NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

UATP MANAGEMENT, LLC, Appellant, v. KIMBERLY BARNES, individually and as natural guardian for E.J.P.R., a minor; and CARTER & DEAN, LLC d/b/a Urban Air Adventure Park, Appellees.	)	Case No. 2D20-1301

Opinion filed April 16, 2021.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Polk County; Wayne M. Durden, Judge.

Joyce A. Delgado and Michael D. Joblove of Genovese, Joblove and Battista, Miami, for Appellant.

Kristin A. Norse and Stuart C. Markman of Kynes, Markman & Felman, P.A., Tampa, for Appellee Kimberly Barnes.

No appearance for remaining Appellee.

LaROSE, Judge.

UATP Management, LLC, appeals the trial court's order denying its motion to compel arbitration of Kimberly Barnes' negligence lawsuit brought on behalf of her minor son. We have jurisdiction. See Fla. R. App. P. 9.130(a)(3)(C)(iv) (authorizing

appeals from nonfinal orders that determine a party's "entitlement . . . to arbitration"). We affirm because UATP failed to prove that the parties agreed to arbitrate the dispute.[1] See City of Clearwater v. Sch. Bd. of Pinellas Cnty., 905 So. 2d 1051, 1057 (Fla. 2d DCA 2005) ("[T]he 'tipsy coachman' doctrine . . . allows an appellate court to affirm a trial court decision that 'reaches the right result, but for the wrong reasons' so long as 'there is any basis which would support the judgment in the record.' " (quoting Dade Cnty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla. 1999))).

Background

UATP franchises indoor amusement parks featuring trampolines, climbing walls, and zip lines. Carter & Dean, LLC, a franchisee, operates one such park, Urban Air Adventure Park, in Lakeland.

An adult friend of Ms. Barnes, Jenny Fluty, took Ms. Barnes' son to Urban Air for a birthday party. In order to be admitted, Ms. Fluty signed a "Customer Release, Assumption of Risk, Waiver of Liability, and Indemnification Agreement." The document included an arbitration agreement and delegation provision requiring that

> ANY DISPUTE OR CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, BREACH THEREOF, THE PREMISES, ACTIVITIES, PROPERTY DAMAGE (REAL OR PERSONAL), PERSONAL INJURY (INCLUDING DEATH), OR THE SCOPE, ARBITRABILITY, OR VALIDITY OF THIS ARBITRATION AGREEMENT (DISPUTE) SHALL BE BROUGHT BY THE PARTIES IN THEIR INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE CAPACITY, AND SETTLED BY BINDING ARBITRATION BEFORE A SINGLE ARBITRATOR ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION (AAA) PER ITS

[1]Our disposition on this threshold matter renders moot the remaining arguments UATP raises on appeal.

> COMMERCIAL INDUSTRY ARBITRATION RULES IN EFFECT AT THE TIME THE DEMAND FOR ARBITRATION IS FILED.

The document also required Ms. Fluty to "represent[]" and to further "warrant and represent" that she had the "actual and implied authority to execute" the document on Ms. Barnes' behalf:

> Authority. As the parent or legal guardian of the Child Participant(s), the undersigned represents to the Protected Parties [s]he has the legal capacity and authority to act for and on behalf of the Child Participant(s), and agrees to **INDEMNIFY AND DEFEND THE PROTECTED PARTIES FROM AND AGAINST ALL CLAIMS OR LIABILITIES RESULTING FROM OR RELATING TO ANY INSUFFICIENCY OF THE UNDERSIGNED'S LEGAL CAPACITY OR AUTHORITY TO ACT FOR OR ON BEHALF OF THE CHILD PARTICIPANT(S)**.
>
> . . . .
>
> Authority. **IF I AM SIGNING THIS DOCUMENT ON BEHALF OF MY SPOUSE, CHILD, FAMILY MEMBER, FRIEND, MINOR CHILD, OR OTHER PERSON, I EXPRESSLY WARRANT AND REPRESENT TO URBAN AIR THAT I HAVE SUCH PERSON'S ACTUAL AND IMPLIED AUTHORITY TO EXECUTE THIS AGREEMENT ON THEIR BEHALF, INCLUDING, BUT NOT LI[M]ITED TO, THE ARBITRATION CLAUSE, WAIVER AND RELEASE, INDEMNITY AGREEMENT, AND LICENSE.**[2]

Additionally, the document included a severability provision:

> Misc. Terms. This Agreement constitutes the entire agreement between the Protected Parties and the Participant, supersedes all previous oral or written promises or agreements, and may only be modified in writing. Participant expressly agrees that this Agreement is intended to be as broad and inclusive as is permitted by the laws of

[2]The preamble to the "Customer Release, Assumption of Risk, Waiver of Liability, and Indemnification Agreement" stated that the agreement "is entered into . . . by . . . the Adult Participant on behalf of and as parent or legal guardian for such Child Participant(s)." (Emphasis added.) So, the preamble and the latter of the two "Authority" sections are inconsistent.

> the state in which the Premises is located and that if any portion thereof is held invalid, it is agreed that the balance shall, notwithstanding, continue in full legal force and effect.

Ms. Fluty electronically signed the document. Urban Air admitted Ms. Barnes' son to its facility. While riding a zipline-type attraction, he fell and suffered serious injuries.

Ms. Barnes sued UATP and Carter & Dean. They jointly moved to compel arbitration based upon the document signed by Ms. Fluty. The trial court conducted a hearing on the motion where the parties confined themselves to legal arguments.

UATP contended that because Ms. Fluty had "legal physical custody of the minor," she could sign the document containing the arbitration agreement on the child's behalf. UATP also noted that because Ms. Fluty signed the document on behalf of a "friend," she represented that she had the authority to sign the document. UATP claimed that the issue of Ms. Fluty's authority to sign the document was reserved for the arbitrator, not the trial court.

After the hearing, the parties submitted supplemental memoranda. For the first time, UATP argued that Ms. Fluty "acted within her authority as [Ms. Barnes'] apparent agent when she signed the [document]." In a footnote, Carter & Dean's memorandum identified as "[n]otabl[e]" the fact that Ms. Barnes had "previously signed the same [document] on behalf of the minor . . . on 11/23/2018, 12/1/2018[,] and 2/18/019." Carter & Dean's footnote went on to point out that "another adult . . . signed the same Contract on behalf of [Ms. Barnes' son] on 1/5/2019."

The trial court denied the motion to compel arbitration. The trial court observed that "[t]he parties . . . agreed that an evidentiary hearing was unnecessary because the operative issue is whether Ms. Fluty, as an undisputed temporary lawful custodian '*in loco parentis*', had the legal authority to have executed the release

containing the mandatory arbitration clause." The trial court pointed out that Florida law permits only a natural guardian to execute a limited release on behalf of a child. See § 744.301(3), Fla. Stat. (2019) ("[N]atural guardians are authorized, on behalf of any of their minor children, to waive and release, in advance, any claim or cause of action against a commercial activity provider, or its owners, affiliates, employees, or agents, which would accrue to a minor child for personal injury, including death, and property damage resulting from an inherent risk in the activity."). The trial court reasoned that there was "no statutory or other legal authority" permitting "expan[sion of] the authority of anyone other than a parent" to execute such a document containing an arbitration clause. Because Ms. Fluty is not the child's parent, she lacked "the legal authority to . . . execute[] the release on behalf of [Ms. Barnes' son] or his actual parent(s)." Consequently, the trial court concluded that "no valid written agreement existed." UATP now appeals.[3]

Analysis

UATP argues that the trial court should have granted its motion. UATP tells us that the trial court's role was strictly limited to the "threshold issue of whether a valid agreement to arbitrate exists." Here, UATP contends, the trial court "erroneously relied on [section] 744.301(3) . . . and determined that the entire release was invalid because [it] was not signed by a parent." In doing so, UATP claims that the trial court usurped the arbitrator's role to resolve "any disputes regarding the validity of the underlying contract." UATP's arguments require disassembly.

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[3]Carter & Dean separately appealed the trial court's order denying the motion to compel arbitration. This court per curiam affirmed. See Carter & Dean, LLC v. Barnes, 308 So. 3d 99 (Fla. 2d DCA 2020) (table decision).

I. Standard of Review & Rules of Construction

"Generally, '[w]e review an order granting or denying a motion to compel arbitration de novo.' " Chaikin v. Parker Waichman LLP, 253 So. 3d 640, 643 (Fla. 2d DCA 2017) (alteration in original) (quoting Roth v. Cohen, 941 So. 2d 496, 499 (Fla. 3d DCA 2006)); see New Port Richey Med. Invs., LLC v. Stern ex rel. Petscher, 14 So. 3d 1084, 1086 (Fla. 2d DCA 2009) ("Our 'review of the [circuit] court's factual findings is limited to determining whether they are supported by competent, substantial evidence.' However, we use a de novo standard to review the circuit court's construction of the arbitration agreement and its application of the law to the facts found." (alteration in original) (quoting and citing Shotts v. OP Winter Haven, Inc., 988 So. 2d 639, 643 (Fla. 2d DCA 2008), quashed on other grounds by, 86 So. 3d 456 (Fla. 2011))).

Arbitration provisions are contractual in nature; the construction of these provisions and the contracts in which they appear require contract interpretation. Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999). In deciding whether a dispute should go to arbitration, a trial court looks to "three fundamental elements": "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 593 (Fla. 2013); accord Sherwood v. Slazinski, 162 So. 3d 229, 231 (Fla. 2d DCA 2015) ("To compel arbitration, the Sherwoods had to demonstrate: (1) that a valid written agreement to arbitrate existed, (2) that an arbitrable issue existed, and (3) that the right to arbitrate had not been waived." (citing MDC 6, LLC v. NRG Inv. Partners, LLC, 93 So. 3d 1145, 1146 (Fla. 2d DCA 2012))); Green Tree Servicing, LLC v. McLeod, 15 So. 3d 682, 686 (Fla. 2d DCA 2009) ("In determining whether a dispute is subject to arbitration, courts consider at least three issues: (1) whether a valid written

agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." (quoting Stacy David, Inc. v. Consuegra, 845 So. 2d 303, 306 (Fla. 2d DCA 2003))); see also ManorCare Health Servs., Inc. v. Stiehl, 22 So. 3d 96, 99 (Fla. 2d DCA 2009) ("[T]he trial court's role in deciding whether to compel arbitration is limited to [Seifert's] three 'gateway' issues."). Here, the first Seifert prong is the dispositive issue.

II. Under Florida Law, the Trial Court Resolves Questions of Contract Formation; Whether the Parties Entered into a Valid Agreement to Arbitrate is a Question of Contract Formation

Seifert "held that it was for the [trial] court, not the arbitrator, to determine 'whether a valid written agreement to arbitrate exists.' " Shotts, 86 So. 3d at 471 (emphasis added) (quoting Seifert, 750 So. 2d at 636); see Granite Rock Co. v. Int'l Brotherhood of Teamsters, 561 U.S. 287, 296 (2010) ("It is well settled . . . that whether parties have agreed to 'submi[t] a particular dispute to arbitration' is typically an 'issue for judicial determination.' " (alteration in original) (quoting Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002))). We have said so, as well. See, e.g., Anderson v. Taylor Morrison of Fla., Inc., 223 So. 3d 1088, 1091 (Fla. 2d DCA 2017) ("It is for the court, not the arbitrator, to determine whether a valid arbitration agreement exists."). And, we point out, the Florida Statutes demand it, too. § 682.02(2), Fla. Stat. (2019) ("The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate."); § 682.03(3) ("If the court finds that there is no enforceable agreement to arbitrate, it may not order the parties to arbitrate . . . .").

The Florida Supreme Court has stated that "the question of whether a minor child or minor child's estate may be bound by an agreement to arbitrate made by

a parent or guardian on the child's behalf is a question of contract formation - whether a valid agreement to arbitrate exists." Glob. Travel Mktg., Inc. v. Shea, 908 So. 2d 392, 398 (Fla. 2005). It follows, then, that the issue confronting us - whether a minor child may be bound by an arbitration agreement signed by a nonparent or nonguardian - is, likewise, a matter of contract formation. UATP seemingly accepts Seifert's holding that the trial court decides issues of contract formation, yet, in its briefs, it urges that the arbitrator should decide whether the parties agreed to arbitrate.

There is a difference between a challenge to contract validity and a challenge to contract formation. See Solymar Invs., Ltd. v. Banco Santander S.A., 672 F.3d 981, 992 (11th Cir. 2012) ("The issue of the contract's validity is different from the issue whether any agreement . . . was ever concluded." (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 n.1 (2006))). UATP misses the distinction.

UATP complains that the trial court impermissibly strayed into the arena of enforceability, which goes to a contract's validity, and should be determined by the arbitrator. See § 682.02(3) ("An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable."); Sherwood, 162 So. 3d at 231 ("An arbitrator decides the satisfaction of conditions precedent to arbitrability and whether an arbitration agreement is enforceable." (citing § 682.02(3), Fla. Stat. (2013))); ManorCare, 22 So. 3d at 99 ("A trial court is to review those defenses which go to the validity of the arbitration agreement itself, rather than to the enforceability of the contract as a whole."); HHH Motors, LLP v. Holt, 152 So. 3d 745, 748 (Fla. 1st DCA 2014) ("Challenges to the

validity of a contract are resolved by the arbitrator, but challenges to formation or existence of a contract are resolved by the court." (citing Granite Rock Co., 561 U.S. at 296)); see, e.g., Basulto v. Hialeah Auto., 141 So. 3d 1145, 1156 (Fla. 2014) ("The record supports the trial court's conclusion that there was no 'meeting of minds' between the buyers and the dealership, which constituted the making of an enforceable arbitration agreement.").

Questions of contract formation, on the other hand, are properly addressed to the trial court. And the trial court's order stated "that no valid written agreement existed" between Ms. Barnes and UATP because Ms. Fluty lacked "the legal authority to . . . execute[] the release on behalf of [the child] or his actual parent(s)." Clearly, the trial court did not say that an agreement existed. Instead, because it ruled that no agreement existed, the trial court did not need to reach the issue of enforceability. After all, enforceability issues presuppose that an agreement exists. See HHH Motors, LLP, 152 So. 3d at 747-48.

Having concluded that the resolution of questions of contract formation rests with the trial court, not the arbitrator, we examine, more closely, whether an arbitration agreement existed, irrespective of the trial court's apparent focus on the release.

III. UATP Failed to Prove the Existence of a Valid Arbitration Agreement

Looking at the arbitration agreement in isolation, "[w]e are mindful that Florida public policy favors arbitration of disputes and thus 'courts should resolve doubts concerning the scope of such agreements in favor of arbitration.' " Austin Com., L.P. v. L.M.C.C. Specialty Contractors, Inc., 268 So. 3d 215, 219 (Fla. 2d DCA 2019) (quoting Stinson-Head, Inc. v. City of Sanibel, 661 So. 2d 119, 120 (Fla. 2d DCA 1995)).

However, no such presumption exists when the parties dispute whether they agreed to arbitrate. See Moen v. Bradenton Council on Aging, LLC, 210 So. 3d 213, 215 (Fla. 2d DCA 2017) ("Although arbitration is a preferred method of dispute resolution, '[t]he general rule favoring arbitration does not support forcing a party into arbitration when that party did not agree to arbitrate.' " (quoting Nestler-Poletto Realty, Inc. v. Kassin, 730 So. 2d 324, 326 (Fla. 4th DCA 1999))). UATP carried the burden of proving such an agreement. See Palm Garden of Healthcare Holdings, LLC v. Haydu, 209 So. 3d 636, 638 (Fla. 5th DCA 2017) ("Appellants, as the proponents of arbitration, have the burden of establishing an enforceable written agreement to arbitrate.").

Ms. Barnes' son did not sign the document. Indeed, he lacked the capacity to do so. See § 743.07(1), Fla. Stat. (2019) ("The disability of nonage is hereby removed for all persons in this state who are 18 years of age or older . . . ."); Glob. Travel, 908 So. 2d at 402 ("[C]hildren, who normally are incompetent to contract, may be bound to the terms of contracts for necessary services such as medical treatment."); see, e.g., Charles v. Klemick & Gampel, P.A., 984 So. 2d 563, 563 (Fla. 2d DCA 2008) (reversing attorney's fees award based in part upon a "contingency fee agreement signed . . . by a minor, who lacks the capacity to enter into a contract").

Nor did Ms. Barnes sign the document. Rather, Ms. Barnes' friend, Ms. Fluty, signed the document. The arbitration agreement that UATP seeks to enforce was not signed by the person against whom UATP seeks enforcement. Consequently, the arbitration agreement could not bind Ms. Barnes, or her son, unless UATP demonstrated that Ms. Fluty had authority to do so. See § 744.301(3).

Section 744.301(3)(b) authorizes a parent to execute a limited preinjury release of her child's personal injury claims resulting from inherent risks in an activity so long as the document contains certain specific language in a particular format. UATP furnishes us with no Florida legal authority recognizing a parent's friend's ability to bind that parent's child to a contract like the one involved here. Cf. Glob. Travel, 908 So. 2d at 405 (holding that the arbitration provision in a commercial travel contract was enforceable against a child because it had been signed by the child's parent).[4]

To avoid this shortcoming, UATP argues that Ms. Fluty had the apparent agency to sign the document. See Fi-Evergreen Woods, LLC v. Est. of Robinson, 172 So. 3d 493, 495 (Fla. 5th DCA 2015) ("[A] non-signatory to an arbitration agreement is bound to the agreement 'when the signatory . . . is authorized to act as the agent of the person sought to be bound[.]' " (second and third alterations in original) (quoting Stalley

[4]UATP cites to Global Travel in support of its claim that "[i]n Florida, arbitration agreements on behalf of minor children are generally valid." However, the arbitration provision in Global Travel was enforceable against a child because it had been signed by that child's parent. 908 So. 2d at 405. The issue in Global Travel was whether the State's "parens patriae" authority to protect children from a waiver of their litigation rights superseded, as a matter of public policy, parents' constitutional right to raise their children as they deem appropriate. Id. at 398. The court concluded the parental constitutional right to decide what activities a child may participate in includes the right to choose arbitration as a forum to resolve an injury claim arising from such activities and that no public policy supplanted that right. Id. at 404-05.

In contrast, when an individual who is not a parent has purportedly sought to waive a child's rights, that person cannot claim any constitutional right to do so. Under UATP's position, were adults given the authority to make decisions for minors who are not their own children, this would undermine the constitutional rights of parents that Global Travel sought to protect. Authorizing a nonparent to waive a child's right to a jury trial interferes with, rather than promotes, a parent's constitutional right to decide how to raise his or her child.

v. Transitional Hosps. Corp. of Tampa, 44 So. 3d 627, 630 (Fla. 2d DCA 2010))). We are not persuaded.[5]

"Our law is well settled that an apparent agency exists only if each of three elements are present: (a) a representation by the purported principal; (b) a reliance on that representation by a third party; and (c) a change in position by the third party in reliance on the representation." Mobil Oil Corp. v. Bransford, 648 So. 2d 119, 121 (Fla. 1995) (first citing Sapp v. City of Tallahassee, 348 So. 2d 363, 367 (Fla. 1st DCA 1977); and then citing Cawthon v. Phillips Petroleum Co., 124 So. 2d 517, 520 (Fla. 2d DCA 1960)).

The fundamental problem for UATP is that it does not rely upon any representation by Ms. Barnes, the purported principal. Rather, UATP attempts to bind Ms. Barnes based upon actions taken by Ms. Fluty. This gets it backwards. UATP does not argue that Ms. Barnes represented anything to UATP to induce its supposed reliance on Ms. Fluty's authority. Instead, UATP points to Ms. Fluty's representation that when she signed the document, she "warrant[ed] and "represent[ed]" that she had Ms. Barnes' "actual or implied authority to execute this agreement." An agent cannot establish her own agency. Apparent agency is conferred based upon the principal's actions or statements. See Jackson Hewitt, Inc. v. Kaman, 100 So. 3d 19, 31 (Fla. 2d

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[5]To the extent UATP further suggests that courts have "extended arbitration agreements to [bind] non-signatories" receiving rights under the agreement, we reject this contention. See Mendez v. Hampton Ct. Nursing Ctr., LLC, 203 So. 3d 146, 149 (Fla. 2016) ("The third-party beneficiary doctrine does not permit two parties to bind a third[-]without the third party's agreement[-]merely by conferring a benefit on the third party."); Jacocks v. Capital Com. Real Est. Grp., Inc., 310 So. 3d 71, 73 (Fla. 4th DCA 2021) ("As a general rule, a plaintiff cannot be bound by an arbitration clause in a contract he did not sign even if he is a third-party beneficiary of the contract.").

DCA 2011) (" '[T]he doctrine rests on appearances created by the principal and not by agents who often ingeniously create an appearance of authority by their own acts.' . . . In considering a claim based on apparent authority, the inquiry properly focuses on the actions of or appearances created by the principal, not by the agent." (first quoting Taco Bell of Cal. v. Zappone, 324 So. 2d 121, 124 (Fla. 2d DCA 1975); then citing Blunt v. Tripp Scott, P.A., 962 So. 2d 987, 989 (Fla. 4th DCA 2007); and then citing Lensa Corp. v. Poinciana Gardens Ass'n, 765 So. 2d 296, 298 (Fla. 4th DCA 2000))); Roessler v. Novak, 858 So. 2d 1158, 1162 (Fla. 2d DCA 2003) ("[A]pparent authority exists only where the principal creates the appearance of an agency relationship." (citing Izquierdo v. Hialeah Hosp., Inc., 709 So. 2d 187, 188 (Fla. 3d DCA 1998))). It was UATP's burden to prove the existence of an agreement between Ms. Barnes and UATP. It failed to do so.

IV. UATP's Remaining Arguments Lack Merit

UATP suggests that prior releases "[n]otably" attached to Carter & Dean's supplemental memorandum, submitted following the hearing, support its argument that Ms. Fluty was Ms. Barnes's apparent agent. The prior releases, however, were not in evidence. See Third Fed. Savs. & Loan Ass'n of Cleveland v. Koulouvaris, 247 So. 3d 652, 654 (Fla. 2d DCA 2018) ("Florida law requires the authentication of a document prior to its admission into evidence."); see, e.g., DiSalvo v. SunTrust Mortg., Inc., 115 So. 3d 438, 439-40 (Fla. 2d DCA 2013) (holding that unauthenticated default letters from lender could not be considered as evidence in mortgage foreclosure summary judgment). UATP did not rely upon these documents at the hearing. Thus, we will not consider this issue for the first time on appeal. See Sunset Harbour Condo. Ass'n v. Robbins, 914 So. 2d 925, 928 (Fla. 2005) ("As a general rule, it is not appropriate for a

party to raise an issue for the first time on appeal. 'In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.' " (citations omitted) (quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985))).

UATP also contends that the "clear and unequivocal delegation provision," which required the arbitrator, not the trial court, to determine the enforceability of the arbitration agreement, salvages its position. Not so. The parties agree that delegation provisions are generally valid, absent a challenge to the specific provision. See Angels Senior Living at Connerton Ct., LLC v. Gundry, 210 So. 3d 257, 258 (Fla. 2d DCA 2017) ("Generally, when an '[arbitration] [a]greement contains a delegation provision, we only retain jurisdiction to review a challenge to that particular provision. Absent a direct challenge, we must treat the delegation provision as valid and allow the arbitrator to determine the issue of arbitrability.' " (alterations in original) (quoting Parnell v. CashCall, Inc., 804 F.3d 1142, 1148 (11th Cir. 2015))). However, if, as here, no contract was ever formed, we cannot hold the parties to the terms of a nonexistent contract. See, e.g., Granite Rock, 561 U.S. at 300; CT Miami, LLC v. Samsung Elecs. Latinoamerica Miami, Inc., 201 So. 3d 85, 93 (Fla. 3d DCA 2015) ("[W]e hold that challenges to either party's agreement to the contract in the first instance are exclusively to be determined by the trial court and that, when raised, such challenges must be decided by the trial court before arbitration can be compelled." (emphasis added)). A delegation clause cannot bind a party who did not agree to the contract in which it is

contained. Ms. Barnes was not bound by the delegation clause in a document she did not sign or authorize.

UATP next asserts that the arbitration provisions are severable from the release and, therefore, the arbitration provision would survive, even if the remainder of the release did not. It strikes us as illogical and impossible to sever and enforce part of an agreement that never existed in the first place. See, e.g., Granite Rock, 561 U.S. at 300; CT Miami, LLC, 201 So. 3d at 93. UATP relies upon Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 402 (1967), for the proposition that "arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded." "However, Prima Paint has never been extended to require arbitrators to adjudicate a party's contention, supported by substantial evidence, that a contract never existed at all." Chastain v. Robinson-Humphrey Co., 957 F.2d 851, 855 (11th Cir. 1992), abrogated in part on other grounds by First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

As we have already explained, the release and arbitration provisions could not possibly be severed from an agreement that never existed. Moreover, provisions going to the "very essence of the agreement" are not severable. Hochbaum ex rel. Hochbaum v. Palm Garden of Winter Haven, LLC, 201 So. 3d 218, 222 (Fla. 2d DCA 2016) ("It is clear from both Shotts and Gessa[v. Manor Care of Fla., Inc., 86 So. 3d 484 (Fla. 2011),] that the existence of a severability clause is not determinative of whether an offending provision may be severed from the agreement and that the 'controlling issue is whether an offending clause or clauses go to ‘the very essence of the agreement.' " (quoting Est. of Yetta Novosett v. Arc Vills. II, LLC, 189 So. 3d 895,

896 (Fla. 5th DCA 2016))). The release provisions could not be severed because they were essential and purported to exculpate UATP from any liability. Excising these provisions would leave UATP with no meaningful release at all.

Conclusion

Because UATP failed to demonstrate that the parties entered into an arbitration agreement, we affirm the trial court's order denying UATP's motion to compel arbitration.

Affirmed.

KHOUZAM, C.J., and BLACK, J., Concur.