IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1258

DONNA MARIE FRANKS, as the personal representative of the Estate of JOSEPH JAMES FRANKS, SR., deceased,

Petitioner,

v. 1st DCA Case No.: 1D10-3078

GARY JOHN BOWERS, M.D., BENJAMIN A. PIPERNO, III, M.D., and NORTH FLORIDA SURGEONS, P.A., a Florida corporation

Respondents.
_____/

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT STATE OF FLORIDA

RESPONDENTS' JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This Court is being asked to review an arbitration agreement that was upheld by the trial court and the First District Court of Appeals. The arbitration agreement ("Agreement") was between the Respondents, North Florida Surgeons, P.A., Gary John Bowers, M.D., and Benjamin A. Piperno, III, M.D. (collectively referred to herein as "North Florida Surgeons"), and their patient, Mr. Joseph Franks, Sr. The Agreement was signed by the parties prior to Mr. Franks receiving any medical care. When Mr. Franks died several days post-surgery, the Petitioner brought suit against North Florida Surgeons in Duval County Circuit Court.

North Florida Surgeons asserted its right to arbitrate the dispute pursuant to the Agreement and after a hearing, the circuit court compelled the parties to arbitration. Petitioner appealed the trial court's Order to Compel Arbitration and argued that the Agreement violated public policy and was unconscionable. However, after briefs and oral argument, the First District unanimously upheld the Agreement and ruled that the Agreement did not violate public policy, as stated in the Medical Malpractice Act, and that the Petitioner failed to meet her burden of proof that the Agreement was unconscionable. Opinion, at 5-6.

The First District noted that the Medical Malpractice Act allows voluntary binding arbitration based on the public policy of encouraging arbitration of medical malpractice claims, as well as to limit hard to measure non-economic damages.

Opinion, at 5. In this case, the parties entered into a binding contract to arbitrate and limit non-economic damages rather than the statutory arbitration process. The First District analyzed the public policy involved and determined that the Agreement did not violate public policy. *Id.* In addition, the First District applied the rules for the contract defense of unconscionability and found that the Agreement was not substantively unconscionable. Opinion, at 5-6. Because unconscionability requires a showing of both substantive and procedural unconscionability, the contract could not be found to be unconscionable.

Subsequent to the issuance of the First District's opinion upholding the Agreement ("Opinion"), Petitioner filed four motions with the First District: Motion for Rehearing, Motion for Rehearing en Banc, Motion to Certify for Great Public Importance, and Motion to Certify for Direct Conflict with Another District Court. The First District denied all four motions. Petitioner now seeks this Court's jurisdiction based on express and direct conflict. However, for the reasons that follow, this Court does not have jurisdiction.

SUMMARY OF THE ARGUMENT

First, Petitioner asserts that there is an express and direct conflict even though the two cases deal with separate and distinct statutes. The Fourth District in *Romano v. Manor Care, Inc.*, 861 So. 2d 59 (Fla. 4th DCA 2003) analyzed whether an arbitration agreement violated the public policy of the Nursing Home Residents Act. The First District in the Opinion below analyzed whether an arbitration agreement violated the public policy of the Medical Malpractice Act. Since both Acts contain substantially different provisions and were created to address substantially different public policy issues, it is expected that the analyses of the arbitration agreements would be substantially different. Therefore, the decisions of the two cases do not expressly and directly conflict because they are readily distinguishable.

Second, Petitioner asserts that there has been a misapplication of the rule established by this Court in *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993). However, the First District did not apply the *Echarte* rule at all because it was inapplicable. The *Echarte* rule addressed whether the legislature, *via* statute, could constitutionally limit the right of access to the courts. *Id.* The Opinion below addressed whether a private contract, not a statute, was in violation of public policy as expressed in a statute. The issues were completely different.

The Opinion does not create new law, nor does it establish new public policy. It does not conflict with well established precedent and further review is unwarranted.

ARGUMENT

Standard of Review. This Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same point of law. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). The conflict must appear within the four corners of the district court's majority opinion and this Court may only consider those facts which are stated therein. *E.g.*, *Reaves v. State of Florida*, 485 So. 2d 829, 830 (Fla. 1986).

I. THIS COURT DOES NOT HAVE JURISDICTION BECAUSE THE FIRST DISTRICT'S OPINION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE FOURTH DISTRICT'S DECISION IN *ROMANO V. MANOR CARE, INC.*, 861 SO. 2D 59 (FLA. 4TH DCA 2003).

There is no express and direct conflict with *Romano*, or with any other case cited by Petitioner which dealt with the Nursing Home Residents Act ("NHRA").[1] In fact, the First District considered the Petitioner's cases and cited the cases in its

[1] Petitioner also cited *Holt v. O'Brien Imports of Ft. Myers*, 862 So. 2d 87 (Fla. 2nd DCA 2003) which involved FDUPTA claims. However, Petitioner did not brief or discuss that case regarding any conflict. Even so, Respondents arguments would apply equally to the FDUPTA context in *Holt*.

Opinion, giving specific reasons why these cases were distinguishable from the case at bar.

First, *Romano* dealt with the unconscionability of an arbitration agreement which contained terms that were expressly contradictory to provisions in the NHRA. *Romano* at 62-63. As one example, the agreement eliminated the right to punitive damages, which were expressly granted in the statute. *Id.* The Fourth District analyzed the legislature's purpose in adopting those provisions in the NHRA and found that the legislature was trying to protect nursing home residents from abuse. *Id.* Since the agreement completely took away some of those protections, the Fourth District held that the agreement defeated the remedial purpose of the statute and was therefore unenforceable. *Id.*

As the First District noted in its Opinion, the cases involving the NHRA are distinguishable and not on point. Opinion, at 4. The remedial purpose and terms of the NHRA are drastically different than the remedial purpose and terms of the Medical Malpractice Act ("MMA"). The remedial purpose of the MMA was to reduce sky-rocketing medical liability insurance premiums. Fla. Stat. § 766.201. The Legislature tried to accomplish this by (1) requiring pre-suit notice and investigation, (2) encouraging the use of voluntary binding arbitration and (3) limiting hard to quantify noneconomic damages. *Echarte*, 618 So. 2d at 191.

Because the Agreement at issue supported the remedial purpose of the MMA by using arbitration and limiting non-economic damages, and did not contradict its terms, the First District properly upheld the Agreement. The Opinion does not conflict with the Fourth District in *Romano* because the cases deal with two separate and distinct statutes that address two fundamentally different purposes.

II. THIS COURT DOES NOT HAVE JURISDICTION BECAUSE THE FIRST DISTRICT'S OPINION DID NOT MISAPPLY THE RULE OF THIS COURT'S HOLDING IN *UNIV. OF MIAMI V. ECHARTE*, 618 SO. 2D 189 (FLA. 1993).

There has been no misapplication of law because the First District did not apply the *Echarte* rule at all. This Court in *Echarte* discussed the circumstances under which the legislature, in a statute, could restrict access to the courts. *Id.* at 190. Specifically, this Court analyzed the MMA and determined that the voluntary arbitration provisions were constitutional. *Id.* at 198.

In the Opinion below, the First District was not analyzing whether a statute was constitutional, but whether a private contract violated the public policy evidenced by the enactment of the MMA. The First District merely cited *Echarte* to support its determination that the public policy of the MMA was to reduce the costs of medical malpractice insurance premiums, and that the purpose was considered an "overpowering public necessity." Opinion, at

5. The rule of *Echarte*, whether a statute is constitutional, was inapplicable in the case at bar.

III. THIS COURT'S JURISDICTION SHOULD NOT BE EXERCISED BECAUSE THE ARBITRATION AGREEMENT AT ISSUE SUPPORTS THE PUBLIC POLICY AS EXPRESSED IN THE MEDICAL MALPRACTICE ACT.

Even if the Court determines that it has jurisdiction, it should not exercise it because the legislature, not the court, is the branch of government responsible for determining public policy. *See Echarte*, 618 So.2d at 196-197. Nowhere in the MMA has the legislature prohibited parties from entering into arbitration agreements instead of electing to follow the voluntary arbitration provisions in the statute. Given its policy of encouraging the use of arbitration in medical malpractice claims, it seems likely that the legislature contemplated arbitration outside of the statute and deliberately chose not to prohibit it. *See Alterra Healthcare Corp. v. Linton*, 953 So. 2d 574, 581 (Fla. 1st DCA 2007) (J. Polston, concurring in part and dissenting in part); *Tallahassee Mem'l Reg'l Med. Ctr. v. Kinsey*, 655 So. 2d 1191, 1198 (Fla. 1st DCA 1995) ("In our opinion, the absence of any such language is strong evidence that the legislature did not intend the result urged by appellants. To presume such an intent in these circumstances would amount to the most blatant form of judicial legislation. We decline the appellants' invitation to don the legislative mantle.").

Contrary to Petitioner's assertion, it has been established in at least three District Courts of Appeal that a doctor and patient have the freedom to contract for arbitration outside of the MMA's voluntary arbitration process. *See Frantz v. Shedden*, 974 So. 2d 1193 (Fla. 2nd DCA 2008); *Gordon v. Shield*, 2010 WL 2882443 (Fla. 4th DCA July 14, 2010).

CONCLUSION

Because there is no express and direct conflict, this Court lacks jurisdiction to hear this appeal. Therefore, Respondent respectfully requests this Court to deny review.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished to **Thomas S. Edwards, Jr., Esquire**, Edwards & Ragatz, P.A., 501 Riverside Avenue, Suite 601, Jacksonville, FL 32202 and **Bryan S. Gowdy, Esquire**, Creed & Gowdy, P.A., 865 May Street, Jacksonville, FL 32204, via U.S. mail this _____ day of July, 2011.

_____
Attorney

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this Answer Brief complies with the font requirements of Rule 9.210(a)(2), Fla.R.App.P. and is submitted in Times New Roman 14-point font.

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