IN THE SUPREME COURT OF THE STATE OF FLORIDA

DONNA FRANKS, as personal Representative of the Estate of JOSEPH JAMES FRANKS, SR., Deceased
Appellant

v.

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

Appellee

SC11-1258
CASE NO., ID10-3078
L.T. No.: 16-2010-CA-00474-XXX

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S JURISDICTIONAL BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The case was appealed to the First District from a non-final order compelling arbitration of a wrongful death medical negligence claim. The case was brought by Donna Franks as Personal Representative of the Estate of her husband Joseph Franks against defendants North Florida Surgeons and their physicians (collectively hereafter "NFS" or "N. Fla. Surgeons").

An arbitration agreement was executed when the care began. The Arbitration agreement required Franks to participate in a Ch. 766 "pre-suit". A "pre-suit" was timely performed. During "pre-suit", Franks offered to Arbitrate under S. 766.207 Fl. Stat. N. Fla. Surgeons did not accept.

Suit was filed. A motion to compel arbitration ensued. Appellant filed a Response objecting to arbitration and a Request for Discovery/Evidentiary Hearing. All were denied. Arbitration was compelled. An Appeal to the First District followed.

The First District Court of Appeal upheld the trial court. A timely Motion for Certification, et al was filed and denied. Timely notice was filed with this Court. That brings us to this Jurisdictional Brief.

SUMMARY OF THE ARGUMENT

The First District opinion expressly and directly conflicts with opinions of other district courts of appeal, providing that an arbitration

agreement may not dispose of statutory rights and remedies in remedial statutes. See *Romano v. Manor Care Inc.*, 861 So.2d. 59 (Fla. 4th DCA 2003) See also *Blankfield v. Richmond Health*, 902 So.2d 296 (Fla. 4th DCA 2005); *Lacey v. Healthcare and Retirement Corp of America*, 918 So.2d 333 (Fla. 4th DCA 2006) and *Holt v. O'Brien Imports of Ft. Myers*, 862 So.2d 87 (Fla. 2nd DCA 2003). *Romano* holds that the arbitration agreement must provide an effective way to vindicate statutory rights and remedies as in court. The opinion herein acknowledges that the Plaintiff's statutory rights and remedies under Chapter 766 were changed and limited.

Damages were capped below amounts guaranteed by Chapter 766 and other remedies allowed by Chapter 766 were taken away by the NFS Arbitration Agreement. The rights which were taken away by the NFS Arbitration Agreement were the same rights identified as necessary to uphold the caps under *University of Miami v. Echarte*, 618 So.2d 189 (Fla. 1993). Moreover, the approach taken in the NFS Arbitration Agreement was rejected by the legislature when creating the current legislative scheme.

Under *Romano*, when an arbitration agreement impairs remedial statutory remedies, the agreement is not enforceable. Thus, the First District opinion herein is inconsistent with *Romano* and other cases in Florida.

The First District opinion also misapplies this Court's ruling in

University of Miami v. Echarte, 618 So.2d 189 (Fla. 1993) requiring that when a statute takes away a remedy (caps on non-economic damages), it may be upheld only if there is a quid pro quo. This Court found a quid pro quo only because Chapter 766 gave the injured plaintiff other new rights in exchange for what was taken away. Thus, under *Romano*, the new rights could not be taken away by Arbitration Agreement for public policy reasons.

If the decision stands, hospitals, physicians, and other healthcare providers will impose even lower caps and remove plaintiff's rights granted by Chapter 766. There will be no incentive for insurance carriers and healthcare providers to reduce costs by resolving meritorious claims expeditiously and inexpensively.

JURISDICTIONAL STATEMENT

This is a request for discretionary review based upon express and direct conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. The Court has discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv) , Fla. R. App. Proc. and Art. V, Sec. 3(b)(3) Fla. Const.

ARGUMENT

I. There is a jurisdictional basis to accept this case because of express and direct conflict with *Romano* which requires that statutory rights and remedies may not be impaired by an arbitration agreement

The decision below expressly and directly conflicts with the case of *Romano v. Manor Care Inc.*, 861 So.2d. 59 (Fla. 4th DCA 2003). See also *Blankfield*; *Lacey* and *Holt*. Consistent with Florida law and federal law, *Romano* provides that an Arbitration Agreement may not impair or take away statutorily protected rights of a plaintiff. The First District opinion acknowledged that NFS Arbitration Agreement took away numerous rights granted to plaintiff by Chapter 766. "A remedial statute is one which confers **or changes a remedy**." (emphasis supplied) *Blankfield* at p. 298. Worse, the agreement herein limited plaintiff's rights in a way expressly rejected by the legislature.

In Romano, the Fourth District set out the following rule of law:

> Although parties may agree to arbitrate statutory claims, even ones involving important social policies, arbitration must provide the prospective litigant with an effective way to vindicate his or her statutory cause of action in the arbitral forum. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)); see also *Flyer Printing Co. v. Hill*, 805 So.2d 829, 831 (Fla. 2d DCA 2001). When an arbitration agreement contains provisions which defeat the remedial provisions of the statute, the agreement is not enforceable. See *Flyer Printing*, 805 So.2d at 831.

See *Romano* at p.62

In this case, the arbitration agreement substantially changed and restricted the rights of the plaintiff as compared with the new rights granted by Chapter 766. Only a lawyer or other person sophisticated in the intricate statutory scheme could have understood the changes.

In NFS' Arbitration Agreement, the plaintiff's non-economic damages are capped at $250,000.00 with a formula used to reduce that amount. By contrast, under Chapter 766, if the plaintiff herein went to court the Estate has the right to $500,000/ $1,000,000.00 in non-economic damages because a death occurred. See Section 766.118 Fla. Stat. Under Chapter 766, if the plaintiff and the defendant agreed to arbitrate under Chapter 766.207 (Plaintiff offered to do so herein), then the defendant had the right to a similar cap on damages ($250,000.00 with a reduction formula) however, the defendant was required to admit liability to obtain this cap, accept joint and several liability, pay for the arbitration, pay plaintiff's attorney's fees, costs and pre-judgment interest. See Section 766.207 – 766.209 Fla. Stat. There are no such commensurate rights under defendant's arbitration agreement.

Both Florida and federal law have long adhered to the basic premise that "the plaintiff should be able to obtain the same relief via arbitration as would be available in court." See *Romano*; *Blankfield; Lacey; Holt;*

Brasington v. EMC Corporation 855 So.2d 1212 (Fla. 1st DCA 2003) citing to *Gilmer v. Interstate Johnson Lane Corporation* 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2nd 26 (1991) and *Mitsubishi Motors Corporation v. Solar Chrysler-Plymouth Inc.* 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2nd 444 (1985) The rights that were taken away in the arbitration agreement herein, are remedial rights as discussed above and below.

II. There is a jurisdictional basis to accept this case because of the District Court's misapplication of *Echarte/Kluger* requiring that there must be a quid pro quo for caps to be valid

In this case, the First District misapplied the holding of *University of Miami v. Echarte*, 618 So.2d 189 (Fla. 1993). In *Echarte* the Court stated:

> We find that **the statutes at issue provide a commensurate benefit to the plaintiff** in exchange for the monetary cap, and thus, we hold the statutes satisfy the right of access to the courts test set forward in *Kluger v. White*, 281 So.2d 1 (Fla.1973). [Emphasis Supplied]

Echarte, 619 at 190.

This arbitration agreement deftly took away the "commensurate benefit" to the plaintiff identified in *Echarte*.

In *Echarte* the court identified new rights which constituted a "commensurate benefit to the plaintiff in exchange for the monetary cap". Thus, the plaintiff's rights under Chapter 766 are new rights. NFS deftly

wrote those new rights out of their arbitration agreement.

In *Echarte* the court found the new rights included "… substantial **incentives for both** claimants and defendants to submit their cases to binding arbitration, thus reducing attorney's fees, litigation costs and delay." See Section 766.201, Fl. Stat. An analysis of the NFS Arbitration Agreement shows the "substantial incentives" created by Chapter 766 were written out of the Arbitration Agreement to eviscerate plaintiff's rights, while leaving intact all advantages to defendant, with no incentive to process claims quickly or timely. The benefits for plaintiff found in *Echarte* were taken away and the First District opinion fails to protect these rights. These new rights are remedial rights. If they are not new remedial rights there is no constitutional basis for the caps. See *Echarte* and *Kluger*.

The court stated that during pre-suit both parties were required to carefully and timely analyze the claim and either party had the right to offer to arbitrate under Chapter 766. *Echarte* at page 192. In the event the parties agreed to a Chapter 766 arbitration then a panel decided only the amount of damages because the defendant was required to admit liability.

In the NFS Agreement they are not required to admit liability, yet they obtain the same low cap on damages as under a Chapter 766 arbitration. Those damages caps are lower than the defendant can obtain in court. The

other incentives that *Echarte* identified as new remedial rights for plaintiff include requirements for any defendant agreeing to participate in Chapter 766 arbitration to agree to joint and several liability with any other parties/nonparties. This protection is not in the NFS Arbitration Agreement. No layperson could possibly understand these intricacies.[1]

If the plaintiff's rights taken away by this agreement are not remedial rights, then there is no basis for holding Chapter 766 constitutional. If these were new rights (remedial benefits) for plaintiff, then under *Romano* and other existing Florida law, it was error for the First District to permit the contractual arbitration agreement. See *Romano* and cases cited herein. This court may accept jurisdiction based upon the misapplication of *Echarte* and *Kluger* to the facts of this case. See *Engle v. Liggett Group, Inc*., 945 So.2d 1246 (Fla. 2006) and *Aguilera v. Inservices, Inc.*, 905 So.2d 84 (Fla. 2005).

III. The court should exercise its jurisdiction to accept this case because this case will impact the rights and remedies between patients and healthcare providers throughout the state.

This case involves core issues of public policy affecting the constitutional and statutory rights of patients and healthcare providers throughout this state. This court is the ultimate arbiter of public policy issues. The breadth and impact of the issues in this case warrant the court

[1] It is notable in this case that there is a separate proceeding going on against another party.

exercising its discretion to accept jurisdiction to decide these issues.

The First District's decision allows an arbitration agreement to be enforced when it deftly removes all patient protections that supported the constitutional basis under a "*Kluger* analysis". See *Echarte* and *Kluger*. Thus, fundamental rights necessary to support the quid pro quo for capping damages are at risk.

Arbitration agreements have become pervasive in the healthcare field as is shown by the number of nursing home appellate opinions addressing the subject and the numerous physician group arbitration agreements submitted to the court below with the Amicus Brief of the FJA. Thus, the issues presented in this case will impact cases throughout the state. The lower court's opinion will likely cause the number of healthcare providers using such agreements to increase – and the attempts to reduce and curtail plaintiff's rights to grow. Given the importance of these rights, the Supreme Court should pass on the propriety of this agreement and the standards to be used.

The Supreme Court of Florida has ultimate responsibility for public policy interpretation and should pass on the propriety of a fiduciary imposing this kind of agreement on a lay person with no explanation – other than a deceptive one. No lay person could possibly be schooled in the

intricacies of the Medical Malpractice Act – few lawyers are. The NFS Arbitration Agreement was carefully crafted by N. Fla. Surgeons to advantage a fiduciary in an area where an untrained patient could not possibly be competent. The importance of Supreme Court review is highlighted by the fact that the rights deftly taken away herein were the rights found necessary to the constitutionality of this Act in *Echarte*.

Unfettered access to healthcare is crucial to the people of our state. The relationship between healthcare providers and patients is a fiduciary relationship. *Nardone v. Reynolds,* 333 So.2d 25, 39 (Fla.1976). A ruling that an arbitration agreement can restrict the statutorily guaranteed rights of a plaintiff re-writes Florida law and fundamentally changes the careful balance fought for and struck in the Legislature. See *Echarte* and *Kluger and FJA Amicus Brief*. The healthcare providers should not be permitted to re-write the statutory rights of patients. Thus, this case warrants Supreme Court review.

CONCLUSION

The court should find there is a jurisdictional basis for review of this case and exercise its discretion to accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished to ***James T. Murphy***, 1200 Riverplace Blvd., Suite 902, Jacksonville, FL 32207, and ***Andrew S. Bolin, Esq***., 201 North Franklin Street, Suite 2900, Tampa, Fl. 33602, via email and U.S. Mail this 1st day of July, 2011.

_____
Attorney

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

The undersigned counsel hereby respectfully certifies that the foregoing Appellant's Initial Brief complies with the font requirements of Fla. R. App. P. 9.210, and has been typed in Times New Roman, 14 point.

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Attorney