SUPREME COURT OF ARIZONA

JEFFREY HAMBLEN and BARBARA YOUNGS, husband and wife, Petitioners/Defendants, v. HONORABLE RALPH HATCH, Judge of the Superior Court of the State of Arizona, in and for the County of Navajo, Respondent, and WINSLOW MEMORIAL HOSPITAL INC d/b/a LITTLE COLORADO MEDICAL CENTER, Plaintiff-Real Party in Interest	Arizona Supreme Court No. Court of Appeals Division One No. 1 CA-SA 16-0201 Navajo County Superior Court No. S0900CV201400311

PETITION FOR REVIEW

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INTRODUCTION

The Court should confirm that the arbitration separability doctrine applies to post-arbitration confirmation proceedings, as well as to motions to compel arbitration. Under the separability doctrine, an arbitration provision is considered a stand-alone agreement separate from the contract in which it is found, even if the contract itself is alleged to have been procured by fraud. Applying the separability doctrine to post-arbitration proceedings is necessary to avoid illogical results and to preserve the finality of arbitration when an arbitrator rescinds a contract containing an arbitration provision, but does not invalidate the arbitration provision itself.

When presented with this very scenario, the superior court below held that because the contract was rescinded, Plaintiff-Real Party in Interest Winslow Memorial Hospital, Inc. d/b/a Little Colorado Medical Center ("LCMC") could assert against Petitioner/Defendant Jeffrey Hamblen the very same claims LCMC had just arbitrated against Hamblen, even though the parties here went through the entire arbitration process, the arbitrator entered a final arbitration award, and the superior court entered a judgment confirming the award.

This Court should confirm that the separability doctrine applies to post-arbitration confirmation proceedings and issue an opinion confirming that a party may not litigate again in superior court claims that are subject to arbitration even if an arbitrator rescinds a contract containing an arbitration provision, but not the arbitration provision itself. The superior court's ruling and the Court of Appeals' denial of jurisdiction demonstrates that the lower courts need guidance from this Court to preserve the strong public policies support arbitration. In addition, the Court should use this case as an opportunity to confirm these principles as applied to the Revised Uniform Arbitration Act ("RUAA"), which was enacted only recently in Arizona.

ISSUES FOR REVIEW

Under the separability doctrine, an arbitration provision is considered a stand-alone agreement separate from the contract in which it is found, even if the contract is rescinded. As a result, a challenge to the entire agreement (as opposed to the arbitration provision itself) does not affect the validity of the arbitration provision. *See U.S. Insulation, Inc. v. Hilro Const. Co., Inc.*, 146 Ariz. 250, 253 (App. 1985). If an arbitrator determines that a party rescinded a contract containing an arbitration

provision (without finding that the separate arbitration provision was rescinded), then may the superior court rule on claims that are subject to arbitration and in fact have already been submitted to and resolved in arbitration?

In addition, Hamblen identifies the following issues under ARCAP 23(d)(1): Whether an arbitration award taken to judgment (i) bars the superior court from taking action beyond confirming the arbitration award; (ii) bars further claims merged into the award; and (iii) bars claims under res judicata.

PERTINENT FACTS

I. Hamblen and LCMC agree to arbitrate every claim between them.

LCMC hired Hamblen as its President and CEO. Hamblen's Employment Agreement with LCMC contains an arbitration provision providing for arbitration of "[a]ny controversy or claim arising out of or relating to" the Employment Agreement:

> Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration rules . . . and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

(APPV1-0091.)[*] In addition, the arbitration provision requires LCMC to submit to arbitration any counterclaim it may have against Hamblen:

> All claims brought under this Agreement must be facially plausible and must meet the pleading requirements of Federal Rule of Civil Procedure 8. All counterclaims that would be compulsory or permissive under Federal Rule of Civil Procedure 13(a) and (b) if the claim were filed in court shall be asserted in the arbitration and not otherwise.

(*Id.*) The arbitration provision's plain language thus requires that all claims and disputes between Hamblen and LCMC, including any permissive counterclaims, must be submitted to binding arbitration "and not otherwise."

II. Hamblen initiates arbitration, LCMC files claims in superior court, and Hamblen moves to compel arbitration.

In April 2014, Hamblen filed an arbitration demand against LCMC regarding Hamblen's claim for severance compensation arising out of his employment agreement (the "Employment Agreement"). (APPV1-0076–0079.) A few weeks later, LCMC sued Hamblen in superior court asserting an unjust enrichment claim. (APPV4-0006.) Hamblen moved to compel arbitration, arguing that LCMC's claim was subject to the arbitration provision in Hamblen's Employment Agreement. (APPV4-0010.)

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[*] Appendix to Hamblen's Petition for Special Action below.

LCMC opposed the motion to compel on several grounds, including that it had rescinded the Employment Agreement. (*See* APPV4-0063.) Hamblen replied that the broad arbitration provision required LCMC to arbitrate its claims and that, under the separability doctrine, the question of rescission of the Employment Agreement fell within the scope of the arbitration provision. (APPV4-0066–0072.) The superior court granted Hamblen's motion, and stayed the case "until mandatory arbitration under the contract is completed." (APPV4-0073.)

III. The parties arbitrate their claims and the arbitrator issues an Arbitration Award rescinding the Employment Agreement.

The parties proceeded with the arbitration, and LCMC asserted a variety of counterclaims in arbitration arising from four central issues: a dispute over severance payments Hamblen received at the beginning of his employment with LCMC; Hamblen's personal expenses and use of LCMC property; a dispute regarding a term note obtained by Hamblen; and Hamblen's alleged spoliation/destruction of information on LCMC's computer system. (Summary found at Petition for Special Action, pp. 17–18.)

During arbitration, LCMC sought rescission of Hamblen's Employment Agreement as one remedy. Importantly, LCMC has never sought to invalidate the specific arbitration provision, as opposed to the Employment Agreement generally. This is confirmed by LCMC's May 19, 2014 Complaint (APPV4-0006) and its Response to Motion to Compel Arbitration in the superior court (where LCMC *could have* raised the separate challenge to the arbitration provision if one existed) (APPV4-0063), its Counterclaims in the arbitration (APPV1-0105), all of its arbitration disclosure statements (APPV1-0122, -0161, -0225, -0291), pre- and post-arbitration memoranda (APPV1-0358, -0370), and its post-arbitration briefing to the superior court (APPV1-0009), none of which anywhere suggests that the arbitration provision itself is invalid.

At the end of the arbitration, the arbitrator issued the Arbitration Award, finding that LCMC had rescinded the Employment Agreement. But the arbitrator did not hold that the arbitration provision itself was rescinded or otherwise invalid. (*See* APPV1-0025.) Importantly, the Arbitration Award resolved all claims asserted in the arbitration: "This Final Award is in full settlement of all claims and counterclaims submitted

to this Arbitration. All claims not expressly granted herein are hereby denied." (APPV1-0026.)

IV. The parties move to confirm the Arbitration Award, and LCMC seeks permission to reassert its claims against Hamblen in superior court.

Following the arbitration, LCMC moved to confirm the Arbitration Award, which Hamblen did not dispute. (APPV1-0009.) LCMC also asked the superior court to lift the stay to allow LCMC to seek damages against Hamblen for the same claims LCMC asserted in the arbitration, including the unjust enrichment claim that the superior court had ordered LCMC to arbitrate. (*Id.*) Hamblen opposed this request. (APPV4-0074–0078.)

On February 10, 2016, the superior court entered a judgment confirming the arbitration award and lifting the stay. (PFR-APP25.)* The February 10 Judgment states that LCMC "has grounds to and did rescind the . . . Employment Agreement which did abrogate the agreement and undid it from its very beginning," and that Hamblen's request "to deny the Plaintiffs their right to a jury trial to prove damages . . . is unreasonable as the contract was rescinded and undid (sic) from its very beginning." (*Id.*)

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* Attached to this petition is an appendix that includes the pertinent superior court and Court of Appeals orders, numbered with PFR-APP##.

In a Rule 59(a) motion, Hamblen argued that under the separability doctrine, the arbitration provision remained effective and required LCMC to arbitrate all of its claims. (*See* APPV1-0059.) The superior court denied the motion (the "April 15 Judgment"), holding that because LCMC rescinded the Employment Agreement, which "'undoes it from the beginning' . . . [LCMC] is entitled to a jury trial on its claims." (PFR-APP27.) Hamblen filed a special action petition and the Court of Appeals denied jurisdiction. (PFR-APP29.)

REASONS TO GRANT THE PETITION

I. The scope and enforceability of arbitration provisions is a matter of statewide importance in Arizona.

Arizona has deeply-rooted support for arbitration. This Court has held that because the "primary purpose of arbitration is to provide an alternative to litigation so that the parties may 'obtain an inexpensive and speedy final disposition of the matter," when parties have agreed to submit their claims to arbitration, "the parties, having chosen a different tribunal, may not reinstate judicial tribunals to resolve the controversy." *Canon School Dist. No. 50 v. W.E.S. Constr. Co., Inc.*, 180 Ariz. 148, 152 (1994) (citing *Smitty's Super-Valu, Inc. v. Pasqualetti*, 22 Ariz. App. 178, 182 (1974)).

In light of this strong support for arbitration and the need for clarity over which issues must be arbitrated, this Court has repeatedly accepted review of issues arising from the enforceability and scope of arbitration provisions. *See, e.g.*, *United Behavioral Health v. Maricopa Integrated Health Sys.*, 240 Ariz. 118 (2016) (analyzing scope of arbitration provision and potential preemption by the FAA); *Canon*, 180 Ariz. at 152 (authority of superior court when presented with valid arbitration award); *Canon School Dist. No. 50 v. W.E.S. Constr. Co., Inc.*, 177 Ariz. 526 (1994) (enforceability of arbitration provision in light of statutory administrative dispute resolution provision); *City of Phoenix v. Fields*, 219 Ariz. 568 (2009) (scope of waiver of binding arbitration provision); *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47 (1999) (ability of a party to appeal an order compelling arbitration); *Clarke v. ASARCO Inc.*, 123 Ariz. 587 (1979) (scope of arbitration provision).

This Court should accept review to continue to provide much-needed guidance on the scope and enforceability of arbitration provisions, specifically in post-arbitration confirmation proceedings. Specifically, this Court should address an issue of first impression in Arizona: does the separability doctrine apply to post-arbitration proceedings to preserve the enforceability of an arbitration provision when, at the conclusion of the

arbitration, the arbitrator rescinded the agreement containing the arbitration provision, but not the provision itself?

II. Applying the separability doctrine to post-arbitration confirmation proceedings is an issue of first impression in Arizona.

Although this Court has never addressed the separability doctrine, the Arizona Court of Appeals has recognized and applied the doctrine for three decades. *See U.S. Insulation*, 146 Ariz. at 253 (adopting the separability doctrine as set forth in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–04 (1967)); *Smith v. Logan*, 166 Ariz. 1, 2 (App. 1990) (applying separability to claim of fraudulent inducement); *Stevens/Leinweber/Sullens, Inc. v. Holm Develop. & Mgmt., Inc.*, 165 Ariz. 25, 29 (App. 1990); *WB, The Building Co., LLC v. El Destino, LP*, 227 Ariz. 302, 306, ¶ 11 (App. 2011); *Falcone Bros. & Assocs., Inc. v. City of Tucson*, —Ariz.—, No. 2 CA-CV 2015-0212, 2016 WL 4490486, at *5, ¶ 21 (Ariz. Ct. App. Aug. 25, 2016).

Under the "'doctrine of separability,' an arbitration provision is considered to be an independent and separate agreement between the parties to the underlying contract." *Stevens/Leinweber/Sullens*, 165 Ariz. at 29. In other words, if a contract has an arbitration provision, then the law

treats those as *two separate agreements* for enforceability purposes: (1) an arbitration agreement, and (2) the rest of the contract, even if both agreements are part of the same document. *See U.S. Insulation*, 146 Ariz. at 253.

Because the law recognizes two separate agreements (even if they are part of the same document), invalidating one does not automatically invalidate the other, just like invalidating an employee's noncompete agreement would not, without more, automatically invalidate the same employee's separate nondisclosure agreement. In order to avoid arbitrating claims covered by an arbitration agreement, a party must seek and obtain a ruling that the arbitration provision is not binding; a broad ruling about the contract will not do.

The Court of Appeals has applied the doctrine when a party challenges a motion to compel arbitration—in other words, in pre-arbitration proceedings. *See U.S. Insulation*, 146 Ariz. at 252; *Logan*, 166 Ariz. at 1; *Stevens/Leinweber/Sullens*, 165 Ariz. at 28. In the *WB* case, the Court of Appeals applied the separability doctrine when a party challenged the enforceability of the arbitration proceedings *during the arbitration*.

In *WB*, the superior court ordered the parties to arbitrate a construction dispute based on an arbitration provision found in the construction contract between the parties. *WB*, 227 Ariz. at 305, ¶ 4. During the arbitration, the defendant discovered that the plaintiff was not licensed as a contractor when it signed the agreement. *Id.* at ¶ 5. The defendant moved for summary judgment and to stay the arbitration proceedings, arguing that "both the contract and the arbitration clause were . . . void and unenforceable pursuant to [A.R.S.] section 32-1151." *Id.* *WB* held that the defendant made a separate and distinct challenge to the enforceability of the arbitration provision, as required by the separability doctrine, and that § 32-1151 rendered the arbitration provision void and unenforceable. *Id.* at 308, ¶ 14.

But no Arizona court has applied the separability doctrine to post-arbitration proceedings with the issues presented in this Petition: if an arbitrator decides that a contract is rescinded, but does not make any separate findings as to the arbitration provision itself, may a party to the arbitration assert in superior court the very claims and issues it submitted in arbitration because the contract containing the arbitration provision was rescinded?

Indeed, not only is there no Arizona case addressing the effect of the separability doctrine in post-arbitration confirmation proceedings when a contract is rescinded, Hamblen has been unable to find a single reported decision *anywhere* in which a party has attempted to do what LCMC has done here—disregard an entire arbitration because the arbitrator rescinded the *contract* containing an arbitration provision, but not the arbitration provision itself.[1]

III. Guidance from this Court is needed to avoid illogical results following arbitration.

This Court should apply the separability doctrine in post-arbitration proceedings in order to avoid the illogical metaphysical problems which can arise when an arbitrator rescinds a contract containing an arbitration provision. These absurdities are evidenced by LCMC's Response to Hamblen's Special Action Petition (at pp. 4:1–5; 6:14–7:2), which states that when the arbitrator issued the arbitration award rescinding the Employment Agreement, (i) the arbitrator lost his authority to adjudicate any other issue between the parties and (ii) it is as though there never was

[1] Hamblen has located one unpublished decision from the U.S. District Court for the Southern District and can provide the citation to the case upon request by the Court.

an arbitration provision (because the Employment Agreement was "undid" from the very beginning). Consequently, under that reasoning, it is as if the arbitration never happened.

But the separability doctrine is intended to prevent this kind of metaphysical paradox:

> The traditional argument against having the arbitrator decide on the rescission of the contract is that rescission, if awarded by the arbitrator vitiates the entire contract, including the arbitration agreement, thus removing the basis for the arbitrator's authority. Courts, however, have dealt with this theoretical problem by adopting the doctrine of separability, whereby the arbitration clause is treated as an independent contract which is severable from the principal agreement.

Martin Domke, Gabriel Wilner and Larry E. Edmond, *Law and Practice of Commercial Arbitrations* § 11:5, p. 22 (3d ed. 2003–2015) (prior edition cited approvingly by *U.S. Insulation*, 146 Ariz. at 253). Indeed, separability "will defeat the argument that when the arbitrator is permitted to decide on the validity of the contract he is, in fact, deciding on the existence of the contract from which his jurisdiction stems." *Id.* § 11.1, at pp. 4–5.

This Court should confirm that the doctrine applies to post-arbitration proceedings as well as to pre-arbitration challenges to motions to compel arbitration. If a party does not challenge the validity of the

arbitration provision—which LCMC did not do at any stage of the proceedings below—an arbitration award which rescinds the contract does not affect the validity of the arbitration provision. This is significant for two reasons. First, a party like LCMC cannot bring its claims again in superior court *after* the arbitration, when an arbitration provision required LCMC to bring these claims in the arbitration. Second, an arbitrator retains the authority to issue an arbitration award—here, the award resolved "all claims" submitted to the arbitration—and the superior court has the obligation under RUAA, A.R.S. §§ 12-3022, 12-3025(A), to confirm the Award, and take no other action.

IV. Guidance from this Court is needed to protect the integrity and finality of arbitration proceedings.

The superior court's actions—and the position urged by LCMC—stand the concept of binding arbitration on its head. The parties here went through the entire arbitration process, the arbitrator entered a final arbitration award, and the superior court entered a judgment confirming the award. But LCMC convinced the superior court that LCMC could pursue in superior court the exact same issues and claims that were argued

and decided in the arbitration. This would permit a "do-over" or second bite at the apple on issues already resolved in binding arbitration.

If left standing, arbitration would no longer be a "speedy and affordable means of resolving disputes." *RS Indus., Inc. v. Candrian*, 240 Ariz. 132, 377 P.3d 329, 332, ¶ 7 (App. 2016). Indeed, the superior court's ruling means that Hamblen faces the prospect of an entire new trial, from scratch, on the very same issues and claims LCMC asserted in the arbitration. Under this reasoning, an arbitrator's decision simply is no longer "final and binding as to both issues of fact and law." *Atreus Cmtys. Grp. of Ariz. v. Stardust Develop., Inc.*, 229 Ariz. 503, 506, ¶ 13 (App. 2012).

Indeed, the superior court's actions are directly contrary to the warnings the Court of Appeals has issued about the dangers and consequences of a superior court interjecting itself into a case the parties agreed to resolve through arbitration:

> If the conclusions of the arbitrators were to be subjected to the full range of ordinary judicial review, then the function of the substituted arbitration [t]ribunal would be largely defeated—the objectives of an inexpensive and speedy final disposition of the controversy would become illusory and the arbitration tribunal would in fact become merely a lower rung in the ascending ladder of judicial review. In addition to defeating the specific intent of the parties, this would add further to the time-consuming and expensive role required by a court

> adjudication—a result which is antithetical to the objectives inherent in the arbitration concept.

Smitty's Super-Valu, Inc. v. Pasqualetti, 22 Ariz. App. 178, 181 (1974).

ATTORNEYS' FEES REQUEST

Hamblen seeks his attorneys' fees and costs for all post-confirmation proceedings under A.R.S. § 12-341.01 and RUAA. A.R.S. §§ 12-3025(B), (C). *See also Steer v. Eggleston*, 202 Ariz. 523, 528, ¶¶ 23–24 (App. 2002) (awarding fees on appeal under a similar provision in the Uniform Arbitration Act, A.R.S. § 12-1514).

CONCLUSION

The Court should grant the petition for review and take the following actions. First, vacate the February 10, 2016 Judgment and all rulings thereafter. Second, remand to the superior court and direct it to issue a judgment confirming the Arbitration Award, and certify the judgment under Rule 54(c). Simply put, LCMC should not be able to take any action in the superior court beyond seeking an order and judgment confirming the Arbitration Award.

RESPECTFULLY SUBMITTED this 4th day of November, 2016.

OSBORN MALEDON, P.A.

By /s/ Joshua M. Ernst

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Appendix

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22	February 10, 2016 Judgment	PFR-APP25–26
30	April 14, 2016 Judgment (re: Ruling on Rule 59 Motions)	PFR-APP27–28
--	October 5, 2016 Order Declining Special Action Jurisdiction	PFR-APP29–30

DOCKETED

February 10, 2016

Navajo County Superior Court

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF NAVAJO

JUDGE:	**RALPH HATCH**	**DATE:**	**February 10, 2016**
DIVISION:	**I**	**ISSUED BY:**	**A. Lee Hunter**

J U D G M E N T

WINSLOW MEMORIAL HOSPITAL, INC., d/b/a LITTLE COLORADO MEDICAL CENTER, **Plaintiff,** **vs.** **JEFFREY HAMBLEN and JANE DOE HAMBLEN, Husband and Wife,** **Defendants.**	**Case No.** **CV 2014-0311**

On February 9, 2016, oral argument was held on the (1) Plaintiff's application for confirmation of the Arbitration Award and Judgment, and (2) Plaintiff's motion for relief from the order staying the case.

Both parties have agreed that the Court should confirm the Arbitration Award and include language that Jeffrey Hamblen has paid the amounts awarded. Therefore;

IT IS ORDERED confirming the Final Arbitration Award dated October 6, 2015. It is further noted that the Parties both agree that Jeffrey Hamblen has already paid the amounts ordered.

Plaintiff has asked the Court to remove the stay so that they can file an amended complaint seeking damages for 1) unjust enrichment, 2) destruction of evidence, 3) the Defendant unilaterally changing the terms of the note, and 4) reimbursement from the Defendant for various expenditures, e.g. vacations, golfing trips, etc.

Defendant has argued that the stay should not be lifted as the Arbitrator's Award was a full and final settlement of all claims and counterclaims submitted to him and that all claims not expressly granted were denied.

The Court notes that at paragraph #26 of the Final Arbitration Award the Arbitrator found that LCMC (the Respondent in the Arbitration case, but the Plaintiff in the Superior Court case) had grounds to and did rescind the LCMC/Hamblen Employment Agreement which did abrogate the agreement and undid it from its very beginning. Defendant's argument therefore asks this Court to deny the Plaintiffs their right to a jury trial to prove damages for 1) unjust enrichment, 2) destruction of evidence, 3) the Defendant unilaterally changing the terms of the note, and 4) reimbursement from the Defendant for various expenditures as noted above. That request is unreasonable as the contract was rescinded and undid from its very beginning. The Plaintiff is entitled to address and attempt to prove damages.

Additionally, the Plaintiff withdrew Its claim for unjust enrichment prior to the Arbitrator issuing his award. See Exhibit #5 of the Defendant's response docketed November 18, 2015, at page 13, line 10.

IT IS THEREFORE ORDERED lifting the stay issued by this Court. The Plaintiff may file a motion to amend the complaint.

DATED this 10th day of February, 2016.

HONORABLE RALPH HATCH
Navajo County Superior Court

cc: Ledbetter Law – Scott Rogers – CFM

DOCKETED

April 14, 2016

Navajo County Superior Court

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF NAVAJO

JUDGE: **RALPH HATCH** **DATE:** **April 14, 2016**

DIVISION: **I** **ISSUED BY: A. Lee Hunter**

J U D G M E N T

WINSLOW MEMORIAL HOSPITAL, INC., d/b/a LITTLE COLORADO MEDICAL CENTER,

Plaintiff,

vs.

JEFFREY HAMBLEN and BARBARA YOUNGS, husband and wife,

Defendants.

Case No.

CV 2014-0311

On February 9, 2016, a hearing was held on the Plaintiff's application for confirmation of the Arbitration Award and Judgment, as well as on the Plaintiff's motion for relief from the order staying the case. Attorney Ledbetter appeared for the Plaintiff. Attorney Rogers appeared for the Defendant.

Both attorneys agreed on the record that the Arbitration Award should be confirmed and advised that the Defendant had already paid the amount ordered. On February 10, 2016, the Court did in fact confirm the final arbitration award by written order.

On February 10, 2016, the Court also by way of written order granted the Plaintiff's motion for relief from the order staying the case while it was in arbitration.

On February 25, 2016, the Defendant filed a motion for a new trial pursuant to Rule 59(a), or alternatively a motion to alter or amend the judgment.

The motion to alter or amend the judgment is denied. The only judgment in this case was the judgment confirming the Arbitration Award. Both attorneys requested and agreed on the record to Court confirming the award which the Court did on February 10, 2016.

The Arbitrator ruled "Because LCMC had grounds to rescind, and did rescind, the rescission of the LCMC/Hamblin Employment Agreement abrogates the agreement **and**

undoes it from the beginning. . . .". (Emphasis Added). As such, this Court found that the Plaintiff is entitled to a jury trial on its claims and the stay was therefore lifted.

The Defendant's motion for a new trial is also denied.

The Defendant's motion for attorney fees is also denied.

Dated this 14th day of April, 2016.

HONORABLE RALPH HATCH
Navajo County Superior Court

cc: Ledbetter Law Firm – Hunter, Humphrey & Yavitz – CFM

DIVISION ONE
FILED: 10/5/16
AMY M. WOOD, CLERK
BY: RB

IN THE

Court of Appeals

STATE OF ARIZONA
DIVISION ONE

JEFFREY HAMBLEN and BARBARA YOUNGS, husband and wife, Petitioners, v. THE HONORABLE RALPH HATCH, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of NAVAJO, Respondent Judge, WINSLOW MEMORIAL HOSPITAL, INC., d/b/a LITTLE COLORADO MEDICAL CENTER, Real Party in Interest.	Court of Appeals Division One No. 1 CA-SA 16-0201 Navajo County Superior Court No. S0900CV201400311

ORDER DECLINING SPECIAL ACTION JURISDICTION

The court, Presiding Judge Kenton D. Jones, and Judges Randall M. Howe and Donn Kessler, participating, has considered the petition for special action filed by the petitioner, the response filed by the Real Party in Interest, and petitioner's reply.

IT IS ORDERED that the Court of Appeals, in the exercise of its discretion, declines to accept jurisdiction in this special action. Judge Donn Kessler specially concurs.

_/s/_______________________________
KENTON D. JONES, Presiding Judge

K E S S L E R, Judge, specially concurring:

I concur in the decision to decline jurisdiction. I write separately to address the reasons for my concurrence. Hamblen and Youngs argue in part that all counterclaims against them were merged into the confirmed arbitration award or are barred by res judicata. However, the record is unclear whether they sought to have Winslow Memorial Hospital, Inc., dba Lower Colorado Medical Center's (LCMC) unjust enrichment claim dismissed because LCMC contended it withdrew the unjust enrichment claim from the arbitration after the presentation of evidence. The superior court should address whether such a withdrawal is tantamount to a voluntary dismissal of the withdrawn claim and/or whether one party with the consent of the arbitrator can withdraw a claim from arbitration after the superior court has ordered such claim to be arbitrated. Any possible special action relief on any of the claims which LCMC now seeks to prosecute in superior court should await a decision on that issue by the superior court.

_/s/_______________________________
DONN KESSLER, Judge

To:
Scott W Rodgers
Thomas L Hudson
Joshua M Ernst
James E Ledbetter
Jared Reid Owens
Randall S Yavitz
Isabel M Humphrey
Hon Ralph E Hatch
Hon Deanne Romo