plate Florida contract for the purchase and sale of real property. *Id.* at 1197.

14. See *id.* at 1200–01 (citing *Maguire v. King*, 917 So. 2d 263, 266–67 (Fla. 5th Dist. Ct. App. 2005)). Compare *id.* at 1204, with *Maguire*, 917 So. 2d at 268.

15. 74 So. 3d 1083 (Fla. 2011) (unpublished table decision).

16. *Oral Argument Schedule & Briefs*, FLA. SUPREME CT., http://www.floridasupremecourt.org/pub_info/summaries/oa06-12.shtml (last visited Oct. 28, 2012).

17. Respondents' Answer Brief on the Merits at 1–2, *Jackson v. Shakespeare Found., Inc.*, No. SC11-1196 (Fla. Feb. 8, 2012); see also Complaint at 1, *Shakespeare Found., Inc. v. Jackson*, No. 09-1399CA, 2010 WL 8747760 (Fla. 14th Cir. Ct. Jan. 27, 2010).

18. Complaint, *supra* note 17, at 3–4.

19. Respondents' Answer Brief on the Merits, *supra* note 17, at 2.

20. *Jackson I*, 61 So. 3d 1194, 1196 (Fla. 1st Dist. Ct. App.), review granted, 74 So. 3d 1083 (Fla. 2011); Respondents' Answer Brief on the Merits, *supra* note 17, at 2.

21. *Jackson I*, 61 So. 3d at 1200–01; see also *Maguire v. King*, 917 So. 2d 263, 268 (Fla. 5th Dist. Ct. App. 2005).

22. See *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999); Act Effective Oct. 1, 1957, ch. 57-402, § 24, 1957 Fla. Laws 928, 936 (codified at FLA. STAT. § 57.11 (1957)). Common law arbitration existed in Florida before the enactment of the Florida Arbitration

Florida lawmakers failed to provide much, if any, guidance to the courts in defining how to appropriately find boundaries as to the scope of arbitration clauses.²³ As a result, it has been left up to the courts to formulate a test that can accurately interpret the essence of the law.²⁴ Generally, the courts struggled with whether to interpret the arbitration clauses broadly or narrowly because it is unclear if the legislature intended for the alternative dispute provisions to be applicable to claims generally or specifically.²⁵

“The size, vitality, and importance of Florida as a center of commercial activity and a unique legal jurisdiction explains why a large quantity of disputes over arbitrability²⁶ each year require a Florida Arbitration Code-based analysis and occur outside of interstate commerce.”²⁷ Therefore, the following discussion regarding arbitration and the complexity of the conceptual scope of arbitration agreement provisions is strictly limited to Florida law.

This article will narrowly focus on the examination of arbitrational issues that arise between contracting parties when they have an agreement with a broad arbitration clause and one party wants to sue the other party in tort. Particularly, this article reviews the major conflicts among the Florida appellate level courts regarding the enforcement of arbitration clauses and the analysis of their applicability to civil tort claims.²⁸

Part II of this paper will describe the current state of arbitration in Florida, including a description of what legal rules apply to arbitration, and how arbitration is compelled by the courts of Florida. Part II will also include a

Code; however, there was a strong presumption against arbitration except in complex employment disputes. See A. Dallas Albritton, Jr., *Florida Arbitration Law*, 31 FLA. B.J. 121, 125 (1957).

23. See FLA. STAT. § 682.02 (2012) (providing that parties can agree to arbitrate future disputes relating to a contract, but failing to define what “relating to” means).

24. See *Seifert*, 750 So. 2d at 636 (citing *Terminix Int’l Co. v. Ponzio*, 693 So. 2d 104, 106 (Fla. 5th Dist. Ct. App. 1997)).

25. See *id.* at 636–38, 641.

26. For purposes of this article, the term arbitrability refers “to the question of whether a particular dispute is within the scope of an arbitration provision the parties indisputably agreed to, as distinct from the question of whether an arbitration provision is unenforceable because of (for example) fraud, unconscionability, or lack of agreement by all parties.” *Certified Coatings of Cal., Inc. v. Shimmick Constr. Co.*, No. A120531, 2009 WL 311527, at *8 n.8 (Cal. Ct. App. Feb. 9, 2009) (citing *Bruni v. Didion*, 73 Cal. Rptr. 3d 395, 407 (Ct. App. 2008)). For example, *Watson v. Duval Cnty. Sch. Bd.*, 408 So. 2d 1053, 1054 (Fla. 1st Dist. Ct. App. 1981), was the first case to use the word “arbitrability” within the main text of a judicial opinion written by a Florida court. Michael Cavendish, *The Concept of Arbitrability Under the Florida Arbitration Code*, FLA. B.J., Nov. 2008, at 19, 25 n.1.

27. Cavendish, *supra* note 26, at 19.

28. Questions in tort are singular—relative to other types of contentions within arbitration issues—because tort law encompasses both common law duties as well as contractually prescribed duties. See VIVIENNE HARWOOD, *MODERN TORT LAW* 1–2 (7th ed. 2009).

brief discussion on the history of arbitration in the Sunshine State, illustrated by reference to highlights of pertinent jurisprudence on alternative dispute resolution. Next, Part III will tackle the judiciary's biggest issue—determining the arbitrability of a given dispute. This issue will be explained and examined through the prism of the case *sub judice*—*Shakespeare Foundation, Inc. v. Jackson (Jackson I)*.²⁹ Part III will discuss the threshold issues the court must determine. It will diagram, with scrutiny, the pros and cons of both the petitioners'³⁰ and respondents'³¹ arguments. Part IV examines the potential fallout from the decision in *Jackson I*, continuing with a discussion of how that decision will shape future arbitration provisions. Finally, this article concludes that the current test under Florida law is unsatisfactory to determine arbitrability with consistent results and that the courts in Florida should craft a new test based on what they deem to be the most controlling factor—the parties' intent.³²

II. CURRENT STATE OF ARBITRATION LAW IN FLORIDA

Otis B. Driftwood: It's all right, that's in every contract. That's what they call a sanity clause.

Fiorello: You can't fool me! There ain't no Sanity Claus!³³

Arbitration clauses are almost always utilized in commercial contracts or other types of arrangements, which can be catalysts for complex litigation.³⁴ The right to arbitrate cases within the purview of the Florida Arbitration Code—similar to the Federal Arbitration Act upon which the *Florida Statutes* are based—generally turns on a “seemingly simple question: ‘Is this

29. 61 So. 3d 1194 (Fla. 1st Dist. Ct. App.), *review granted*, 74 So. 3d 1083 (Fla. 2011).

30. See Petitioners' Initial Brief on the Merits at 5–13, *Jackson v. Shakespeare Found., Inc.*, No. SC11-1196 (Fla. Jan. 19, 2012).

31. See Respondents' Answer Brief on the Merits, *supra* note 17, at 7–28.

32. See Cavendish, *supra* note 26, at 20.

33. *Memorable Quotes for A Night at the Opera*, IMDB, <http://www.imdb.com/title/tt0026778/quotes> (last visited Oct. 28, 2012). These lines are from a famous scene, known as “the contract scene,” where two managers of entertainers are negotiating a contract for performances. *A NIGHT AT THE OPERA* (Metro-Goldwyn-Mayer 1935).

34. See MASSEY, *supra* note 11, para. 2.

In the United States unionized sector, studies have shown that the number of collective bargaining agreements that contain arbitration clauses as a means of dispute resolution (grievance arbitration) has been on the rise. In fact, by 1944 the Bureau of Labor Statistics showed that 73% of all labor contracts in America contained arbitration clauses and by the early 1980's that figure had grown to 95%. Today, 98% of all collective bargaining agreements in the United States contain arbitration clauses.

Id. (citations omitted).

claim arbitrable?”³⁵ The answer to this question often requires the intricate dissection of multifaceted legal rationale, which has the ability to lead to unpredictable results.³⁶ A clear understanding of “the concept of arbitrability under the Florida Arbitration Code” is a mandatory qualification for adjudicators in contemporary courts to resolve the deft question posed above in one of their most hotly litigated subject matters—arbitration concerning tort claims.³⁷

Though there are instances in which a particular controversy is within the scope of an arbitration agreement between contracting parties, it is also quite regular that disputes fall into a grey area of whether or not they are within the scope of the arbitration clause.³⁸ In Florida, this is usually called into question “in the context of a motion to compel arbitration, when the court is required to determine, *inter alia*, whether” a claim is subject to arbitration.³⁹ When adjudicating the issue of whether a claim falls within the scope of an arbitration clause, the court must glean the intent of the contracting parties through careful examination of the language of the agreement.⁴⁰ Presumably, the question arises most when the quarrel under review is whether a civil complaint in tort falls within the defined boundaries of an agreement to arbitrate or whether such a claim lies solely within the jurisdiction of the courts.⁴¹

The preeminent Florida case devoted to this controversy is *Seifert v. U.S. Home Corp.*,⁴² where the court held the suitable test to determine if an

35. Cavendish, *supra* note 26, at 24–25.

36. *Id.* at 25.

37. *Id.*

38. See Milligan, *supra* note 8, at 23; see generally Joseph L. Daly & Suzanne M. Scheller, *Strengthening Arbitration by Facing Its Challenges*, 28 QUNNIPIAC L. REV. 67, 67–83 (2009) (discussing and addressing many issues within arbitration).

39. *The Scope of Arbitration Clauses in Florida*, L. & ARB. OFFS. DONALD T RYCE, http://floridaarbitrator.net/the_scope_of_arbitration_clauses_in_florida (last visited Oct. 28, 2012).

40. *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999) (quoting *Seaboard Coast Line R.R. Co. v. Trailer Train Co.*, 690 F.2d 1343, 1348 (11th Cir. 1982)) (citing *Regency Grp., Inc. v. McDaniels*, 647 So. 2d 192, 193 (Fla. 1st Dist. Ct. App. 1994) (per curiam)); *The Scope of Arbitration Clauses in Florida*, *supra* note 39.

41. See *The Scope of Arbitration Clauses in Florida*, *supra* note 39. Arbitration provisions must have defined boundaries, even if they are vague, because it is illegal for such provisions to oust the jurisdiction of the courts. See *id.*; 17A C.J.S. *Contracts* § 315 (2012). Additionally, “arbitration [agreements and] provisions are contractual in nature [and] construction of such provisions . . . remains a matter of contract interpretation.” *Seifert*, 750 So. 2d at 636 (citing *Seaboard Coast Line R.R. Co.*, 690 F.2d at 1352; *R.W. Roberts Constr. Co. v. St. Johns River Water Mgmt. Dist. ex rel. McDonald Electric & Repair Serv., Inc.*, 423 So. 2d 630, 632 (Fla. 5th Dist. Ct. App. 1982)).

42. 750 So. 2d 633 (Fla. 1999).

issue falls within the scope of an arbitration provision is “whether the tort claim, as alleged in the complaint, arises from and bears such a significant relationship to the contract between the parties as to mandate application of the arbitration clause.”⁴³ Simply speaking, the court has to balance the contract incorporating the arbitration provision against the allegations set forth in the complaint to determine if “a ‘sufficient nexus’ [exists] between the two.”⁴⁴ The Supreme Court of Florida, in *Seifert*, “concluded that the tort claim in that case” failed to connect via a significant relationship to the contract to merit “submission of the cause to arbitration;” the rationale being that all of the allegations by the plaintiff failed to assert that any of “the defendant’s duties or obligations arose from or were governed by the contract.”⁴⁵ Conversely, not too long ago, the Third District Court of Appeal “held that a claim for breach of fiduciary duty” against a CEO by his former company was within the arbitration provision of the employment contract “because it was necessary to examine the contract to ascertain exactly what the CEO’s duties [were] to the company.”⁴⁶

A. *A Brief History of Arbitration in Florida*

It is impossible to pinpoint the exact genesis of arbitration but scholars believe alternative dispute resolution is from time immemorial.⁴⁷ The British Kingdom had arbitrations dating back before the installation of the common law system upon which our American courts are based.⁴⁸ Domestically, Native Americans used arbitration as a means of solving intra and inter tribe disputes.⁴⁹ Moreover, even George Washington included a proviso in his will that “if any dispute [arose] over the [language] of the document that a panel of three arbitrators [must be utilized] to render a final and binding decision to resolve the dispute.”⁵⁰

43. *Id.* at 640.

44. *The Scope of Arbitration Clauses in Florida*, *supra* note 39; *see also Seifert*, 750 So. 2d at 638.

45. *The Scope of Arbitration Clauses in Florida*, *supra* note 39; *see also Seifert*, 750 So. 2d at 640, 642.

46. *The Scope of Arbitration Clauses in Florida*, *supra* note 39; *Burke v. Windjammer Barefoot Cruises*, 972 So. 2d 1108, 1111–12 (Fla. 3d Dist. Ct. App. 2008) (citing *Seifert*, 750 So. 2d at 642).

47. MASSEY, *supra* note 11, para. 3.

48. *Id.*

49. *Id.*

50. *Id.*

The first inclusive laws about arbitration in Florida were enacted in 1828.⁵¹ The propagation of arbitration law in Florida was put forth by the unicameral Legislative Council.⁵² These laws were exceptionally analogous in many ways to English arbitration law from 1697, which authorized “parties [to] file an agreement to arbitrate with the court that would have jurisdiction over the controversy.”⁵³ Originally, agreements providing for the arbitration of future disputes were unenforceable as executory contracts, which were voidable by either party.⁵⁴ Furthermore, it was common for courts to merely renounce enforcement of arbitration clauses over future disputes as a matter of public policy against “oust[ing] the jurisdiction of the courts.”⁵⁵ Judicial hostility combined with the general “reticence of lawyers to venture into unfamiliar territory” meant arbitration was a rarely utilized process in Florida.⁵⁶ In fact, a 1954 study found that only a handful of Florida lawyers had considerable experience with arbitration and that most lawyers preferred litigation over arbitration.⁵⁷

The impetus for the modern era of arbitration was the New York Legislature’s amendment of the Civil Practice Act in 1920.⁵⁸ This new law supported the enforceability of agreements to arbitrate for the first time.⁵⁹ New York’s legislative actions created a buzz about arbitration, which compelled “the Conference of Commissioners on Uniform State Laws to release a draft

51. Judith A. Mellman, Comment, *Seeking Its Place in the Sun: Florida’s Emerging Role in International Commercial Arbitration*, 19 U. MIAMI INTER-AM. L. REV. 363, 367 (1987–1988).

52. *Id.* at 367 n.23. During this same session, on November 17, 1828, many of the territory’s civil and criminal laws were established. *Id.*

53. *Id.* at 367.

54. *Id.* at 367 & n.25.

55. Mellman, *supra* note 51, at 367 n.25.

56. *Id.* at 367.

57. *Id.* at 367 n.26.

58. *Id.* at 367; *see also* Act of Apr. 19, 1920, ch. 275, § 2, 1920 N.Y. Laws 803, 804 (current version at N.Y. C.P.L.R. 7501 (McKinney 1998 & Supp. 2011)).

The statute’s constitutionality was upheld one year later in *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 292 (N.Y. 1921). It is interesting to note that the *Berkovitz* decision was authored by Judge Cardozo. Just seven years earlier he had written that: If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes. It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary. The jurisdiction of our courts is established by law, and it is not to be diminished, any more than it is to be increased, by the convention of the parties.

Mellman, *supra* note 51, at 367–68 n.27 (citations omitted).

59. *Id.* at 367.

Uniform Arbitration Statute (“UAS”) in 1924.”⁶⁰ The UAS was unfortunately rejected by a majority of states, but it set the stage for the passage of the United States Arbitration Act, more commonly known as the Federal Arbitration Act (“FAA”).⁶¹ Following the lead of the New York law, the FAA “similarly made agreements to arbitrate future disputes enforceable.”⁶² The scope of the FAA was limited to maritime transactions, interstate commerce, and foreign commerce.⁶³ However, the Supreme Court of the United States’ support of the Act,⁶⁴ combined with the Act’s nationwide coverage, served to intensify sponsorship “for the enactment of modern state arbitration laws.”⁶⁵ Shortly after the end of World War II, a University of Miami School of Law professor, David S. Stern, undertook crafting a contemporary arbitration statute for Florida for use with commercial arbitration.⁶⁶ After facing intense opposition, Professor Stern’s draft was adopted into Florida law in 1957.⁶⁷

“Following the lead of Congress, many states, including Florida, have also legislated the field of arbitration.”⁶⁸ Section 682.02 of the *Florida Statutes*, which falls within the Florida Arbitration Code,⁶⁹ expressly affords that written contractual provisions calling for settlements of any disputes via arbitration “shall be valid, enforceable, and irrevocable without regard to the justiciable character of the controversy.”⁷⁰ However, the Florida Arbitration Code will not apply if the contracting parties exercise the option to specifically stipulate as such in their agreement.⁷¹ For example, in *Wickes Corp. v.*

60. *Id.* at 367–68; *see also* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING 21 (1925).

61. Mellman, *supra* note 51, at 368; *see also* 9 U.S.C. § 2 (1925–1926) (amended 1947).

62. Mellman, *supra* note 51, at 368; *see also* 9 U.S.C. § 2 (2006).

63. 9 U.S.C. § 1.

64. *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 279 (1932) (holding the FAA was constitutional).

65. Mellman, *supra* note 51, at 368; *see also* Douglas J. Giuliano, *Parochialism in Arbitration? How Some Arbitration Decisions by Florida Courts Are at Variance with Federal Arbitration Precedent*, FLA. B.J., Feb. 2007, at 9, 9 (“The result . . . was that ‘[s]tates can no longer harbor their historical hostility towards arbitration.’ Indeed, ‘[m]any state legislatures also have enacted statutes that encourage the use of arbitration and ensure that agreements to arbitrate will be enforced according to their terms and conditions.’” (alteration in original)).

66. Mellman, *supra* note 51, at 368.

67. *Id.*

68. Michael A. Hanzman, *Arbitration Agreements: Analyzing Threshold Choice of Law and Arbitrability Questions*, FLA. B.J., Dec. 1996, at 14, 16.

69. FLA. STAT. § 682.01 (2012) (providing that “[s]ections 682.01–682.22 may be cited as the ‘Florida Arbitration Code’”).

70. FLA. STAT. § 682.02.

71. Mellman, *supra* note 51, at 369.

Industrial Financial Corp.,⁷² where the parties clearly expressed their desire to not have the Florida Arbitration Code apply, the court held that “their rights and duties will be decided according to common law principles.”⁷³ Courts in Florida have reluctantly acknowledged that the goal of the Florida Arbitration Code is to bypass protracted litigation and its accompanying costs.⁷⁴ Thus, Florida courts strictly construe arbitration agreements under the Florida Arbitration Code, and “only matters expressly covered by the arbitration agreement may be arbitrated.”⁷⁵

Finally, the “general hostility” of the Florida courts plus the inherent restrictions of the Florida Arbitration Code handicapped the acceptance of arbitration in Florida.⁷⁶ Thus, twenty years after the passage of the Florida Arbitration Code, “it was [plausible] for one commentator to write that ‘it is clear that in Florida arbitration of disputes, other than these [sic] in the labor area, are fairly rare.’”⁷⁷ Despite this, the Florida judiciary eventually softened its stance and arbitration is now looked upon favorably in the Sunshine State.⁷⁸

B. *What is Arbitration?*

Arbitration is one of several modes of alternative dispute resolution.⁷⁹ Contrary to standard litigation, the adversaries do not resolve their problems “in a civil courtroom with a judge and jury making the decision.”⁸⁰ Instead, the parties sanction their controversy to the authority of a single arbitrator or a panel of arbiters outside traditional jurisprudential settings—*i.e.*, the courtroom or chambers.⁸¹ The arbitrator is not technically “a judge, [but] has quasi-judicial power[s] to investigate, weigh the evidence presented, and to

72. 493 F.2d 1173 (5th Cir. 1974).

73. Mellman, *supra* note 51, at 369 n.40; *see also Wickes Corp.*, 493 F.2d at 1175.

74. Mellman, *supra* note 51, at 369; *see, e.g., Merkle v. Rice Constr. Co.*, 271 So. 2d 220, 221–22 (Fla. 2d Dist. Ct. App. 1973).

75. Mellman, *supra* note 51, at 369.

76. *Id.* at 370.

77. *Id.*; *see also* Guy O. Farmer II, *Introduction to Arbitration*, in *ARBITRATION IN FLORIDA* 1, 9 (1979).

78. *See* Robert J. Hauser et al., *Re-examining the Presumption in Favor of Arbitration in Complex Commercial Cases*, FLA. B.J., Mar. 2010, at 8, 9.

79. Todd D. Greene, *Arbitration: Coming to a Contract Near You*, HILL WALLACK LLP, http://www.hillwallack.com/web-content/news/article_v14n2_08.html (last visited Oct. 28, 2012).

80. *Id.*

81. Meah R. Tell, Florida Supreme Court Approved Arbitration Training 31 (Feb. 18, 2012) (unpublished training manual) (on file with *Nova Law Review*); Greene, *supra* note 79.

render a final decision to resolve the matter, which is enforceable by a court judgment.”⁸²

To start “[t]he arbitration process . . . opposing sides select[] a neutral third party” to adjudicate their dispute.⁸³ Generally, once an arbitrator is selected, the opposing counsels and judges⁸⁴ will meet to “discuss the issues in dispute and decide on a time frame for their resolution.”⁸⁵ Next, the individuals on either side of the dispute will mutually create a formal Arbitration Agreement.⁸⁶ These formal agreements integrate the controversies in their entirety and the arbitration proceedings are restricted to resolving only those issues raised in the Arbitration Agreement.⁸⁷

After these initial deeds are accomplished, the parties each make their presentations to the arbitrator.⁸⁸ “The proceedings may or may not be recorded and often do not abide by the rules of evidence used in traditional litigation.”⁸⁹ Once the parties have completed presenting their respective sides of the case, the arbitrator is capable of, and “will, render a final decision.”⁹⁰

The benefits of arbitration are numerous.⁹¹ Proponents of the method allege the process to be more efficient, and thus quicker at resolving disputes than the courts.⁹² Arbitration is a private proceeding, which means that “the timing of the matter is contingent upon the preparation of the parties” as opposed to being subject to the mercy of the court’s caseload.⁹³ An arbitrator can swiftly reach a decision, potentially within a few months, as opposed to years of litigation.⁹⁴ “By limiting discovery and the time it takes to resolve an issue, the parties often expend less money preparing for and arbitrating a matter than litigating in court.”⁹⁵ Additionally, those who choose to arbitrate

82. Greene, *supra* note 79.

83. *Id.*

84. Though not officially judges, during arbitration proceedings, the arbitrators are usually referred to directly as judges, and sometimes even “your honor.” See Tell, *supra* note 81, at 59. This is due to the lack of better title for the arbitrator within the process of arbitration. *Id.* However, in some cases, usually involving construction contracts, arbitrators are known as umpires. *Id.*

85. Greene, *supra* note 79.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Greene, *supra* note 79.

91. *See id.*

92. *Id.*

93. *Id.*

94. *Id.*; see, e.g., Tell, *supra* note 81, at 112–14.

95. Greene, *supra* note 79.

have the luxury of selecting an arbitrator.⁹⁶ “The freedom to choose an arbitrator is especially beneficial to highly technical disputes.”⁹⁷ Most parties believe it is to their advantage to employ an arbitrator who maintains a high level of knowledge or expertise within the field that is the subject of the dispute “because the arbitrator is familiar with the normal course of [business] and terms [within] the trade.”⁹⁸

However, arbitration is not without its disadvantages.⁹⁹ One of the disadvantages of arbitration is the majority of proceedings are based on limited discovery.¹⁰⁰ Limitations on discovery mean that “both sides may never be able to acquire the facts necessary to accurately evaluate the controversy.”¹⁰¹ Ergo, arbitrators potentially could be issuing fallible decisions based on specious logic resultant from inadequate information.¹⁰² Additionally, most ventures forego the rules of evidence, and “while this [may] allow for the free flow of information, the protections [from] the rules . . . are essentially waived.”¹⁰³ Finally, it is seen as a large con by many that most arbitration decisions are not appealable.¹⁰⁴

1. Playing by the Rules

Through statutory legislation and traditional common law jurisprudence, Florida has evinced an extensive set of rules applicable to understanding the arbitrability of disputes.¹⁰⁵ No doubt, the most important of these rules is in the Florida Arbitration Code.

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.*

100. Greene, *supra* note 79.

101. *Id.*

102. *Id.*; *see* Hauser et al., *supra* note 78, at 16.

103. Greene, *supra* note 79.

104. Scott D. Marrs & Sean P. Milligan, *10 Major Arbitration Issues Recently Addressed by Courts*, DISP. RESOL. J., Aug.-Oct. 2009, at 38, 42; Barbara Repa, *Arbitration Pros and Cons*, NOLO, <http://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html> (last visited Oct. 28, 2012). Robert Stone, an Adjunct Professor at Nova Southeastern University Shepard Broad Law Center, expressed very similar sentiment among securities lawyers—who must regularly arbitrate—during class on August 21, 2012.

105. *See* FLA. STAT. § 682.01 (2012) (stating Chapter 682 of the *Florida Statutes* encompasses the entire Florida Arbitration Code); *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999) (providing the three elements to determine arbitrability in Florida); *Maguire v. King*, 917 So. 2d 263, 266 (Fla. 5th Dist. Ct. App. 2005) (stating that torts based in common law may sometimes fall within or outside of an arbitration clause while contractually-created duties are normally subject to broad arbitration clauses (citing *Seifert*, 750 So. 2d at 639–41; *Stacy David Inc. v. Consuegra*, 845 So. 2d 303, 306 (Fla. 2d Dist. Ct. App. 2003))).

Arbitration agreements made valid, irrevocable, and enforceable; scope.—Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. This section also applies to written interlocal agreements under ss. 163.01 and 373.713 in which two or more parties agree to submit to arbitration any controversy between them concerning water use permit applications and other matters, regardless of whether or not the water management district with jurisdiction over the subject application is a party to the interlocal agreement or a participant in the arbitration. Such agreement or provision shall be valid, enforceable, and irrevocable without regard to the justiciable character of the controversy; provided that this act shall not apply to any such agreement or provision to arbitrate in which it is stipulated that this law shall not apply or to any arbitration or award thereunder.¹⁰⁶

Courts are required to compel arbitration when an agreement to arbitrate and an issue within the scope of the agreement co-exist, plus neither of the parties has waived their right to arbitration.¹⁰⁷ Though courts now generally favor compelling arbitration, they can only do so when the provisions in question comply with the Florida Arbitration Code.¹⁰⁸ “[P]arties [who] resort to the statutory mode of arbitration” must substantially comply with statutory requirements.¹⁰⁹ Thus, if an agreement fails to comply with the Florida Arbitration Code, the courts are unable to enforce or compel specific performance.¹¹⁰ For the Florida Arbitration Code to apply, the parties must either: (1) “agree in writing to submit to arbitration any controversy existing between them at the time of the agreement” or (2) include a provision for the settlement of controversies thereafter arising between the parties relative to the contract or failure to perform or refusal to perform the contract partially or wholly.¹¹¹ The second type of agreement does not controvert the constitu-

106. FLA. STAT. § 682.02.

107. *United Healthcare of Fla., Inc. v. Brown*, 984 So. 2d 583, 585 (Fla. 4th Dist. Ct. App. 2008) (quoting *Miller & Solomon Gen. Contractors, Inc. v. Brennan’s Glass Co.*, 824 So. 2d 288, 290 (Fla. 4th Dist. Ct. App. 2002) (per curiam)).

108. *Avid Eng’g, Inc. v. Orlando Marketplace Ltd.*, 809 So. 2d 1, 3 (Fla. 5th Dist. Ct. App. 2001) (citing *Knight v. H.S. Equities, Inc.*, 280 So. 2d 456, 459 (Fla. 4th Dist. Ct. App. 1973)).

109. *Readdy v. Tampa Electric Co.*, 41 So. 535, 537 (Fla. 1906).

110. *Knight*, 280 So. 2d at 459.

111. FLA. STAT. § 682.02.

tional rights of Floridians¹¹² because parties waive their rights to access the courts upon “agreeing to arbitration in lieu of litigation.”¹¹³ Interestingly, the arbitration provisions in contracts do not need to be titled as such.¹¹⁴ The Florida courts prefer to stick to an *if it quacks like a duck and walks like a duck, then it must be a duck* analysis.¹¹⁵ The only judicial guidance proffered is “[t]he provisions in a contract providing for arbitration must sufficiently identify what particular matters are to be submitted to arbitration, and set forth some procedures by which arbitration is to be effected.”¹¹⁶ Additionally, the Florida Arbitration Code does not apply retroactively.¹¹⁷ Accordingly, “only . . . agreements and provisions for arbitration made subsequent to the effective date of the [Florida Arbitration] Code” are subject to it.¹¹⁸

For example, the Fifth District Court of Appeal reviewed the dismissal of the complaint of a licensee brought against a licensor and the licensor’s president that asserted tort and statutory claims in *Marine Environmental Partners, Inc. v. Johnson*.¹¹⁹ Despite the fact that the licensing agreement provided that Colorado law was controlling, the parties failed to argue the applicability of Colorado law at any judicial level and predominantly relied on Florida law.¹²⁰ The court held that Florida law was applicable since the issue of choice of law was waived by the parties, and Florida was the forum state.¹²¹

Jurisdiction over arbitration is conferred to the Florida courts when an agreement is made subject to the Florida Arbitration Code and provides for arbitration in the state, regardless of the province in which the accord was made.¹²² Among other things, once a court has jurisdiction over a claim the courts have the authority to enforce arbitration agreements or arbitration

112. See FLA. CONST. art. I, § 21 (“Access to [C]ourts” states that “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.”). For further discussion see JOHN F. COOPER & THOMAS C. MARKS JR., *FLORIDA CONSTITUTIONAL LAW: CASES AND MATERIALS* (4th ed. 2006).

113. *Value Car Sales, Inc. v. Bouton*, 608 So. 2d 860, 861 (Fla. 5th Dist. Ct. App. 1992).

114. See, e.g., *Intracoastal Ventures Corp. v. Safeco Ins. Co. of Am.*, 540 So. 2d 162, 163–64 (Fla. 4th Dist. Ct. App. 1989).

115. See *id.*

116. *Id.* at 164.

117. 3A FLA. JUR. 2D *Arbitration and Award* § 10 (2008).

118. *Id.*

119. 863 So. 2d 423, 424–25 (Fla. 4th Dist. Ct. App. 2003).

120. *Id.* at 426.

121. *Id.* (citing *Waner v. Ford Motor Co.*, 331 F.3d 851, 856 n.2 (Fed. Cir. 2003); *Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 180 (3d Cir. 1995); *Terminix Int’l Co. v. Ponzio*, 693 So. 2d 104, 106 (Fla. 5th Dist. Ct. App. 1997)).

122. 3A FLA. JUR. 2D *Arbitration and Award* § 11 (2008).

clauses in contracts.¹²³ Though parties are free to contract that laws of any jurisdiction will be controlling in the result of arbitration, Florida courts will not enforce such provisions due to the Florida Arbitration Code.¹²⁴

When making determinations about whether a claim falls within the potential scope of arbitration courts are required to “look beyond the [mere] legal cause of action and examine the factual allegations of the complaint.”¹²⁵ The wide gaze of the fact-finder is necessary to ensure that only the claims the parties intended to arbitrate are compelled.¹²⁶ Because arbitration agreements are contractual in nature, a trial court’s denial of a motion to compel arbitration is an issue of contractual interpretation and thus, subject to the appellate court’s *de novo* review.¹²⁷

Arbitration is strictly limited to only the disputes “‘which the parties have expressly agreed’” to resolve through arbitration.¹²⁸ Judges shall not compel arbitration if there is an “‘absence of express language [mandating such] in the . . . contract’” before the court.¹²⁹ Any questions about the

123. FLA. STAT. § 682.18 (2012).

124. See FLA. STAT. ANN. § 682.02 (West 2003) (referencing provisions for arbitration in another state).

125. *Singer v. Gaines*, 896 So. 2d 851, 854 (Fla. 3d Dist. Ct. App. 2005) (citing *In re Scott*, 100 S.W.3d 575, 581 (Tex. App. 2003)). The financial advisors’ claim that the employer and its principals “‘fraudulently induced him into entering into an employment contract,’” arose out of the employment, and thus, the claim was subject to arbitration under National Association of Securities Dealers (NASD) Code of Arbitration. *Id.* at 852–53. The advisors’ claims that the defendants “‘falsely represented that they would provide him with ample support staff, significant marketing programs, and guidance from producers who had made more than \$2.7 million in revenue in the prior year,’” *id.* at 852, “‘necessarily require[d] evaluation of . . . performance of the defendants as an employer of [a] broker[.]’” *Id.* at 855.

126. See *Vargas v. Schweitzer-Ramras*, 878 So. 2d 415, 417 (Fla. 3d Dist. Ct. App. 2004) (*per curiam*).

127. *Engle Homes, Inc. v. Jones*, 870 So. 2d 908, 910 (Fla. 4th Dist. Ct. App. 2004) (quoting *Ocwen Fed. Bank FSB v. LVWD, Ltd.*, 766 So. 2d 248, 249 (Fla. 4th Dist. Ct. App. 2000)).

128. *Vargas*, 878 So. 2d at 417 (quoting *Atencio v. U.S. Sec. Ins. Co.*, 676 So. 2d 489, 490 (Fla. 3d Dist. Ct. App. 1996)) (citing *Miller v. Roberts*, 682 So. 2d 691, 692 (Fla. 5th Dist. Ct. App. 1996); *Regency Grp., Inc. v. McDaniels*, 647 So. 2d 192, 193 (Fla. 1st Dist. Ct. App. 1994) (*per curiam*)).

129. *Morgan Stanley DW Inc. v. Halliday*, 873 So. 2d 400, 404 (Fla. 4th Dist. Ct. App. 2004) (quoting *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 642 (Fla. 1999)) (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

Finally, appellee argues that the trial court was correct to deny the motion to compel arbitration because there was no agreement that *tort claims* would be subject to arbitration. We find the instant case clearly distinguishable. Here, the agreement containing the arbitration clause obligated appellant to provide appropriate care to the decedent, and the dispute alleges that appellant failed to provide appropriate care. It certainly appears to us that there is a strong nexus between the dispute giving rise to the lawsuit and the contract containing the arbitration clause. That the claim sounds in negligence (failure to exercise reasonable care) rather than breach of

scope—or questions regarding waiver—should be resolved in favor of arbitration rather than against it.¹³⁰ In addition, Florida courts should conclude any and all doubts about the reach of arbitration agreements with favoritism towards arbitration.¹³¹ Remarkably, the courts in Florida fail to mention how to balance the public policy of favoring arbitration when weighed against the presumption of mistakes in contractual drafting being held against the drafter.¹³²

Public policy in Florida is partial to arbitration “as an efficient means of [dispute settlement]” since it generally “avoids the delays and expenses of litigation.”¹³³ It is important to remember the essential purpose of these quasi-judicial proceedings is “freedom from the formality of ordinary judicial procedure.”¹³⁴ Nevertheless, even though courts look upon arbitration agreements with favor, parties who seek to exercise their arbitral rights must safeguard them.¹³⁵ The appellate court in the Second District reversed a

contract (failure to fulfill a contractual obligation) does not ipso facto sever an otherwise significant relationship between the contractual obligation and the matter in dispute. The trial court found the dispute to be arbitrable and we do as well.

Consol. Res. Healthcare Fund I, Ltd. v. Fenelus, 853 So. 2d 500, 505–06 (Fla. 4th Dist. Ct. App. 2003) (footnote omitted) (citation omitted).

130. See *EMSA Ltd. P’ship v. Mason*, 677 So. 2d 105, 107 (Fla. 4th Dist. Ct. App. 1996) (quoting *Ronbeck Constr. Co. v. Savanna Club Corp.*, 592 So. 2d 344, 346 (Fla. 4th Dist. Ct. App. 1992)).

131. *Ronbeck Constr. Co.*, 592 So. 2d at 346–47 (property “owner’s claim for rescission of [construction] contract [was] subject to arbitration” where property owner’s fraud claims that formed the basis of rescission were “predicated on events dealing with performance [of] the . . . contract, rather than its making” or inducement).

132. See, e.g., *Engle Homes, Inc.*, 870 So. 2d at 910–11 (holding that an arbitration provision in a purchase agreement did compel arbitration but remained silent on the presumption of mistakes in contractual drafting being held against the drafter); *Avid Eng’g, Inc. v. Orlando Marketplace Ltd.*, 809 So. 2d 1, 5 (Fla. 5th Dist. Ct. App. 2001) (involving no mention of the presumption of mistakes in contractual drafting being held against the drafter in their decision); *Intracoastal Ventures Corp. v. Safeco Ins. Co. of Am.*, 540 So. 2d 162, 164–65 (Fla. 4th Dist. Ct. App. 1989) (holding that an appraisal clause was not an arbitration clause by its plain language, but not mentioning the presumption of mistakes in contractual drafting being held against the drafter).

133. *KFC Nat’l Mgmt. Co. v. Beauregard*, 739 So. 2d 630, 631 (Fla. 5th Dist. Ct. App. 1999) (citing *Gale Grp., Inc. v. Westinghouse Electric Corp.*, 683 So. 2d 661, 663 (Fla. 5th Dist. Ct. App. 1996)); see also *Johnson v. Wells*, 73 So. 188, 190–91 (Fla. 1916) (acknowledging that arbitration expedites and facilitates the settlement of disputes, thereby avoiding the formalities, delay, and expense of ordinary litigation). But see *Hauser et al.*, *supra* note 78, at 14.

134. *Cassara v. Wofford*, 55 So. 2d 102, 106 (Fla. 1951) (quoting *Sapp v. Barenfeld*, 212 P.2d 233, 237 (Cal. 1949) (in bank)).

135. *Williams ex rel. Estate of Williams v. Manor Care of Dunedin, Inc.*, 923 So. 2d 615, 616 (Fla. 2d Dist. Ct. App. 2006) (quoting *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005)).

trial court's finding that there was no waiver of the right when the appellee—defendant below—failed to answer the complaint in a manner consistent with those rights.¹³⁶ Therefore, one can either expressly waive their right to arbitrate or implicitly do so by acting in a manner inconsistent with the right to arbitrate.¹³⁷

The *Florida Jurisprudence, Second Edition* does provide a stern word of caution regarding Florida's public policy favoring arbitration by reminding attorneys that every rule has exceptions.¹³⁸

Caution: Where legislation clearly mandates that a particular issue or type of dispute be resolved in a judicial forum, the policy favoring arbitration will yield. Other exceptions to the policy favoring the enforcement of agreements to arbitrate arise where public policy is said to require that a matter in issue be determined by a court. There is a narrow class of cases that have been excepted from arbitration on public policy grounds, but an incidental effect on the public policy of the state is insufficient to remove a claim from arbitration where there is an agreement to arbitrate.

Arbitration is an alternative to the court system and limited review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true alternative.¹³⁹

Above all else, attorneys facing motions to compel arbitration should always remember that these agreements and provisions are contractual in nature, thus Floridian benches will view them matter-of-factly: “Like all contracts, each arbitration agreement is unique. Although it may employ some standard terms, the contract must be construed and understood in light of its whole text, context, structure and purpose . . . [and] the entire undertaking must be considered.”¹⁴⁰

2. How is Arbitration Compelled?

Because this article focuses on the test to determine the arbitrability of tort claims only slightly touching contracts, it is not necessary to dive into a

136. *Id.* at 617.

137. *Cassara*, 55 So. 2d at 106; *Williams ex rel. Estate of Williams*, 923 So. 2d at 617.

138. 3A FLA. JUR. 2D *Arbitration and Award* § 4 (2008).

139. *Id.* (footnotes omitted).

140. *Aberdeen Golf & Country Club v. Bliss Constr., Inc.*, 932 So. 2d 235, 236 (Fla. 4th Dist. Ct. App. 2005).

detailed discussion on how to compel such claims. It is important to note that the issue being covered below—save for when parties expressly opt to use common law—generally arises when the parties follow the procedures set forth in the Florida Arbitration Code.¹⁴¹ Thus, this section is only intended as a rudimentary primer to further the understanding of the reader.

Below is the practical procedure, as stated in the *Florida Statutes*, that an attorney must follow in Florida to initiate and have proceedings that can compel arbitration.¹⁴²

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 [section] 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 [sic] 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 deter-

141. FLA. STAT. § 682.03 (2012).

142. *See id.*

mine 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.¹⁴³

Basically, when a court is hearing a motion to compel arbitration under the Florida Arbitration Code, it must decide whether or not to compel arbitration based on three elements.¹⁴⁴ First, the court must determine that a valid written arbitration agreement exists.¹⁴⁵ If the court finds that an agreement to arbitrate exists, then it must determine whether an arbitrable issue exists; and finally, if either party waived its right to arbitration.¹⁴⁶

III. THE CASE AT HAND: *JACKSON V. THE SHAKESPEARE FOUNDATION, INC.*

A. *How Did We Get Here?*

The case *sub judice* arose when the Supreme Court of Florida entered an order accepting jurisdiction, resulting from the First District Court of Appeal certifying conflict with the Fifth District Court of Appeal.¹⁴⁷ The proceeding before the court began when the respondent, Shakespeare Foundation (“Shakespeare”), along with its development team, Herd Community Development Corporation (“Herd”), filed a complaint against the petitioners, George Jackson, Kerry Jackson, and Jackson Realty Team, Inc. (“Jackson(s)”) in March of 2009.¹⁴⁸ The complaint alleged “that the Jacksons had fraudulently misrepresented, [among other things], the existence of wetlands on certain real property in Bay County, Florida, that had been purchased by Shakespeare and Herd from the Jacksons.”¹⁴⁹ Specifically, the respondents

143. *Id.*

144. H. Michael Muñoz, *Compelling Arbitration of Disputes—The Florida v. Federal Law Quagmire*, FLA. B.J., Dec. 2006, at 31, 32.

145. *Id.*

146. *Id.* For a more in-depth discussion on the issues related to compelling arbitration, the reader should consult *Compelling Arbitration of Disputes—The Florida v. Federal Law Quagmire. Id.*

147. *Jackson II*, 74 So. 3d 1083, 1083 (Fla. 2011) (unpublished table decision); *Jackson I*, 61 So. 3d 1194, 1200–01 (Fla. 1st Dist. Ct. App.) (discussing *Maguire v. King*, 917 So. 2d 263, 266 (Fla. 5th Dist. Ct. App. 2005)), *review granted*, 74 So. 3d 1083 (Fla. 2011).

148. Respondents’ Answer Brief on the Merits, *supra* note 17, at 1.

149. Petitioners’ Brief on Jurisdiction at 2, *Jackson v. Shakespeare Found., Inc.*, 74 So. 3d 1083 (Fla. 2011) (No. SC11-1196).

complained that the petitioners “fraudulently misrepresented . . . the . . . property . . . [as] ‘a great affordable housing project’ and that [a] ‘wetland study verifies no wetlands.’”¹⁵⁰ Furthermore, Shakespeare and Herd claim that the damages suffered were a direct result of the fraudulent misrepresentation¹⁵¹ since Florida law could prevent development of the portion of property containing wetlands.¹⁵²

In their responsive pleading, “[t]he Jacksons filed a motion to dismiss [established upon] the existence of an arbitration clause contained within the contract,”¹⁵³ requiring the parties “to resolve the[ir] dispute through neutral binding arbitration.”¹⁵⁴ The lower court granted the Jacksons’ motion, causing Shakespeare and Herd to timely file an appeal.¹⁵⁵ The First District Court of Appeal held in favor of the appellant-plaintiffs, thereby reversing the order of the trial court.¹⁵⁶ Lastly, “[t]he Jacksons . . . filed their Notice to Invoke Discretionary Jurisdiction.”¹⁵⁷

1. The Facts of the Case

Mr. and Mrs. Jackson owned property at 915 Everett Avenue, Panama City, Florida, which Shakespeare and Herd agreed to purchase for \$253,000.¹⁵⁸ Shakespeare and Herd did so with the intent to develop twenty-seven affordable housing units upon that tract of land.¹⁵⁹ The Jacksons ad-

150. Respondents’ Answer Brief on the Merits, *supra* note 17, at 2.

151. Petitioners’ Initial Brief on the Merits, *supra* note 30, at 2.

152. *Id.* at 2–3.

The controversy regarding the preservation of wetlands involves two diametrically opposed and equally important interests: [T]he maintenance of Florida’s sensitive ecology and the continued increase in Florida’s population. As Florida’s population increases, the need for land development proportionately increases. Since a large portion of Florida’s undeveloped landmass is comprised of wetlands, and wetlands are relatively easy and inexpensive to develop, wetlands have been targeted by many developers as the construction site of choice. However, given the important role that wetlands play in Florida’s ecology, the State protects wetlands by regulating their development.

Tirso M. Carreja, Jr., *Adding A Statutory Stick to the Bundle of Rights: Florida’s Ability to Regulate Wetlands Under Current Takings Jurisprudence and Under the Private Property Rights Protection Act of 1995*, 11 J. LAND USE & ENVTL. L. 423, 423–24 (1996) (footnote omitted); see FLA. STAT. § 373.414(1) (2012).

153. Petitioners’ Initial Brief on the Merits, *supra* note 30, at 3.

154. Respondents’ Answer Brief on the Merits, *supra* note 17, at 2.

155. *Id.*

156. *Jackson I*, 61 So. 3d 1194, 1196, 1201 (Fla. 1st Dist. Ct. App.), *review granted*, 74 So. 3d 1083 (Fla. 2011); Respondents’ Answer Brief on the Merits, *supra* note 17, at 2.

157. Respondents’ Answer Brief on the Merits, *supra* note 17, at 2–3.

158. *Id.* at 3, 5.

159. *Id.* at 5.

vertised the parcel of land on the Bay County Multiple Listing Service.¹⁶⁰ The real estate advertisement posted by the petitioners contained a long paragraph about the prospective parcel, and the petitioners stated, among other things, that the parcel was an “affordable housing project” and that [the] “wetland study verifies no wetlands.”¹⁶¹ The respondents argued that this claim was a fraudulent misrepresentation, forcing them to suffer damages “because the presence of . . . wetlands prevented them from developing a portion of the property.”¹⁶²

Once the property was purchased by Shakespeare and Herd, the developer began preparations to move into the construction phases of his plan.¹⁶³ The initial step was “an onsite meeting . . . with their builder and engineer.”¹⁶⁴ During the meeting, the builder observed “the foliage and the general lay of the land [causing him to opine] . . . that the subject property might contain some wetlands.”¹⁶⁵ Upon contacting the surveyor used by the petitioners,¹⁶⁶ the respondents learned that according to the surveyor, someone was hired to “walk the property,” and from that stroll, the plot was declared wetland free.¹⁶⁷ Subsequent to this revelation, Shakespeare and Herd hired their own team to conduct an in-depth wetlands survey, which revealed the real estate to be twenty-six percent wetlands, and thus twenty-six percent unbuildable.¹⁶⁸

The purchase and sale agreement (“Contract”) for the parcel at 915 Everett Avenue contained an arbitration agreement clause in the Dispute Resolu-

160. *Id.* at 3.

161. *Id.* at 2 (quoting Complaint, *supra* note 17, at 3–4).

162. Petitioners’ Initial Brief on the Merits, *supra* note 30, at 2.

At the time the above advertisement was posted by the Jacksons or Jackson Realty on the Bay County Multiple Listing Service, the Jacksons had in their possession a Property Report Land Use Planning Analysis prepared by Ron Thomasson, A.T.C.P., Land Use Consulting, showing that, in fact, 25% of the land was in wetlands. The Jacksons purchased the property shortly before listing it for sale through the Bay County Multiple Listing Service. Ms. Jackson used the above-referenced report to negotiate the purchase price of the subject property from the prior owner from \$175,000.00 down to \$145,000.00.

Respondents’ Answer Brief on the Merits, *supra* note 17, at 4.

163. *Id.* at 5.

164. *Id.*

165. *Id.*

166. *Id.* at 5–6. The company hired by the Jacksons in connection with the property preparations was North Bay Engineering. Respondents’ Answer Brief on the Merits, *supra* note 17, at 5.

167. *Id.* (emphasis added). “Shakespeare and Herd then contacted Ms. Jackson who stated that she would provide a copy of the wetland study and a fill permit. As of the date of filing the Complaint, no copy of a wetlands report or fill permit report had been provided to Shakespeare and Herd.” *Id.* at 5–6.

168. *Id.* at 6.

tion section that “survive[d] the closing of the property . . . [and] state[d], in pertinent part:”¹⁶⁹

14. DISPUTE RESOLUTION: This Contract will be construed under Florida law. All controversies, claims, and other matters in question arising out of or relating to this transaction or this Contract or its breach will be settled as follows:

. . .

(b) **All other disputes: Buyer and Seller** will have 30 days from the date a dispute arises between them to attempt to resolve the matter through mediation, failing which the parties will resolve the dispute through neutral binding arbitration in the county where the Property is located. The arbitration may not alter the Contract terms or award any remedy not provided for in this Contract . . .

¹⁷⁰

“The award will be based on the greater weight [sic] of the evidence and will state findings of fact and the contractual authority on which it is based.”¹⁷¹

“This clause shall survive closing.”¹⁷²

Because the above contract language does not specifically name the causes of action that are subject to arbitration and the parties remain divided on the issue, it is up to the court to determine whether the respondents’ fraud in the inducement claim falls within the arbitrable realm.¹⁷³

B. *Threshold Issues for the Court to Determine*

In deciding *Jackson II*, the court must not forget that in Florida, arbitration is the “preferred mechanism of dispute resolution, and . . . any doubt[s] regarding the arbitrability of a claim should be resolved in favor of allowing arbitration.”¹⁷⁴ The Supreme Court of Florida has even gone so far as to dec-

169. Petitioners’ Brief on Jurisdiction, *supra* note 149, at 2; *see also* Respondents’ Answer Brief on the Merits, *supra* note 17, at 2.

170. Respondents’ Amended Brief on Jurisdiction at 1, *Jackson v. Shakespeare Found., Inc.*, 74 So. 3d 1083 (Fla. 2011) (No. SC11-1196) (alteration in original); *see also* Petitioners’ Brief on Jurisdiction, *supra* note 149, at 2–3.

171. Petitioners’ Brief on Jurisdiction, *supra* note 149, at 3.

172. Respondents’ Amended Brief on Jurisdiction, *supra* note 170, at 1.

173. *See id.*; *Maguire v. King*, 917 So. 2d 263, 266–67 (Fla. 5th Dist. Ct. App. 2005); *see also* Petitioner’s Brief on Jurisdiction, *supra* note 149, at 5 (citing *Maguire*, 917 So. 2d at 264–66).

174. *Cavendish*, *supra* note 26, at 19.

lare that when agreements are subject to the Florida Arbitration Code, “courts [will] indulge every reasonable presumption to uphold proceedings resulting in an award.”¹⁷⁵ As a result, it is not a stretch for one to claim Florida has a very pro-arbitration policy.¹⁷⁶ “This gloss of public policy gives rise to a judicially employed rule of construction for arbitration language in a valid contract—the rule of maximum breadth.”¹⁷⁷ Under the instructions of this rule, judges are to consider arbitration clauses giving the “broadest possible interpretation to accomplish the salutary purpose of resolving controversies out of court.”¹⁷⁸

To the uninitiated, reading the preceding rules governing arbitration along with the overlay of strong policy, it may appear as if questions regarding arbitrability consistently return the same unyielding answer—this is an understandable misconception.¹⁷⁹ What appears as a “monolith” of Florida law is in reality a hollow shell.¹⁸⁰ This is because Florida courts have yet another important rule which commands “that, under the Florida Arbitration Code, no party may be forced into arbitrating something they did not agree to arbitrate, notwithstanding the general rule favoring arbitration.”¹⁸¹ In other words, Florida courts adhere to contractual ideals, whereby contracts containing arbitration provisions “are to be carefully construed so as not to force a nonarbitrable issue into arbitration.”¹⁸²

This leads us to a crossroads at which formidable judicial ideals steadily impede marked pro-arbitration preference ingrained in Florida law and public policy.¹⁸³ Clearly, the courts are referring to the basic notion of intent;¹⁸⁴ intent meaning that “part[ies] cannot be [forced] to submit to arbitration” where a party neither intended nor agreed to arbitration.¹⁸⁵ Hence, in spite of conventional wisdom favoring arbitration, Florida courts will only allow arbitration of a particular dispute based on contractual proviso if the four

175. *Id.* (alteration in original) (quoting *Roe v. Amica Mut. Ins. Co.*, 533 So. 2d 279, 281 (Fla. 1988)).

176. *Id.*

177. *Id.* at 20.

178. *Id.* (quoting *Auchter Co. v. Zagloul*, 949 So. 2d 1189, 1195 (Fla. 1st Dist. Ct. App. 2007); *Benedict v. Pensacola Motor Sales, Inc.*, 846 So. 2d 1238, 1240 (Fla. 1st Dist. Ct. App. 2003)).

179. *Cavendish*, *supra* note 26, at 20.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Cavendish*, *supra* note 26, at 20.

185. *Rolls-Royce PLC v. Royal Caribbean Cruises Ltd.*, 960 So. 2d 768, 770 (Fla. 3d Dist. Ct. App. 2007) (quoting *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 648 (1986)); *see also Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999).

corners of the document evince the “parties’ intent to submit that particular dispute to arbitration.”¹⁸⁶ Conversely conceptualized, the judicial corollary instruct that when arbitration clause language unmistakably constructs arbitral blockades—precluding certain types of claims by a party—the interpreting bench can positively conclude the intent of the parties was to exclude any “extra-contractual or extra-textual claim[s]” from arbitration.¹⁸⁷ The maintenance of this ideal of requiring contractual intent provides balance to the rule of maximum breadth stemming from public policy favoring arbitration.¹⁸⁸ Though both axioms find plenty of support in decisional reporters, one must note that contract law wins the battle against arbitration-based law.¹⁸⁹

Finally, the main threshold question must be answered: How do we determine which disputes are appropriate for arbitration?¹⁹⁰ According to the Supreme Court of Florida, there must be “some nexus [linking] the dispute [with] the contract containing the arbitration clause.”¹⁹¹

1. The Intent of the Parties

With clear regard to the public policy and judicial ideal, the Supreme Court of Florida has instructed that the first hurdle to clear when considering arbitrability is the intent of the parties to arbitrate appropriate disputes.¹⁹² The intention to arbitrate can be express¹⁹³ or actual.¹⁹⁴

186. Cavendish, *supra* note 26, at 20.

187. *Id.*

188. *Id.*

189. *Id.*; *see, e.g.*, Hirshenson v. Spaccio, 800 So. 2d 670, 675–76 (Fla. 5th Dist. Ct. App. 2001).

There are maxims supporting this corollary in almost equal number to the reported judicial language supporting the expansive rule of maximum breadth, such as, for example, “[i]t is the intention as expressed by the language employed in the agreements that governs, not the after-the-fact testimony of the parties.” Within this corollary, intent, subject to the common law and evidence code filters restricting how contracting intent may be demonstrated, will seem to carry the day in a dispute over arbitrability.

Cavendish, *supra* note 26, at 20 (alteration in original) (footnotes omitted).

190. *See Seifert*, 750 So. 2d at 638.

191. *Id.*

192. *Id.* at 636 (quoting Seaboard Coast Line R.R. Co. v. Trailer Train Co., 690 F.2d 1343, 1348, 1352 (11th Cir. 1982)); *see* Maguire v. King, 917 So. 2d 263, 266 (Fla. 5th Dist. Ct. App. 2005) (citing *Seifert*, 750 So. 2d 636).

193. *Rosenhaus v. Star Sports, Inc.*, 929 So. 2d 40, 42 (Fla. 3d Dist. Ct. App. 2006) (citing *Atencio v. U.S. Sec. Ins. Co.*, 676 So. 2d 489, 490 (Fla. 3d Dist. Ct. App. 1996)). Express, refers to contractual language that explicitly states the parties’ intentions. BLACK’S LAW DICTIONARY 17c (9th ed. 2009).

194. *Medanic v. Citicorp Inv. Servs.*, 954 So. 2d 1210, 1211 (Fla. 3d Dist. Ct. App.) (citing *Citigroup, Inc. v. Amodio*, 894 So. 2d 296, 298–99 (Fla. 4th Dist. Ct. App. 2005)), *rev’d*

In determining the intent of the parties, consideration is only given to the language of the contract, and the “after-the-fact testimony of the parties” is summarily disregarded.¹⁹⁵ “Where questioned transactions involving matters not covered by an arbitration clause are inextricably interwoven with a subject which is expressly subject to the clause, an order requiring that the issues be submitted to arbitration is proper.”¹⁹⁶

The second hurdle in the preliminary step of determining the ambit of an arbitration clause is classifying the clause as either broad or narrow.¹⁹⁷ The Supreme Court of Florida has distinguished between broad and narrow arbitration provisions.¹⁹⁸ “Narrow arbitration clauses are those that require disputes ‘arising out of’ or ‘under’ a contract to arbitration.”¹⁹⁹ On the other hand, “[b]road arbitration provisions are those that require claims ‘arising out of or relating to’ a contract to be arbitrated.”²⁰⁰ Florida courts have also stated that the “language providing for . . . arbitration of ‘any and all’ [claims] . . . [i]s broad,” and includes all controversies or disputes arising from the contract.²⁰¹

When a provision is found to be broad, the presumption in favor of arbitration can only be rebutted by “the most forceful evidence of an intent to exclude a particular claim from arbitration.”²⁰² Therefore, when an arbitration provision is found to be broad, it plays right to the strength of Florida’s public policy favoring arbitration.²⁰³ But all coins have two sides, and the contra positive is that when a provision is found to be narrow—such as when

in part, 958 So. 2d 501 (Fla. 3d Dist. Ct. App. 2007). In this context, the term “actual” is analogous to “implied,” and means the intention of the parties which can be discerned from the language used by the parties in their agreement. BLACK’S LAW DICTIONARY 17c (9th ed. 2009).

195. *Maguire*, 917 So. 2d at 266 (quoting *Bill Heard Chevrolet Corp., Orlando v. Wilson*, 877 So. 2d 15, 18 (Fla. 5th Dist. Ct. App. 2004)). This step is always part of the analysis, but not necessarily always the second part. *See Gendzier v. Bielecki*, 97 So. 2d 604, 608–09 (Fla. 1957); *Wilson*, 877 So. 2d at 18.

196. 3A FLA. JUR. 2D *Arbitration and Award* § 31 (2008).

197. *See Seifert*, 750 So. 2d at 636–38. The court makes this determination by examining the wording of the arbitration clause. *See id.*

198. *Id.*

199. *Jackson I*, 61 So. 3d 1194, 1198 (Fla. 1st Dist. Ct. App.) (citing *Seifert*, 750 So. 2d at 636–37), *review granted*, 74 So. 3d 1083 (Fla. 2011).

200. *Id.* (citing *Seifert*, 750 So. 2d at 636–37).

201. *Cavendish*, *supra* note 26, at 22.

202. *Id.*

203. *See id.* at 19–20, 22.

the parties use special purpose maxims—the balance shifts in favor of the judicial ideals respecting the parties’ intent.²⁰⁴

In *Jackson I*, the First District Court of Appeal held that the arbitration provision in the sale and purchase agreement between Jackson and Shakespeare to be broad under Florida precedent.²⁰⁵ This is because the language in the clause within the contract states that “[a]ll controversies, claims, and other matters in question **arising out of or relating** to this transaction or this Contract or its breach’ to be arbitrated,” places it within the broad category promulgated by the Supreme Court of Florida.²⁰⁶

2. The *Seifert* Test for Arbitrability

The Supreme Court of Florida describes how to undertake finding “some nexus between the dispute and the contract containing the arbitration clause.”²⁰⁷ The court evinced a three element test to properly determine if a given dispute is arbitrable: “(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived.”²⁰⁸

This three-prong test and its aimed-at findings (for the existence of arbitrability) of “valid agreement/yes, arbitrable issue/yes, waiver/no” has a jurisprudential gloss of its own. While applying this test, Florida courts will instruct that arbitrability depends upon the relationship between the claim and the agreement, not the legal label attached to the dispute. What this means is that the heart of this three-prong test is the second prong, “arbitrable issue.”²⁰⁹

Therefore, once a contractual arbitration provision is deemed broad by the court, the test for determining the arbitrability of the claim is the presence of

204. *See id.* at 22.

For example, Florida courts opine that intent not to arbitrate a claim is evidenced through *omission* where an arbitration clause does not refer to the subject matter being contested. In another example, Florida courts state that intent not to arbitrate a claim can be evidenced through *exclusion* where the clause narrowly tailors its language to define or limit the scope of arbitrable issues.

Id.

205. *Jackson I*, 61 So. 3d at 1198.

206. *Id.*

207. *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636, 638 (Fla. 1999).

208. *Id.* at 636 (citing *Terminix Int’l Co. v. Ponzio*, 693 So. 2d 104, 106 (Fla. 5th Dist. Ct. App. 1997)).

209. *Cavendish*, *supra* note 26, at 22.

a “significant relationship” between the contract containing the broad clause and the cause of action.²¹⁰

The First District Court of Appeal concluded that Shakespeare and Herd’s claim failed the contractual nexus test despite the fact that the parties would not have been adversaries but for the existence of the real estate contract.²¹¹ The appellate court reasoned that “the claim at the center of the dispute arose from a general duty owed under common law.”²¹² Continuing further, the majority declared that torts must at least instigate some question that can only be resolved by “reference to or construction of [or interpretation of] some portion of the contract itself.”²¹³ The rationale behind this decision is that the claim of fraud in the inducement rests solely on Jackson’s Multiple Listing Service (MLS) advertisements, therefore not requiring any reference to or construction of the contract.²¹⁴ Further bolstering this point, the bench contended that “[t]he contract here is incidental to the dispute, because [Shakespeare and Herd] . . . could have raised their . . . claim even before the contract was signed if [they] detrimentally relied on [Jackson’s] advertisement.”²¹⁵

C. *The Petitioners’ Arguments*

The petitioners raise two arguments in their brief to the Supreme Court of Florida.²¹⁶ First, the Jacksons’ claim that the respondent-plaintiffs’ “action for fraudulent inducement . . . requires [both] reference . . . and interpretation of the contract . . . [and therefore] is significantly related to the contract.”²¹⁷ The second argument the petitioners raise is the undisputed nature of the arbitration provision as broad means it is all encompassing as to dis-

210. *Seifert*, 750 So. 2d at 637–38 (citing *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996)).

211. *Jackson I*, 61 So. 3d at 1198–99 (citing *Seifert*, 750 So. 2d at 638).

212. *Id.* at 1198. This seems to be the crux of the issue of the certified conflict between the First District Court of Appeal and the Fifth District Court of Appeal, though it is not evidently clear from the opinion. *See id.* at 1198, 1201; *Maguire v. King*, 917 So. 2d 263, 268 (Fla. 5th Dist. Ct. App. 2005).

213. *Jackson I*, 61 So. 3d at 1198 (quoting *Seifert*, 750 So. 2d at 638).

214. *See id.* at 1199.

215. *Id.*

Appellees rely on *Beazer Homes Corp. v. Bailey*, 940 So. 2d 453, 455 (Fla. 5th [Dist. Ct. App.] 2006), in support of their argument that the fraud claim here bore a significant relationship to the contract. *Beazer Homes*, however, did not result in an opinion of the Fifth District, as two judges on the panel concurred in result only.

Id. (citing *Beazer Homes Corp. v. Bailey*, 940 So. 2d 453, 455 (Fla. 5th Dist. Ct. App. 2006)).

216. Petitioners’ Initial Brief on the Merits, *supra* note 30, at 5, 12.

217. *Id.* at 5, 8–10.

putes between the parties.²¹⁸ Thus, an action for fraud in the inducement falls squarely within the provision.²¹⁹

Addressing the first issue, the petitioners give a brief dissertation on the history of *Seifert*, whereby they attempt to factually distinguish their case from that hallmark decision, while urging the court to adopt the reasoning of *Maguire v. King*.²²⁰ Howbeit, the true crux of the Jacksons' argument is that the respondents had a contractually imposed duty to perform a feasibility study.²²¹ This is based on a land use provision in the contract.²²²

6. LAND USE: Seller will deliver the Property to Buyer at the time agreed in its present "as is" condition, with conditions resulting from Buyer's inspections and casualty damage, if any, excepted.

....

(c) Inspections: (check (1) or (2) below)

(1) Feasibility Study: Buyer will, at Buyer's expense and within 30 days from Effective Date ("Feasibility Study Period"), determine whether the Property is suitable, in Buyer's sole and absolute discretion, for use. During the Feasibility Study Period, Buyer may conduct a Phase 1 environmental assessment and any other tests, analyses, surveys and investigations ("inspections") that Buyer deems necessary to determine to Buyer's satisfaction the Property's engineering, architectural and environmental properties . . . to determine the Property's suitability for the Buyer's intended use.

....

Buyer will deliver written notice to Seller prior to the expiration of the Feasibility Study Period of Buyer's determination of whether or not the Property is acceptable. Buyer's failure to comply with this notice requirement will constitute acceptance of the Property as suitable for Buyer's intended use in its "as is" condition. If the Property is unacceptable to the Buyer and written no-

218. *Id.* at 12.

219. *Id.*

220. *Id.* at 5–8, 10–11 (citing *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 635–38, 640, 642–43 (Fla. 1999); *Maguire v. King*, 917 So. 2d 263, 266 (Fla. 5th Dist. Ct. App. 2005)).

221. Petitioners' Initial Brief on the Merits, *supra* note 30, at 8–9.

222. *Id.*

tice of this fact is timely delivered to **Seller**, this Contract will be deemed terminated as of the day after the Feasibility Study period ends and **Buyer's** deposit(s) will be returned after Escrow Agent receives proper authorization from all interested parties.

(2) **No Feasibility Study:** **Buyer** is satisfied that the property is suitable for **Buyer's** purposes . . . [t]his Contract is not contingent on **Buyer** conducting any further investigations.²²³

The respondents checked option one in favor of a feasibility study.²²⁴ In their complaint, Shakespeare and Herd allege that had they been aware of the presence of wetlands—a fact misrepresented by the sellers in their advertisement—“they would not have purchased the property.”²²⁵ The petitioners rely on the above clause to show that Shakespeare had a contractually-imposed duty to perform a study on the property.²²⁶ This is a specious argument since the clause above actually imposes no duty.²²⁷ The clause provides the procedure taken, and the time available for the buyer to refuse the property.²²⁸ The clause is in essence a sophisticated return policy.²²⁹ This is indicated by the fact that under Option One the buyers are taking the property “as is” with the option to terminate within thirty days to perform a study.²³⁰ The **will** provisions for the buyer under this clause are for the buyer to determine, at his discretion, if the property is suitable for use.²³¹ However, if the buyer does not find the property up to par, the remaining **will** provisions guide the acceptable method for rejecting the property.²³² If the buyer fails to comply with the **will** provisions the buyer is accepting the property as suitable in its “as is” condition.²³³ The remainder of the terminology in the clause includes **may** provisions—“may conduct a Phase [one] . . . assessment”—which means the buyer is not under a duty to do so.²³⁴ The buyer has the option to let the thirty days lapse and accept the property in its current condition.²³⁵ The duties under this provision only arise in the event that the buyer

223. *Id.* at 8–9.

224. *Id.* at 9.

225. *Id.* at 8; *see* Complaint, *supra* note 17, at 4.

226. Petitioners’ Initial Brief on the Merits, *supra* note 30, at 8–10.

227. Respondents’ Answer Brief on the Merits, *supra* note 17, at 29.

228. Petitioners’ Initial Brief on the Merits, *supra* note 30, at 8–9.

229. *See id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. Petitioners’ Initial Brief on the Merits, *supra* note 30, at 8–9.

234. *See id.* at 9.

235. *Id.*

chooses Option One, performs a study, and then decides to reject the property as suitable.²³⁶ In this case, the seller-petitioners allegedly fraudulently misrepresented the property as wetland-free in their MLS advertisement, and the buyers relied on that advertisement in purchasing the property.²³⁷ In doing so, they failed to exercise the option that would have created a contractual duty.²³⁸ Whether intentional, or accidental, the petitioner, by including this clause—which clearly requires substantial interpretation—may have actually won the battle to include the fraud in the inducement claim within the scope of arbitration, but not in the manner originally designed.²³⁹

The second issue raised by the Jacksons is all about intent.²⁴⁰ Most of the discussion put forth by the petitioners surrounds the respondents' knowledge.²⁴¹ The petitioner claims that because the buyers are sophisticated within the area of real estate, and because they stated their intent to build on the property, then they clearly intended to arbitrate these types of claims.²⁴² Unfortunately, this argument is faulty since intent and knowledge, though closely tied, are not analogous.²⁴³ Intent—in the vacuum of contract legalese—can only be derived from the language contained within the four corners of the contract.²⁴⁴ It is defined as “[t]he state of mind accompanying an act, esp[ecially] a forbidden act. While motive is the inducement to do some act, intent is the mental resolution or determination to do it.”²⁴⁵ On the other hand, knowledge is generally accepted as being earned through experience.²⁴⁶ The accepted legal definition of knowledge is “[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact.”²⁴⁷ The petitioner correctly and thoroughly explains that the broad nature of the arbitration provision within

236. *See id.* at 8–9.

237. *Id.* at 8; Complaint, *supra* note 17, at 3–4.

238. *See* Petitioners' Initial Brief on the Merits, *supra* note 30, at 8–9. Remember, mere reference to the contract does not necessarily create the contractual nexus. *See* Seifert v. U.S. Home Corp., 750 So. 2d 633, 638 (Fla. 1999).

239. *See* Petitioners' Initial Brief on the Merits, *supra* note 30, at 8–10.

240. *Id.* at 12–13.

241. *Id.* at 13.

242. *Id.* at 10, 13.

243. Compare BLACK'S LAW DICTIONARY 881 (9th ed. 2009) (defining intent), with *id.* at 950 (defining knowledge).

244. *See* Cavendish, *supra* note 26, at 20. In several opinions, judges have written that depending on the language of the contract, intent can also be inferred from the conduct of the parties. *See, e.g.,* Rosenhaus v. Star Sports, Inc., 929 So. 2d 40, 42–43 (Fla. 3d Dist. Ct. App. 2006).

245. BLACK'S LAW DICTIONARY 881 (9th ed. 2009) (emphasis added).

246. *See id.* at 950–51.

247. *Id.* at 950.

the contract clearly indicates the intent to include a tort for fraud in the inducement as within its scope.²⁴⁸ The remaining question for the court to decide is whether the remainder of the contract continues this reasoning or limits the intent of the parties.²⁴⁹

Additionally, what the petitioner should have argued here, but only do so impliedly, is that the facts underlying the complaint for fraud in the inducement are the same facts, which would support a breach of contract claim. Therefore, the court should follow the reasoning of the Fifth District Court of Appeal in *Maguire*.

D. *The Respondents' Arguments*

The respondent also raises the same two issues, but in the negative; thus, the fraud claim bears no significant relationship to the contract and the clear intent of the parties is to exclude these types of claims from arbitration.²⁵⁰

The first argument addressed by the respondent centers on a lengthy discussion of the complaint.²⁵¹ This is because Florida law requires the court to look at the allegations set forth in the complaint to determine whether the dispute arises from or relates to the subject of the contract.²⁵² Out of more than twenty paragraphs, the contract in question is only mentioned thrice.²⁵³

As set forth above, the only reference to the Contract relate to the fact that it exists, the price paid, and the prayer for attorney's fees. Shakespeare and Herd's common-law fraud claim does not require reference to or construction of the Contract for its resolution, nor does it invoke any contractual provision.²⁵⁴

Therefore this shows that the contract slightly touches the complaint but does not bear a significant relation.²⁵⁵ Next, Shakespeare and Herd go through the entire process of proving fraud in the inducement without relation to the contract.²⁵⁶ However, this argument is subject to criticism because a buyer find-

248. See Petitioners' Initial Brief on the Merits, *supra* note 30, at 12; see also *Maguire v. King*, 917 So. 2d 263, 266 (Fla. 5th Dist. Ct. App. 2005) (citing *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 640–41 (Fla. 1999)).

249. See Petitioners' Initial Brief on the Merits, *supra* note 30, at 12.

250. Respondents' Answer Brief on the Merits, *supra* note 17, at 11, 22.

251. *Id.* at 12; see also Complaint, *supra* note 17, at 3–6.

252. See Respondents' Answer Brief on the Merits, *supra* note 17, at 13–14.

253. See *id.* at 17; see also Complaint, *supra* note 17, at 4, 6.

254. Respondents' Answer Brief on the Merits, *supra* note 17, at 18.

255. See *id.*

256. See *id.* at 18–20.

ing a property unsuitable—based on the Feasibility Study Period—springs forth particular contractual duties supported by the “Buyer Provision” discussed above.²⁵⁷ It is at this point the respondent should have pointed to the complaint, which *does not* allege the desire to return the property, but states that the harm inflicted by the Jacksons caused Shakespeare and Herd to miss a favorable housing market, thus losing profits and additional expenses on the property.²⁵⁸ This indicates that the relief sought is not based on the contract, but in common law principles.²⁵⁹ This is important because an essential component of this conflict among the district courts is how the causes of action averred in pleadings relate to the contractual provision.²⁶⁰

The second issue argued by the respondent is related to the intent of the parties.²⁶¹ The central theme of this argument is that because the contract failed to provide any remedy for the fraud allegations, it indicates that the intent of the parties was to exclude this from arbitration.²⁶² The argument rests on the theory that the remedies provision of the contract limits the extent of the arbitration award, thus limiting the scope of claims subject to arbitration.²⁶³

The remedies provided in the Contract are:

(1) A remedy for the Buyer in the event the “Seller fails, refuses or neglects to perform this Contract,” in which case the Buyer may choose to receive a return of the Buyer’s deposit without waiving the right to seek damages or to seek specific performance as per paragraph 14.

(2) A remedy for the Seller if the Buyer defaults, in which case the Seller may choose to retain and collect all deposits paid and agreed to be paid as liquidated damages or to seek specific performance as per paragraph 14.

257. See Petitioners’ Initial Brief on the Merits, *supra* note 30, at 9. Shakespeare in fact did undertake a feasibility study of the parcel of land upon which this dispute is grounded. See Complaint, *supra* note 17, at 5.

258. See *Jackson I*, 61 So. 3d 1194, 1197 (Fla. 1st Dist. Ct. App.), review granted, 74 So. 3d 1083 (Fla. 2011); see also Respondents’ Amended Brief on Jurisdiction, *supra* note 170, at 2; Complaint, *supra* note 17, at 5–6.

259. *Jackson I*, 61 So. 3d at 1198.

260. *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636–37 (Fla. 1999) (citing *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir.1983); *In re Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir.1961)).

261. Respondents’ Answer Brief on the Merits, *supra* note 17, at 22.

262. *Id.* at 22, 24–25, 27.

263. See *id.* at 27.

(3) A remedy in the event of disputes concerning entitlements to deposits, failing resolution through mediation, in which case the Escrow Agent may choose to elect to have the issue resolved by arbitration, a Florida Court, or the Florida Real Estate Commission.

(4) All other disputes, failing resolution in mediation, must be determined through mutual binding arbitration in the county where the Property is located, however, "the Arbitrator may not alter the contract terms or award any remedy not provided for in this Contract."²⁶⁴

However, this argument fails on two points.²⁶⁵ First, from the logical means-ends analysis, one can point to the simple fact that the ends here of limiting awards to those provided for in the contract do not bear a rational relationship to the means/causes of action.²⁶⁶ More likely, this provision is set forth in the contract as a necessary way to limit the liability of the parties in the event that either defaults. The respondent does a notable job of reciting Florida constitutional law in an effort to rebut this argument.²⁶⁷ This brings us to the second point, whereby the right to redress can be limited by the parties to the contract, a point rightly asserted by the dissent in the court below.²⁶⁸ In fact, the court in *Maguire* dismissed the same exact argument.²⁶⁹ Moreover, award-limiting provisions are more accurately viewed as an analogue to guidelines or rules promulgated by the contracting parties for the arbitrator.²⁷⁰

264. *Id.* at 24.

265. *See Jackson I*, 61 So. 3d 1194, 1198–99 (Fla. 1st Dist. Ct. App.), *review granted*, 74 So. 3d 1083 (Fla. 2011).

266. *See id.*; *see also* Respondents' Answer Brief on the Merits, *supra* note 17, at 24.

267. Respondents' Answer Brief on the Merits, *supra* note 17, at 26 (noting that a basic right in Florida requires that the courts remain open for redress of all injuries); *see also* FLA. CONST. art I, § 21.

268. *Jackson I*, 61 So. 3d at 1202–03 (Marsteller, J., dissenting) (citing *Kaplan v. Kimball Hill Homes Fla., Inc.*, 915 So. 2d 755, 761 (Fla. 2d Dist. Ct. App. 2005)).

269. *Maguire v. King*, 917 So. 2d 263, 267 (Fla. 5th Dist. Ct. App. 2005).

270. *Id.* (citing *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401, 405–07 & n.2 (2003); *see Rollins, Inc. v. Lighthouse Bay Holdings, Ltd.*, 898 So. 2d 86, 88–89 (Fla. 2d Dist. Ct. App. 2005)).

IV. FALLOUT FROM THE DECISION

The discussion above reveals that regardless of which way the Supreme Court of Florida ultimately decides on the issues raised in *Jackson*, the future of arbitration provisions is a slippery slope.²⁷¹

If the court sees fit to side with the arguments of the petitioner, it has the potential to exponentially expand the public policy in Florida to the point where almost all tort claims even remotely connected to a contract will be subject to arbitration provisions within any contract between the litigants.²⁷² Agreeing with the petitioner would almost assuredly create precedent such that arbitration provisions containing “any and all dispute” language would be construed so broadly that only those disputes clearly unrelated to the contract could be litigated.²⁷³

Conversely, if the court agrees with the respondent’s arguments stating how the claim can be resolved without reference or interpretation of the contract,²⁷⁴ the potential fallout could change how future lawyers draft arbitration provisions. Future drafters would surely react by carefully crafting contract language that is simultaneously more descriptive yet remains vague—for example, “this arbitration provision contemplates torts, contractual provisions, employment, and all other disputes which may arise from this contract.” The blowback from this type of language means that courts will ulti-

271. See discussion *infra* Part III.D.

272. Compare *Jackson I*, 61 So. 3d at 1198, with *Maguire*, 917 So. 2d at 266–67; see also Petitioners’ Initial Brief on the Merits, *supra* note 30, at 12.

273. See *Jackson I*, 61 So. 3d at 1198; Petitioners’ Initial Brief on the Merits, *supra* note 30, at 12. For example, assume Buyer and Seller enter into a real estate agreement to construct and furnish a single-family home in Fort Lauderdale, Florida, which goes off without a hitch. This real estate agreement includes an arbitration provision, which assuming *arguendo*, is broad within Florida law. Sadly, ten years later Buyer is severely beaten by Seller because Buyer slept with Seller’s wife, Desi. Now, Buyer wants to bring a civil suit for battery against Seller. It would seem that the two events bear no relation and Buyer can litigate his claim. However, what if we learn that Desi is short for Designer, and the entire genesis of the affair between Buyer and Designer began a decade earlier when Designer and Buyer worked together to furnish the home, a duty imposed upon Designer only because of the real estate contract? If the Florida courts continue on the path outlined above, it is plausible that Buyer’s battery claim against Seller would be precluded from going to court because the past contract required that the claim be arbitrated. See *Maguire*, 917 So. 2d at 266. Furthermore, it is disheartening to ponder a legal climate where the gravamen of a decision can swing on such minutiae.

274. Respondents’ Answer Brief on the Merits, *supra* note 17, at 18 (quoting Petitioners’ Initial Brief on the Merits, *supra* note 30, at 8).

mately be forced to construct or interpret contracts for the sheer fact of their complexity.²⁷⁵

The result, as this author sees it, is the emergence of a new judicial rule—that ultimately courts will be forced to create a new test based in equity and focused more on the intent of the parties as discerned through the language chosen and their actions.²⁷⁶ In other words, the test would force the courts to ask, “*was it foreseeable that this dispute would arise and litigation would occur?*” If the answer is yes, then the claim must be compelled to arbitration. Conversely, if the answer is no, this is an unforeseeable cause of action. Unforeseeable claims shall remain within the jurisdiction of the courts.²⁷⁷

This test is essentially contractual intent distilled by traditional tort law, and for the purposes of this article, it will be known as the “Shakespeare Test.”²⁷⁸ The standard of review for the Shakespeare Test is that of an objectively reasonable person in the same circumstances as the party seeking to enforce the arbitration clauses.²⁷⁹ The reason that a test based on foreseeabil-

275. See *Jackson I*, 61 So. 3d at 1199 (citing *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238, 1239–40 (Fla. 1996)).

276. See *id.* at 1201, 1204 (Marsteller, J., dissenting).

277. This test would not be unlike the current foreseeability test of proximate causation used in common-law negligence analyses. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. 1928); see also *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992). This test would establish a limitation on arbitration with respect to the scope of broad arbitration clauses applied to torts. *Palsgraf* established the concept of proximate cause, which uses foreseeability to limit the liability in negligence cases to repercussions of an action which could reasonably be foreseen as opposed to every action which follows the negligent act. See *Palsgraf*, 162 N.E. at 101. Currently, Florida uses a test which is similar to the “but for” test in torts. See *Seifert v. U. S. Home Corp.*, 750 So. 2d 633, 638 (Fla. 1999). However, with regard to arbitration agreements, it is almost certain that *but for* the contract these two parties would not have an issue in dispute. Therefore, one who seeks arbitration and is fortuitous enough to have an injury in tort which a judge, in his discretion, sees as *significantly related* or having a *sufficient nexus* to the contract—itsself a perversion of “but for” applied to arbitration clauses—will be able to compel arbitration. See *id.* Sadly, if the judge does not find, in his opinion, a “but for” relationship, then the dispute will not be subject to arbitration. See *id.* Therefore, to avoid this, the author proposes that for a tort issue to be subject to a broad arbitration clause, it must be the type of dispute which reasonable contracting parties in a similar situation would contemplate as a result of this contract or a breach of the same.

278. See *Jackson I*, 61 So. 3d at 1197–98 (citing *Seifert*, 750 So. 2d at 636).

279. See *D'Alemberte v. Anderson*, 349 So. 2d 164, 168 (Fla. 1977) (explaining the reasonably prudent person standard). One could also listen in on the first week of any torts class at any law school within the state of Florida to learn about the reasonably prudent person standard.

The **reasonable person** is an ideal of a model citizen, but will have shortcomings as determined appropriate by the fact finder.

However, the **reasonable person** may act differently in different situations. The fact finder must determine what a **reasonable person** would do “under the same or similar cir-

ity²⁸⁰ is the best test to determine whether a particular claim is subject to arbitration, is because it falls directly in line with contractual intent.²⁸¹ When discussing the intent of the parties within the bounds of contract law, courts have repeatedly fallen back upon the essence of intent as an objective *meeting of the minds*.²⁸² Obviously then, whenever a court is determining the intent of the parties as to the breadth of an arbitration clause, the judges are implicitly asking themselves: “What did these two parties want to be covered by this arbitration clause in this contract?”²⁸³ It is at this point that logical consideration must be given to what that question means. It means that at some point, prior to signing the contract, the parties must have realized that certain types of disputes are the plausible result of the contract they intend to sign, and that those claims are too expensive, or present too much liability, or any myriad of other reasons parties prefer to avoid litigation. The simple point is that these parties contemplated and *foresaw* various disputes they would prefer to arbitrate, rather than litigate; and it is these disputes which are within the scope of the arbitration clause found within the agreement between the parties.

V. CONCLUSION

Due to the confusing nature of the test currently used in Florida, it is difficult for contracting parties to know at the outset what future disputes are

cumstances” as the defendant. Although the **reasonable person** standard of conduct is clearly determined by taking account of the facts of each situation, the **reasonable person** standard is, minus narrow exceptions, an objective standard in regards to the actor. The idiosyncrasies of individuals are not taken into account when determining whether an actor is liable for damages.

Kristin Harlow, Note, *Applying the Reasonable Person Standard to Psychosis: How Tort Law Unfairly Burdens Adults with Mental Illness*, 68 OHIO ST. L.J. 1733, 1738 (2007) (emphasis added) (footnotes omitted).

280. See *McCain*, 593 So. 2d at 502 (discussing foreseeability under Florida common law with regard to proximate causation). In this respect, proximate cause is concerned with if and to what magnitude the defendant’s conduct foreseeably and substantially caused the particular injury in dispute. *Id.*

281. See Cavendish, *supra* note 26, at 20.

282. See *Robbie v. City of Miami*, 469 So. 2d 1384, 1385 (Fla. 1985) (emphasis added) (quoting *Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp.*, 302 So. 2d 404, 407 (Fla. 1974)) (stating that mutual assent refers not to both parties having the same subjective intent but to both parties having the same understanding of the essential terms of a contract).

283. See *Seifert*, 750 So. 2d at 636 (citing *Tracer Research Corp. v. Nat’l Envtl. Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994); *Seaboard Coast Line R.R. Co. v. Trailer Train Co.*, 690 F.2d 1343, 1352 (11th Cir. 1982); *Miller v. Roberts*, 682 So. 2d 691, 692 (Fla. 5th Dist. Ct. App 1996); *Regency Grp., Inc. v. McDaniels*, 647 So. 2d 192, 193 (Fla. 1st Dist. Ct. App. 1994) (per curiam)).

potentially subject to arbitration.²⁸⁴ The split of authority amongst the district courts of Florida results in a failure of uniform jurisprudence, leaving potential contractors without the capacity to determine their ability to redress foreseeable future torts via litigation when considering agreements containing arbitration provisions.²⁸⁵ Though courts have seen fit to manipulate the *Seifert* test under their discretion to decide conflicts, this test ultimately proves to be more confusing than workable, owing mostly to its highly discretionary nature.²⁸⁶ The judges and lawyers overseeing these cases are assuredly highly intelligent, and therefore always able to reach a conclusion. However, it is disturbing that two cases with analogous facts could reach opposite results.²⁸⁷ Therefore, the Supreme Court of Florida should take this opportunity to streamline the process of determining whether tort claims, which tenuously touch commercial contracts, are subject to arbitration.

284. See *Seifert*, 750 So. 2d at 636–37; Hanzman, *supra* note 68, at 22–23; *The Scope of Arbitration Clauses in Florida*, *supra* note 39.

285. See *supra* Parts II.A, III.

286. See *supra* Part III.B.2.

287. See *Jackson I*, 61 So. 3d 1194, 1197 (Fla. 1st Dist. Ct. App.), *review granted*, 74 So. 3d 1083 (Fla. 2011); see also *Maguire v. King*, 917 So. 2d 263, 264–65, 268 (Fla. 5th Dist. Ct. App. 2005).