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

ANSWER BRIEF

MATHIS & MURPHY, P.A.

Kelly B. Mathis, Esquire
Florida Bar No.: 0768588
Laurie M. Lee, Esquire
Florida Bar No.: 0668257
1200 Riverplace Blvd, Suite 902
Jacksonville, FL 32207
(904) 396-5500; (904) 396-5560 (fax)
Attorneys for Respondents

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PRELIMINARY STATEMENT

Respondents, Gary John Bowers, M.D., Benjamin A. Piperno, III, M.D. and North Florida Surgeons, P.A. were the Defendants in the trial court, the Appellees before the District Court, and will be referred to collectively as "North Florida Surgeons" unless otherwise noted.

Petitioner, Donna Marie Franks, in her capacity as personal representative of the Estate of Joseph James Franks, was the Plaintiff in the trial court, the Appellant before the District Court, and will be referred to as "Petitioner." Joseph James Franks, deceased, will be referred to as "Mr. Franks."

References to Respondents' Appendix will be made using the designation "(R.App. __)" followed by the applicable page number from Respondents' Appendix.

References to the Petitioner's Appendix will be made using the designation "(P.App. __)" followed by the applicable page number from Petitioner's Appendix.

STATEMENT OF THE FACTS

On September 25, 2008, Mr. Joseph Franks visited Dr. Bowers at North Florida Surgeons' office for a consultation. (P.App. D-2) Six (6) days before his scheduled appointment, on September 19, 2008, Mr. Franks received and signed various documents from North Florida Surgeons, including the contract at issue in this appeal ("Contract"). (R.App. A)

The Contract consisted of three and a half pages and contained an arbitration provision on page two, which was clearly labeled "Arbitration" (herein referred to specifically as "Arbitration Agreement"). (R.App. A-2) Indeed, the second page had a bold heading at the top labeled, "**Arbitration**," and was highlighted in a box.[1] (R.App. A-2) The Arbitration Agreement states,

> It is further understood, that in the event of any controversy or dispute, which might arise between the Doctor and the Patient, regardless of whether the dispute concerns the medical care rendered, including any negligence claim relating to the diagnosis, treatment, or care of the Patient, or payment of surgical fees, or any other matter whatsoever, then the parties agree that the dispute shall be resolved by arbitration as provided by the Florida Arbitration Code, Chapter 682 (Florida Statutes).

The Arbitration Agreement explicitly stated, "This arbitration shall be in lieu and instead of any trial by jury." (R.App. A-2) The Arbitration Agreement noted that

[1] This heading is difficult to read in the document in Petitioner's Appendix due to the poor quality copy. North Florida Surgeons has provided a clear copy in its Appendix.

prior to commencing arbitration, the patient "must comply with the presuit notice and investigation requirements of Chapter 766, Florida Statutes." (R.App. A-2)

In the middle of page two, the Contract contained a limitation of damages provision which was labeled with a bold and underlined title, "**Limitation of Damages**" (herein referred to specifically as "Damages Agreement"). (R.App. A-2) The provision limited the amount of recoverable noneconomic damages to $250,000.00 per incident, "and shall be calculated on a percentage basis with respect to capacity to enjoy life, pursuant to the formula contained in Florida Statutes, Section 766.207." (R.App. A-2) To be clear, the Damages Agreement recited the formula in § 766.207, Fla. Stat., and stated, "For example, if the Patient's injuries resulted in a 50% reduction in his or her capacity to enjoy life, this would warrant an award of not more than $125,000.00 in noneconomic damages." (R.App. A-2) Unlike § 766.207, Fla. Stat., there were no other limitations on damages. The Damages Agreement made that clear by stating, "This limitation of damages provision does not limit or restrict in any way the Patient's right to seek all economic damages actually incurred by the Patient, including any medical expenses and lost wages." (R.App. A-2) (emphasis in original).

On page three, there is an acknowledgement by the patient that he has read the Contract, understands its terms, has no unanswered questions, and has not been

coerced into the Contract. It also states, "The Patient may consult with an attorney before signing this Doctor-Patient Agreement." Mr. Franks signed directly below this acknowledgment. In all capital bold letters, the sentence above his signature reads, "BY SIGNING THIS DOCTOR-PATIENT AGREEMENT, I ACKNOWLEDGE THAT I HAVE CAREFULLY READ, UNDERSTAND AND AGREE TO THE ABOVE TERMS AND CONDITIONS." (R.App. A-3)

The entire Contract was signed again by Mr. Franks on page four. Again, directly above his second signature reads the sentence, "BY SIGNING THIS DOCTOR-PATIENT AGREEMENT, I ACKNOWLEDGE THAT I HAVE CAREFULLY READ, UNDERSTAND AND AGREE TO THE ABOVE TERMS AND CONDITIONS." (R.App. A-4)

On January 23, 2009, Dr. Bowers performed surgery for a left inguinal hernia. (P.App. C-4) Mr. Franks suffered complications from the surgery and was readmitted to the hospital three (3) days later under the care of Dr. Piperno, another surgeon with North Florida Surgeons. (P.App. C-4) Unfortunately, Mr. Franks died in the hospital on February 3, 2009. (P.App. C-2)

STATEMENT OF THE CASE

On January 12, 2010, Petitioner filed a complaint alleging medical malpractice and wrongful death against North Florida Surgeons. (P.App. C) In response, North Florida Surgeons filed a Motion to Compel Arbitration pursuant to the Contract signed by Mr. Franks. In support of its Motion to Compel, North Florida Surgeons asserted that the Contract was valid, the claim was an arbitrable issue, the right to arbitration was not waived, and the Contract did not violate public policy. (P.App. I).

The trial court conducted a hearing on the Motion to Compel Arbitration on April 29, 2010. (P.App. H). At that hearing, Petitioner argued that the Contract was unconscionable and against public policy. (P.App. H-15). The trial court found that the Contract was not substantively unconscionable because it did "not rise to the level that it shocks the judicial conscience." (P.App. K-4) Because the court did not find the Contract substantively unconscionable, it held that there was no need for a hearing on procedural unconscionability, as both are required for invalidating a contract. (P.App. K-5) The court also noted that public policy favors arbitration and compelled the parties to arbitration. (P.App. K-10)

On June 7, 2010, Petitioner filed her Notice of Appeal with the First District Court of Appeal. On appeal, Petitioner again argued that the Contract was void as against public policy and unconscionable. Franks v. Bowers, 62 So. 3d 16, 17

(Fla. 1st DCA 2011). The First DCA rejected both arguments and affirmed the trial court's order. Id. at 18.

The First DCA found that the Contract was not contrary to the public policy of the Medical Malpractice Act ("MMA"), Chapter 766, Florida Statutes. Id. The Court recognized that the Florida Legislature enacted the MMA in response to the medical malpractice insurance crisis and that the current version of the statute places a cap on noneconomic damages and sets forth a voluntary arbitration scheme whereby the defendant may not contest liability and damages are capped at a maximum of $250,000.00. Id. at 17; see §§ 766.118(2)(b), 766.207 Fla. Stat.

Petitioner argued that because the Contract contains a different arbitration scheme than that provided in § 766.207, Fla. Stat., the Contract is inconsistent with the legislative intent and policy embodied in the MMA and as such is void as against public policy. Franks, 62 So. 3d at 17. In rejecting this argument, the First DCA stated, "the arbitration clause, as applied in this instance, affords meaningful relief and is consistent with the legislative purpose and the public policy which led to the enactment of the medical negligence provisions in Chapter 766." Id. at 18. Moreover, "[t]he differences between the arbitration process in Chapter 766 and arbitration under the Financial Agreement in the present case do not countermand the public policy reflected in Chapter 766 as applied to the claims presented in this case." Id. The court further reasoned that "[c]hapter 766 **itself** imposes limitations

on non-economic damages, and provides for arbitration as a means of dispute resolution." Id. (emphasis added).

The First DCA distinguished the line of cases, all of which involved the Nursing Home Residents Act (the "NHRA"), which invalidated arbitration agreements containing limitations on damages. Id. The court stated, "[t]hose cases do not address Chapter 766 arbitration, and instead involved arbitration agreements that were contrary to remedial enactments which did not authorize arbitration, and which created private rights and a statutory cause of action which had not previously existed." Id.

On June 17, 2011, Petitioner filed her "Notice of Appeal" with this Court challenging only the district court's holding as it applied to Petitioner's public policy argument. This Court accepted jurisdiction pursuant to Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv) based on direct and express conflict with Romano v. Manor Care, Inc., 861 So. 2d 59 (Fla. 4th DCA 2003) and the NHRA line of cases and/or Univ. of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993). Jurisdiction for this appeal is now with this Court.

SUMMARY OF THE ARGUMENT

This Court's jurisdiction is based on express and direct conflict between the First DCA's opinion below and the nursing home line of cases cited by Petitioner. Petitioner uses the rule of law from those cases stating an arbitration agreement containing provisions which undermine the rights and remedies granted by a remedial statute is against public policy. However, Petitioner's cases do not present an applicable rule of law. First, the Nursing Home Residents Act ("NHRA") has a significantly different purpose than the Medical Malpractice Act ("MMA") and represents a completely different public policy. Second, unlike the NHRA which grants a protected class of citizens a new cause of action, the MMA is not a remedial statute because it limits and restricts rights and remedies that were previously available at common law. Lastly, the terms of the Contract do not undermine the public policy of the MMA, nor do they take away rights granted by it. To the contrary, the Contract contains the same three tools used by the Legislature to achieve its purpose of reducing medical malpractice insurance premiums: (1) presuit notice and investigation, (2) cost efficient arbitration, and (3) limitations on hard to quantify noneconomic damages.

Contrary to Petitioner's assertion, the voluntary arbitration procedures in the MMA are not mandatory or exclusive. The plain language and expressly stated intent of the Legislature show that MMA arbitration is elective in nature and was

intended to only apply in the limited circumstances where the doctor chose not to contest liability. Parties are free to choose MMA arbitration, not choose MMA arbitration, or choose completely different arbitration, such as that under the Florida Arbitration Code. To interpret the MMA as providing for mandatory and exclusive arbitration would be to contradict the Federal Arbitration Act ("FAA"). Any state law that prohibits arbitration agreements for a specific claim is preempted by the FAA.

A limitation on noneconomic damages in the Contract does not violate public policy because it is precisely the public policy of this state to limit noneconomic damages in *all* medical malpractice claims. The $250,000.00 cap on noneconomic damages in the Contract is not substantively unconscionable because it does not "shock the judicial conscience." For instance, the Legislature chose the exact same amount for one of the many levels of caps on noneconomic damages in the MMA.

Should this Court find the $250,000.00 cap unconscionable, it can sever the Damages Agreement from the Contract and the remaining Arbitration Agreement would be left whole, with all of the parties' promises to arbitrate the claim left intact. There would be no need to "rewrite" any of the remaining Arbitration Agreement because that "agreement" would not be altered by the severance of the Damages Agreement.

ARGUMENT

Standard of Review

The validity of an arbitration clause in a contract presents a question of law, which is reviewed by the appellate court using the de novo standard of review. Global Travel Marketing, Inc. v. Shea, 908 So. 2d 392, 396 (Fla. 2005).

I. Petitioner's nursing home case law is not applicable and does not conflict with the First DCA's opinion below.

Petitioner asserts that the contract at issue ("Contract") violates public policy and is therefore void. Petitioner relies almost exclusively on case law involving the Nursing Home Residents Act ("NHRA") for the premise that an arbitration agreement containing provisions which undermine the rights granted by a remedial statute is against public policy and is therefore void as a matter of law.

The NHRA cases, including this Court's recent holdings in Shotts v. OP Winter Haven, Inc., 36 Fla. L. Weekly S665b (Nov. 23, 2011) and Gessa v. Manor Care of Fla., Inc., 36 Fla. L. Weekly S676a (Nov. 23, 2011) are readily distinguishable. First, the NHRA was enacted for a vastly different statutory purpose than the Medical Malpractice Act ("MMA"). Second, the NHRA is a "remedial" statute created to establish a completely new cause of action in order to protect nursing home residents from abuse. The MMA, on the other hand, is not a "remedial" statute because it limits and reduces the rights and remedies of patients in order to address the societal problem of high medical malpractice insurance

premiums. Third, the Contract is consistent with the purpose of the MMA and is therefore supported by the public policy of this state. It does not frustrate the remedies created by statute nor diminish or circumvent those remedies. Therefore, the rule of law from Petitioner's NHRA cases is not applicable to this case and cannot be used to invalidate the Contract. There is no express and direct conflict between the NHRA cases and the First DCA's opinion below.

A. The NHRA and the MMA have different statutory purposes and address different public policies.

The arbitration agreements in Petitioner's NHRA cases contained provisions which directly frustrated the purpose of the NHRA. The enactment of the NHRA was specifically designed to address "substantial elder abuse occurring in nursing homes" as revealed by an extensive grand jury investigation. Shotts, 36 Fla. L. Weekly S665b. The purpose of the NHRA was to protect nursing home residents by giving each resident specific statutory rights and a new cause of action for their violation. Fla. Stat. § 400.023(1)(2011). No specific cause of action previously protected this class of citizens.

In contrast, the MMA was enacted to address the financial crisis occurring with escalating medical malpractice insurance premiums and rising healthcare costs. Univ. of Miami v. Echarte, 618 So. 2d 189, 191 (Fla. 1993). The Legislature addressed the fact that physicians in Florida had seen a 229% to 444% increase in insurance premiums and that the average cost of defending a

malpractice claim was increasing at a rate of seventeen percent (17%) per year. Id. at 190 (citing to the Academic Task Force for Review of Insurance and Tort Systems, Medical Malpractice Recommendations at 10-11 (Nov. 6, 1987)("1987 Task Force Report"). The Legislature also considered that healthcare premiums were continuing to rise at an excessive rate. See Governor's Select Task Force on Healthcare Professional Liability Insurance, *Final Report and Recommendations*, at 72 (Jan. 29, 2003), available at http://www.doh.state.fl.us/myflorida/DOH-Large-Final%20Book.pdf (last visited Feb. 22, 2012)("2003 Task Force Report").

The public policy and purpose of the MMA was expressly stated by the Legislature in section 766.201:

> 766.201 Legislative findings and intent.
>
> (1) The Legislature makes the following findings:
>
> (a) Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased medical care costs for most patients and functional unavailability of malpractice insurance for some physicians.
>
> (b) The primary cause of increased medical malpractice liability insurance premiums has been the substantial increase in loss payments to claimants caused by tremendous increases in the amounts of paid claims.
>
> (c) The average cost of a medical negligence claim has escalated in the past decade to the point where it has become imperative to control such cost in the interests of the public need for quality medical services.

> (d) The high cost of medical negligence claims in the state can be substantially alleviated by requiring early determination of the merit of claims, by providing for early arbitration of claims, thereby reducing delay and attorney's fees, and by imposing reasonable limitations on damages, while preserving the right of either party to have its case heard by a jury.

§ 766.201 (2011), Fla. Stat.

This Court has acknowledged that the public policy of the MMA was to "address the medical liability insurance crisis." Echarte, 618 So. 2d at 192; see also St. Mary's Hosp., Inc. v. Phillipe, 769 So. 2d 961, 971 ("Legislature's stated goal [is] alleviating the financial crisis in the medical liability insurance industry.") To do this, the Legislature needed to encourage the prompt resolution of claims and to reduce the amount of claims payouts. Fla. Stat. § 766.201(1)(d); Echarte, 618 So. 2d at 191.

Because the NHRA has a completely different statutory purpose than the MMA, Petitioner's line of cases is distinguishable. Petitioner cannot use this line of cases for the proposition that the Contract violates public policy because the purpose of the MMA is significantly different than the NHRA. There is no express and direct conflict between the nursing home cases and the First DCA's opinion.

B. Unlike the NHRA, the MMA is not a remedial statute.

Petitioner relies on a rule of state law that an arbitration agreement cannot have provisions that are contrary to a remedial statute. It is important to note that

this rule of law is only applied in cases involving statutes that are "remedial" and which are enacted to protect a specific class of people from harm. In this line of cases, the courts have held that arbitration provisions which take away rights granted in a remedial statute are void as against public policy. See e.g., Romano v. Manor Care, Inc., 861 So. 2d 59 (Fla. 4th DCA 2003); Brasington v. EMC Corp., 855 So. 2d 1212 (Fla. 1st DCA 2003). Petitioner relies on this line of cases, most of them addressing the NHRA, to argue that the Contract here takes away rights granted by a remedial statute. However, the MMA is not a remedial statute and therefore the Petitioner's cited cases are not applicable.

Remedial statutes are ones which protect a class of persons by providing a party a remedy for a wrong where there was none before. See e.g., Wagner, Vaughn, et al v. Kennedy Law Group, 64 So. 3d 1187, 1192 (Fla. 2011) (Florida Wrongful Death Act is remedial because it protects the survivors of decedents by providing additional damages); Irven v. Dept. of HRS, 790 So. 2d 403, 406 (Fla. 2001) (Whistle Blower's Act is remedial because it protects public employees who reported illegal behavior by establishing a new cause of action). In Wagner, this Court contrasted remedial statutes, which should be construed liberally to advance their intended remedy, with those that limited common law rights. 64 So. 3d at 1191; see also Irven, 790 So. 2d at 406; Becker v. Amos, 141 So. 136, 140 (Fla. 1932); Nolan v. Moore, 88 So. 601, 605 (Fla. 1921).

The NHRA is a "remedial" statute because it creates a new cause of action for the violation of statutorily created rights that were intended to protect nursing home residents from abuse. E.g., Shotts, 36 Fla. L. Weekly S665b; Romano, 861 So. 2d at 63. In the NHRA, the Legislature created a "Bill of Rights" and listed each right given to nursing home residents. Fla. Stat. § 400.022 (2011). There are twenty-two rights listed in the Bill of Rights and each is explained and set out in detail in the statute. "Section 400.022 creates twenty-two unique *statutory* requirements applicable to nursing homes." Integrated Health Care Serv., Inc. v. Lang-Redway, 840 So. 2d 974, 979 (Fla. 2002)(emphasis in original).

Most of the NHRA cases involved the same analysis. As an example, the reasoning in Romano is illustrative. In Romano, the Second District analyzed the NHRA and held,

> Sections 400.022 and 400.023 are **remedial statutes, designed to protect nursing home residents**. … The [NHRA] set up rights of residents, including the right to appropriate medical care, and requires nursing homes to make public statements of the rights and responsibilities of the residents. *See* § 440.022(1). To enforce these rights, the Legislature **provided each resident with a cause of action** for their violation. *See* § 400.023(1). … The Legislature also **provided for the award of punitive damages** for gross or flagrant conduct or conscious indifference to the rights of the resident. See § 400.023(5). Moreover, there was **no cap on pain and suffering** damages in the statute.

Romano, 861 So. 2d at 63 (emphasis added). The arbitration agreement in Romano contained provisions that "would specifically deprive the resident of

remedies that the Legislature felt were important to the reduction of elder abuse in nursing homes." Id. Specifically, the agreement eliminated punitive damages and it capped noneconomic damages at $250,000.00. Id. at 61. In comparison, the NHRA expressly provided that residents could "recover actual and punitive damages for any violation of the rights of a resident or for negligence." Fla. Stat. § 400.023(1) (emphasis added). There are no caps on actual damages in the NHRA. Fla. Stat. §§ 400.022, et seq. The court held that the agreement was not enforceable because it eliminated the specific means by which the Legislature tried to reduce the abuse of nursing home residents and expressly contradicted the NHRA, a remedial statute. Romano, 861 So. 2d at 63.

In contrast, the MMA is not a "remedial statute" and no court has declared it as such. Rather, the MMA *reduces* and *eliminates* rights of patients that were previously available at common law. Even though the MMA limits the amount of damages available, the remedy itself is not new. See Lang-Redway, 840 So. 2d at 974 (noting the distinction between a statutory right to receive adequate and appropriate healthcare under the NHRA and the common law claim for medical negligence).

The Legislature's purpose in enacting the MMA is substantially similar to its purpose in enacting the Florida Birth-Related Neurological Injury Compensation Act ("NICA"), which was to "address the adverse impact that the high cost of

medical malpractice insurance premiums was having on the delivery of obstetric services in Florida." Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 948 So. 2d 705, 710 (Fla. 2007). In Fla. Birth-Related Neurological, Justice Lewis and Justice Pariente both noted in their dissenting opinions that NICA limits common law rights and should be strictly construed. Id. at 718-719. In her dissent, Justice Pariente stated, "For this reason, NICA is not a remedial statute that should be liberally construed. Unlike legislation such as the Wrongful Death Statute and the Whistle-Blower's Act, which created remedies unknown at common law and which we have stated should be liberally construed, NICA mandates an administrative remedy in lieu of a common law remedy for most claims arising from birth-related neurological injuries." Id. at 722 n. 20.

Similarly, the Legislature's goal in the MMA of reducing medical malpractice insurance premiums was effectuated by measures intended to reduce the amount of claims payouts. Specifically, the Legislature targeted the reduction of (1) litigation costs and plaintiffs' attorneys' fees, which were measured to be 40% of the amounts paid by insurance companies, and (2) noneconomic damages, which it found to be arbitrarily awarded and not based on measurable losses.[2] Echarte, 618 So. 2d at 191-192. The Legislature used incentives for the parties to

[2] The Legislature also limited a plaintiff's right to economic damages to the net economic damages of past and future medical expenses and eighty percent of lost wages and earning capacity. § 766.207(7), Fla. Stat.

voluntarily elect arbitration in order to reduce litigation costs and attorneys' fees. § 766.207, Fla. Stat. The Legislature also placed a system of caps on noneconomic damages to lower the excessive jury awards for pain and suffering damages. § 766.118 (2011); § 766.207(7), Fla. Stat.

Because the Legislature restricted a plaintiff's common law right to full noneconomic damages, the MMA had to meet the constitutionality test as laid out by this Court in Kluger v. White, 281 So. 2d 1 (Fla. 1973). The Kluger test states,

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a **reasonable alternative** to protect the rights of the people of the State to redress for injuries, **unless** the Legislature can show an **overpowering public necessity** for the abolishment of such right, **and no alternative method** of meeting such public necessity can be shown.

281 So. 2d at 8-9 (emphasis added). This Court has held that section 766.207 is constitutional even though it abolished a plaintiff's common law right to full noneconomic damages because the Legislature evidenced an "overpowering public necessity" and "no alternative method" was available. Echarte, 618 So. 2d at 196.

This Court in Echarte also found that plaintiffs' receive a "commensurate benefit" from the legislation because it provides prompt recovery, eliminates the uncertainty of litigation, and saves the expense of expert witness fees which would

be required to prove liability.[3] Id. at 194. It is this commensurate benefit that Petitioner is now trying to say is the granting of "new rights" to plaintiffs, making the MMA a "remedial" statute. Petitioner asserts that she has the "right" to have a doctor admit liability. However, MMA arbitration is simply a method for settling a claim that is already ripe for settlement. The doctor is not contesting liability, therefore the only issue to be determined is the amount of damages. MMA arbitration makes the settlement process more productive because the parties are bound by the arbitrators' determination of damages. More realistically, the commensurate benefits to plaintiffs are not new rights but merely the Legislature providing plaintiffs with an *incentive* to elect arbitration.

The commensurate benefits to plaintiffs were not meant to create new rights in order to "protect" patients. Rather, they were a part of a comprehensive legislative scheme to reduce insurance claim payouts. Moreover, the MMA does not create a new "right to proceed to trial." The right to proceed to trial pre-existed the MMA and was always subject to the right of the parties to voluntarily contract otherwise.

In essence, remedial statutes, like the NHRA, create new rights and remedies not previously available in order to protect a class of people from harm. Unlike

[3] In MMA arbitration, the doctor does not contest liability. "Upon the completion of presuit investigation with preliminary reasonable grounds for a medical negligence claim intact, the parties may elect to have damages determined by an arbitration panel." § 766.207(2), Fla. Stat.

remedial statutes, the MMA reduces and eliminates rights of patients that *were* previously available at common law. Because the MMA is not a remedial statute, the Petitioner's reliance on the rule of law for remedial statutes is not appropriate in this case. There is no express and direct conflict with the NHRA cases.

C. The Contract does not undermine the public purpose of the MMA nor does it conflict with its terms.

Whether or not this Court determines that the MMA is a remedial statute, the Contract is still enforceable because it does not contain provisions that defeat the purpose of the MMA or contradict its terms. Indeed, it uses the same means to accomplish the reduction of litigation costs and attorneys' fees as well as the prevention of excessive noneconomic damage awards.

Conversely, the nursing home arbitration agreements at issue in the NHRA cases directly contradicted the statutory terms of the NHRA. Specifically, they contained provisions that eliminated punitive damages, removed a cause of action for negligence, and/or capped noneconomic damages for nursing home residents. Those limitations specifically denied residents a cause of action in negligence and from recovering statutorily granted punitive and actual damages. In Gessa, this Court recently held, "These provisions [of the arbitration agreements] directly frustrate the remedies created by statute. The provisions eviscerate the remedial purpose of the statute, or, in the language of Schotts, they 'substantially diminish[] or circumvent[] these remedies.'" 36 Fla. L. Weekly S676a. The agreements

directly contradicted the terms of the NHRA, had an adverse effect on protecting nursing home residents, and violated the public policy of that statute.

In contrast, the Contract in this case supports the purpose of the MMA and does not directly undermine any of its terms. Instead, it uses the same means to accomplish the same goals. The Legislature chose three distinct "tools" to reduce the costs of healthcare: (1) encouraging the prompt resolution of MMA claims through the use of **pre-suit notice and investigation** requirements, (2) reducing litigation costs through the use of voluntary **arbitration** and (3) **limiting hard to quantify noneconomic damages** in order to lower claim payouts. Echarte, 618 So. 2d at 192. The Contract in this case utilizes the same three tools that the Legislature used in the MMA. And, although arbitration is conducted via contract and not the MMA, it achieves the same public policy goals.

First, the Contract reiterated the statutory requirement of presuit notice and investigation. The Contract states, "Prior to commencing any action pursuant to this Doctor-Patient Agreement, Patient must comply with the presuit notice and investigation requirements of Chapter 766, Florida Statutes."[4] The use of the pre-suit process was to encourage the early resolution of meritorious claims and

[4] Contrary to Petitioner's assertion, this reference does NOT incorporate the entirety of Chapter 766 into the Agreement. Incorporation of one provision does not incorporate all provisions of the entire chapter. Instead, it clearly shows the parties intent to incorporate only the presuit notice and investigation requirements. See OBS Co. v. Pace Constr. Corp., 558 So. 2d 404, 406 (Fla. 1990).

discourage claimants from pursuing claims with no merit. Fla. Stat. §§ 766.106, 766.203. All of the pre-suit requirements are mandatory and apply in every medical malpractice claim, whether in arbitration or in court. § 766. 201(2), Fla. Stat.; see also Gordon v. Shield, 41 So. 3d 931 (Fla. 4th DCA 2010).

Second, in the Contract, the parties agreed to arbitrate "any controversy or dispute, which might arise between the Doctor and the Patient, regardless of whether the dispute concerns the medical care rendered, including any negligence claim relating to the diagnosis, treatment, or care of the Patient, or payment of surgical fees, or any other matter whatsoever…." Similarly, the Legislature chose to encourage arbitration in order reduce litigation costs and attorneys' fees. Thus, the second tool used by the Legislature to achieve its public policy goals is also used in the Contract and has the same effect of lowering litigation costs, and thereby lowering insurance claims.

Lastly, the Contract contains a limitation on noneconomic damages identical to the one chosen by the Legislature in section 766.207 of the MMA. The separate Damages Agreement of the Contract limits "non-economic damages (including, but not limited to damages for pain and suffering)" to a maximum of $250,000.00 per incident. The Legislature, in its findings, stated that "there are certain elements of damage presently recoverable that have no monetary value, except on a purely arbitrary basis, while other elements of damage are either easily measured on a

monetary basis or reflect ultimate monetary loss." Chapter 88-1, Laws of Florida. The Legislature's stated goal in limiting noneconomic damages was to "provide increased predictability of the outcome of the claims resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims." § 766.201(2)(b)(3), Fla. Stat. Thus, by including a limitation on noneconomic damages, the Contract contains the third tool chosen by the Legislature to respond to the issues affecting Floridians' access to healthcare.

Petitioner tries to manufacture a conflict between the arbitration in the Contract and arbitration in section 766.207 to show that "rights" were "taken away." Setting aside the fact that the patient *consented* and *agreed* to the terms in the Contract, the "rights" Petitioner claims were actually incentives in the MMA for parties to elect arbitration. Petitioner claims that the "right" to costs and fees were "taken away" because under section 766.207 arbitration the doctor is responsible for paying them. Yet it makes logical sense that if a doctor admits liability and proceeds to arbitration only for damages, then he or she *should* be liable for attorneys' fees and costs as well.

Petitioner also claims that the "right" to an "expedited process" was taken away, yet the Contract was to arbitrate the claim, an expedited process in and of

itself.[5] Still grasping at straws, Petitioner tries to make a claim for the "right" to an administrative law judge as an arbitrator. Yet, an administrative law judge is not required to have any experience in medical malpractice claims and would provide no additional benefit to the Petitioner.

Similarly, the evidentiary standards Petitioner is claiming a "right" to pursuant to section 766.207 are virtually identical to those used in the Florida Arbitration Code.[6] See §§ 120.569(2)(g), 120.57(1)(c), Fla. Stat. And lastly, Petitioner makes an illogical argument that the Contract gives the doctor no obligation to pay the final award. Yet the Florida Arbitration Code provides for confirmation and conversion of the award to a final judgment by a court, which entitles the patient to all due rights of collection.[7] Fla. Stat. §§ 682.12, 682.15 (2011).

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[5] See AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011) (noting the benefits of arbitration include greater efficiency and speed of the process).

[6] Notably, the Florida Arbitration Code does not change the standard of care for medical negligence, nor does the Agreement. The standard of care would be the same as with all medical negligence claims. Therefore, Petitioner's argument that the standard of care has been changed is without basis.

[7] As an additional protection, insurance companies, who typically are responsible for the payment of the award, are under legal obligations to pay the award promptly. Fla. Stat. § 627.427(1)(2011). If a doctor is self-insured, he or she has a statutory obligation to pay the award promptly or his or her license to practice medicine may be revoked. See Fla. Stat. § 458.320(4)(b) (2011).

Therefore, the Contract in this case does not take away any "rights" granted to Petitioner. Rather, it supports the public policy of the MMA and uses the same tools selected by the Legislature to achieve its goal of reducing medical malpractice insurance premiums. Unlike the arbitration agreements in Petitioner's NHRA cases, which eliminated and reduced the rights created by the Legislature to protect nursing home residents from abuse, this Contract does not violate public policy, but rather supports it by achieving the same goals as intended by the MMA. Therefore, the NHRA cases relied on by Petitioner are distinguishable and thus not applicable to this case.

The cases cited by Petitioner do not expressly and directly conflict with the opinion of the First DCA issued below. The Contract here does not violate the purpose of the MMA. The MMA is not a remedial statute and does not create new rights that did not exist at common law. The Contract does not take away any statutorily granted rights. Therefore, there are no grounds for this Court's discretionary jurisdiction based on express and direct conflict with the NHRA line of cases or with Echarte. North Florida Surgeons respectfully asks this Court to dismiss this appeal for lack of jurisdiction.

II. The Contract is a valid and enforceable agreement to arbitrate.

A. MMA arbitration is voluntary and does not foreclose other forms of arbitration.

The plain language of the MMA shows that the Legislature did not make MMA arbitration mandatory or exclusive and hence, parties can contract for arbitration outside the MMA. The Legislature did not prohibit private contracts for arbitration of medical malpractice claims nor did it intend to do so. The voluntary arbitration procedures in the MMA are available for the parties to *elect* MMA arbitration if they so choose. Because MMA arbitration is voluntary and elective, the parties may choose to not participate in arbitration at all, or they may choose to participate in arbitration under different procedures, such as those in the Florida Arbitration Code. Nothing in the plain language of the MMA or the Legislature's expressly stated intent shows that it intended MMA arbitration to be the only means of arbitration available for medical malpractice claims.

This Court has held many times that "the intent of the Legislature is the polestar of statutory construction. To discern this intent, the Court looks 'primarily' to the plain text of the relevant statute, and when the text is unambiguous, our inquiry is at an end." E.g., E.A.R. v. State, 4 So. 3d 614, 629 (Fla. 2009). In this instance, the intent of the Legislature in enacting the MMA, and specifically the MMA arbitration procedures, is expressly stated in section 766.201, entitled "Legislative findings and intent." Therefore, the interpretation of

the MMA must be consistent with the Legislature's expressly stated intent and the plain language of the statute.

Numerous sections of the MMA plainly show that the Legislature intended for its arbitration procedures to be voluntary and not mandatory. Section 766.201(2) of the MMA expressly states:

> It is the intent of the Legislature to provide a plan for prompt resolution of medical negligence claims. Such plan shall consist of two separate components, presuit investigation and arbitration. Presuit investigation shall be mandatory and shall apply to all medical negligence claims and defenses. **Arbitration shall be voluntary and shall be available except as specified.**[8]

Fla. Stat. § 766.201(2)(emphasis added). Subsection (2)(b) states:

> Arbitration shall provide:
> 1. **Substantial incentives** for both claimants and defendants **to submit their cases** to binding arbitration, thus reducing attorney's fees, litigation costs, and delay.

§ 766.201(2)(b), Fla. Stat. (emphasis added). Indeed, even section 766.207, which sets out the procedures for MMA arbitration, is titled, "**Voluntary** binding arbitration of medical negligence claims." § 766.207, Fla. Stat. (emphasis added).

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[8] The words "shall be available except as specified" refer to section 766.207(1) which states, "**Voluntary** binding arbitration pursuant to this section and ss. 766.208-766.212 shall not apply to rights of action involving the state or its agencies or subdivisions, or the officers, employees, or agents thereof, pursuant to s. 768.28." § 766.207(1), Fla. Stat. (emphasis added).

Throughout the entirety of section 766.207, the language used by the Legislature indicates that each party has a choice of whether to elect MMA arbitration. For example, subsection (2) states:

> Upon the completion of presuit investigation with preliminary reasonable grounds for a medical negligence claim intact, the **parties may elect** to have damages determined by an arbitration panel. Such election **may be initiated** by either party by serving a request for **voluntary** binding arbitration of damages within 90 days after service of the claimant's notice of intent to initiate litigation upon the defendant.

§ 766.207(2), Fla. Stat. (emphasis added). Subsection (3) also shows that MMA arbitration is not mandatory but elective in nature:

> Upon receipt of a party's **request** for such arbitration, the opposing party **may accept the offer** of **voluntary** binding arbitration within 30 days. … Such **acceptance** within the time period provided by this subsection shall be a binding **commitment** to comply with the decision of the arbitration panel.

§ 766.207(3), Fla. Stat. (emphasis added.) Indeed, this Court has previously noted that 766.207 arbitration is voluntary and not mandatory. Lang-Redway, 840 So. 2d at 977 ("After the presuit investigation is complete, the parties may elect to enter voluntary binding arbitration pursuant to sections 766.207-766.212.").

In addition, at least two District Courts of Appeal have decided cases that involve a private contract to arbitrate medical malpractice claims and have upheld that contract. The Second DCA has held that a private contract between a doctor and a patient to arbitrate a medical malpractice claim pursuant to the Florida

Arbitration Code, and *not* pursuant to the voluntary arbitration procedures in the MMA, was neither unconscionable nor against public policy. Frantz v. Shedden, 974 So. 2d 1193 (Fla. 2d DCA 2008). In Frantz, the patient argued that the arbitration agreement was substantively unconscionable because it did not follow the MMA arbitration provisions.[9] Id. at 1196. The Second DCA held that there is no requirement that a private contract for arbitration must contain the MMA arbitration provisions forcing a doctor to admit liability. See id. In fact, the court recognized that both parties' procedural and substantive rights were completely protected because the arbitration was to be conducted pursuant to the Florida Arbitration Code. See id.

Similarly, the Fourth DCA has considered a case involving an arbitration agreement between a doctor and patient that was different from the voluntary MMA arbitration scheme. Gordon, 41 So. 3d at 932. In Gordon, the specific issue was whether participation by the doctor in presuit notice and investigation waived his right to proceed with arbitration pursuant to the contract. Id. at 933. The Fourth DCA held that presuit notice and investigation is mandatory for all medical malpractice claims and that participation by the doctor did not waive his right to arbitrate pursuant to the arbitration agreement signed by the patient. Id.

[9] The public policy analysis is the same regardless of whether it is analyzed as part of the unconscionability analysis or separately.

Therefore, it upheld the arbitration agreement and compelled the parties to arbitration. Id. at 934.

Despite the plain language of the MMA, the Legislature's expressly stated intent, and the on-point holdings of two district courts of appeal in Florida, Petitioner here argues (1) that the arbitration provisions in the MMA are mandatory and (2) a private contract to arbitrate medical malpractice claims must include the same provisions and procedures as the MMA arbitration. Petitioner asserts that because a doctor has a fiduciary duty to patients regarding *health care decisions*, the doctor is also a fiduciary of patients' *legal rights*. To date, no Florida court has held that a physician has a fiduciary duty with respect to a patient's legal rights.

Basically, Petitioner argues that any doctor who wants to arbitrate a patient's claim for medical malpractice must admit liability for the patient's injuries and only arbitrate the amount of damages to be awarded. This would be the case if the MMA arbitration provisions were mandatory, since those provisions contemplate that the doctor admits liability and only arbitrates the issue of damages. It would also be the case if any private agreement to arbitrate must contain the same provisions as the MMA arbitration. But why would the parties need a contract to arbitrate if the terms of that contract had to be identical to the statute? Since the Legislature intended for MMA arbitration to apply only in the limited

circumstances where a doctor admits liability, private contracts to arbitrate in other circumstances are not prohibited.

Petitioner's assertion leads to an illogical result – in order for a doctor to have access to arbitration for a medical malpractice claim, he or she would have to give up the right to contest liability for the injury. This would have the effect of *discouraging* arbitration. In cases where the doctor's liability is questionable or nonexistent, the doctor would have no incentive to arbitrate. The doctor's only option would be to contest liability in court, not arbitration. This would lead to *fewer* arbitrations for medical malpractice claims, contrary to the express intent and public policy articulated by the Legislature.

This Court has held that, "[S]tatutory enactments are to be interpreted so as to accomplish rather than defeat their purpose." E.g., Reeves v. State, 957 So. 2d 625, 629 (Fla. 2007). If Petitioner's interpretation of the MMA is adopted by this Court, the Legislature's purpose would be "defeated" rather than "accomplished." Therefore, North Florida Surgeons urge this Court to hold true to the expressly stated legislative intent of the MMA as well as the plain language in the statute and find that the voluntary arbitration procedures in the MMA do not prohibit parties from privately contracting for arbitration of medical malpractice claims. For the same reasons, private arbitration contracts do not have to contain identical provisions as § 766.207, Fla. Stat.

Petitioner also contends that contracts should not be able to alter fundamental tort rights. Petitioner mistakenly relies on the Economic Loss Rule to justify her position that the law prohibits contractual modification of tort rights. The analogy is misplaced. The foundational basis for the cause of action differs from the right of parties to contract. "It is well settled that contractual waivers are enforceable under Florida law for any type of rights." Bellaire Sec. Corp. v. Brown, 168 So. 2d 625, 639 (Fla. 1936) ("A party may waive any right to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution."); Gessa, 36 Fla. L. Weekly S676a (Polston, dissenting). If a party can contractually waive such rights, a party can contractually *limit* such rights. Simply, there is no per se state law prohibition against modifying tort remedies by contract.

Although by agreeing to arbitrate a claim, a plaintiff waives her right of access to court and trial by jury, the waiver does not rise to level of a complete bar to recovery against professionals for tort damages. See Shea, 908 So. 2d at 403. The right to go to court and have a case heard by the jury may be contractually relinquished. Id. at 398. Thus, Petitioner's reliance on Moransais v. Heathman, 744 So. 2d 973 (Fla. 1999) and the California cases[10] is misplaced.

[10] Tunkl v. Regents, 383 P.2d 441 (Cal. 1963); City of Santa Barbara v. Superior Court, 161 P.3d 1095 (Cal. 2007).

> [A]n arbitration agreement constitutes a prospective **choice of forum** which trades the procedures and opportunity for review of the courtoom for the simplicity, informality, and expedition of arbitration.

Shea, 908 So. 2d at 403 (emphasis added). An arbitration agreement is not tantamount to a waiver or forfeiture of a party's tort rights. Id. It is simply a choice of forum.

B. The Federal Arbitration Act precludes a state from prohibiting arbitration agreements.

The Federal Arbitration Act ("FAA") preempts any state law which forbids arbitration agreements of specific claims. The FAA was enacted to declare the "liberal federal policy of favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Perry v. Thomas, 482 U.S. 483, 489 (1987). The FAA may apply in state courts as well as federal courts. E.g., id. The United States Supreme Court has noted that Congress, in enacting the FAA, intended "courts to enforce arbitration agreements into which parties had entered and to place such agreements upon the same footing as other contracts." Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265, 271 (1995); Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

> In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. … Congress has thus mandated the enforcement of arbitration agreements.

Southland Corp., 465 U.S. at 10. There are only two limitations on the applicability of the FAA. Id. First, the arbitration provision must be a part of a contract "evidencing a transaction involving commerce." Id. Second, arbitration provisions may be revoked only upon "grounds as exist at law or in equity for the revocation of any contract." Id.

The first limitation on the applicability of the FAA involves whether the transaction involved interstate commerce.[11] The FAA applies if the transaction *in fact* involved interstate commerce. Allied-Bruce, 513 U.S. at 273. For instance, nursing home arbitration agreements are subject to the FAA because most nursing homes purchase medical supplies and medicines from out-of-state vendors, have maintenance performed on equipment by out-of-state companies, serve out-of-state residents, receive income from federally funded Medicaid or Medicare, and some have additional offices located out-of-state. See Owens v. Coosa Valley Health Care, 890 So. 2d 983, 987 (Ala. 2004); Rainbow Health Care Ctr. v. Crutcher, 2008 U.S. Dist. Lexis 6705 at *8 (N.D. Okla. Jan. 29, 2008); Triad Health Mgmt. of Ga. v. Johnson, 679 SE 2d 787, 788 (Ga. App. 2009); Canyon Sudar Partners v. Cole, 2011 U.S. Dist. Lexis 34043 at *35 (S.D. W. Va. Mar. 29, 2011)); see also Kroupa v. Casey, 2005 WL 3315279, *3 (Tex. 1st DCA 2005)(finding the FAA

[11] The U.S. Supreme Court has determined that Congress' authority in enacting the FAA was based in the Commerce Clause of the U.S. Constitution. See Allied-Bruce, 513 U.S. at 273.

applicable to an arbitration agreement between a patient and chiropractor). Most healthcare providers, like North Florida Surgeons, purchase medical supplies, equipment and medicines from out-of-state vendors, care for out-of-state patients, and receive payments from Medicare and Medicaid. Accordingly, since this transaction involves interstate commerce, the FAA is applicable.[12]

Although the Contract adopts Florida law this does not preclude, or even impact, the application of the FAA. The FAA preempts and voids any state law that interferes with its principal purpose. Volt Info. Serv., Inc. v. Bd. of Tr. of Leland Stanford Jr. Univ., 489 U.S. 468, 469 (1989); see also Shotts, 36 Fla. L. Weekly S665b ("In Florida, an arbitration clause in a contract involving interstate commerce is subject to the Florida Arbitration Code (FAC), to the extent the FAC is not in conflict with the FAA."). Any contractual choice of law provision includes any federal requirements that are necessarily a part of that state's laws.

The second limitation on the applicability of the FAA states that arbitration provisions may be revoked only upon "grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2 (2012); see also, Southland Corp., 465 U.S. at 11. In other words, states may not enact or interpret laws that treat

[12] North Florida Surgeons acknowledges that this argument was not presented to the courts below. However, a claim concerning federal preemption cannot be waived. Olympic Pipe Line Co. v. Seattle, 437 F. 3d 872, 882 (9th Cir. 2006) ("Preemption is a power of the federal government, not an individual right of a third party that the party can 'waive.'")

arbitration agreements differently than other contracts. Southland Corp., 465 U.S. at 16. In Southland Corp., the California Supreme Court had interpreted the Franchise Investment Law to mean that all claims brought under the statute require judicial consideration, and consequently an agreement to arbitrate one of those claims was unenforceable. Id. at 10. The U.S. Supreme Court held that the statute, as interpreted by the California Supreme Court, directly conflicted with § 2 of the FAA and therefore violated the Supremacy Clause of the U.S. Constitution. Id. at 16. The Court in its ruling stated, "In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." Id. Therefore, the Court concluded that the California statute was not a "ground that exists at law or in equity for the revocation of *any* contract." Id. (emphasis in original).

In Perry v. Thomas, the U.S. Supreme Court invalidated California Labor Code § 229, which provided that wage collection actions may be maintained "without regard to the existence of any private agreement to arbitrate." 482 U.S. at 484. The Court ruled that

> [The] clear federal policy places § 2 of the [FAA] in unmistakable conflict with California's § 229 requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the Supremacy Clause, the state statute must give way.

Id. at 491. The Court reasoned its decision by explaining,

> Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.

Id. at 492 (emphasis in original).

In Allied-Bruce, the U.S. Supreme Court held an Alabama statute unconstitutional because it made written, predispute arbitration agreements invalid and unenforceable. 513 U.S. at 282. The Court noted the established rule that state courts cannot apply state statutes that invalidate arbitration agreements. Id. at 272. The Court in its opinion stated,

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract. What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.

Id. at 281 (emphasis in original).

In Doctor's Associates, Inc. v. Carasotto, the U.S. Supreme Court invalidated a Montana statute which declared all arbitration agreements without a specific statutory notice to be unenforceable. 517 U.S. 681 (1996). The Court

held that the statute was unconstitutional because it governed not "any contract" but specifically and solely contracts "subject to arbitration." Id. at 682. The Court stated in its opinion, "Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration agreements." Id. at 687 (emphasis in original).

Recently in AT&T Mobility LLC v. Concepcion, the U.S. Supreme Court held unconstitutional California's "*Discover Bank* Rule", which stated that class action waivers in arbitration agreements were unconscionable. 131 S.Ct. at 1744. The Court reasoned that although the *Discover Bank* Rule was derived from the defense of unconscionability, which applied to contracts generally, it was applied in a manner that frequently invalidated arbitration agreements. Id. at 1747.

> When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress, or as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.

Id. The Court held that the "disproportionate impact on arbitration agreements" undermines the principal purpose of the FAA, which is to "ensure that private arbitration agreements are enforced according to their terms." Id. at 1750 n. 6.

As this Court has noted in State v. Presidential Women's Center, there is a "settled principle that 'when two constructions of a statute are possible, one of

which is of questionable constitutionality, the statute must be construed so as to avoid any violation of the constitution.'" 937 So. 2d 114, 116 (Fla. 2006) (citing Indus. Fire & Cas. Ins. Co. v. Kwechin, 447 So. 2d 1337, 1339 (Fla. 1983)); see also Hiers v. Mitchell, 116 So. 1, 84 (1928)(noting that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such question are avoided, our duty is to adopt the latter.") While North Florida Surgeons asserts that there is only one reasonable construction of the MMA, if this Court is of a different opinion, this "settled principle" becomes crucial.

Given this well settled rule of statutory construction, the Court should adhere to the plain language of the statute and uphold the Legislature's intent that the provisions for arbitration in the MMA are voluntary. To hold otherwise would invalidate private arbitration agreements involving medical malpractice claims. Consequently under that interpretation, section 766.207 of the MMA would be unconstitutional as violative of the Supremacy Clause because it would conflict with the FAA.

Petitioner's alternative argument that it is against public policy to allow private arbitration agreements of medical malpractice claims runs afoul of established law. Although public policy has always been a ground at common law to void a contract, the analysis here is not that simple. The specific public policy

concerns that are implicated by Petitioner's arguments must also be considered. If the Court were to conclude, as urged by Petitioner, that it is public policy and not the plain language of the MMA that prohibits arbitration in the context of medical services, that rule would still violate the FAA by prohibiting the arbitration of a particular type of claim. A state may not enact a rule, legislatively or judicially, that would have a disproportionate impact on arbitration agreements. Pursuant to federal law, the State of Florida cannot "prohibit outright the arbitration of a particular type of claim," such as medical malpractice claims. Thus, concluding that the prohibition is based on grounds of public policy does not cloak the rule of law with immunity from the FAA.

C. North Florida Surgeons did not waive its right to arbitrate under the Arbitration Agreement and consequently, the contractual obligation to arbitrate is still valid.

The right to arbitration can be waived by actions inconsistent with the right to arbitrate, such as participating in the litigation process. Raymond James Fin. Serv., Inc. v. Saldukas, 896 So. 2d 707 (Fla. 2005). Petitioner contends that North Florida Surgeons has waived its right to arbitrate under the Contract because it rejected Petitioner's offer of statutory arbitration under section 766.207. However, Petitioner's assertion is incorrect and unsubstantiated by law.

Participation by North Florida Surgeons in the pre-suit notice and investigation requirements of Chapter 766 is not inconsistent with its right to

arbitrate under the Contract. The Contract expressly provides that the pre-suit notice and investigation requirements of Chapter 766, Florida Statutes apply. Here, participating in the pre-suit notice and investigation of Chapter 766 is not only consistent with the arbitration agreement, but required by it and by statute. See Gordon, 41 So. 3d at 932 (holding that doctor had no choice in whether to participate in pre-suit notice and investigation since the Legislature made it mandatory in all medical malpractice claims). Likewise, the refusal to admit to liability in order to arbitrate pursuant to § 766.207 is not a waiver of the right to contest liability and arbitrate pursuant to the Arbitration Agreement.

III. The limitation on noneconomic damages in the Contract is enforceable.

A. The limitation of damages does not violate public policy.

It is the public policy of the state of Florida to limit noneconomic damages in medical malpractice claims. The Legislature recognized that the medical malpractice insurance crisis was caused by the size and frequency of very large payouts in medical malpractice claims. Echarte, 618 So. 2d at 191 (citing to the 1987 Task Force Report). In response, the Legislature chose to target the reduction of noneconomic damages, which the Legislature found to have "no monetary value, except on a purely arbitrary basis." Chapter 88-1, Laws of Florida. In expressing its intent, the Legislature stated,

> [T]he Legislature desires to provide a rational basis for determining damages for noneconomic losses, which may be awarded in certain

> civil actions, recognizing that such noneconomic losses should be fairly compensated and that the interests of the injured party should be balanced against the interests of society as a whole, in that the burden of compensating for such losses is ultimately borne by all persons, rather than the tortfeasor alone[.]

Id. Additionally, the Legislature noted that the medical malpractice insurance crisis affected the public in that healthcare providers, if the crisis was not abated, would be unable to purchase liability insurance, resulting in their inability to cover damages for injured persons' economic losses *or* their noneconomic losses. Id.

As a result, the Legislature created a cap on noneconomic damages in medical malpractice cases. § 766.118, Fla. Stat. The amount of the cap differs based on the circumstances of the parties; however the cap exists for all medical malpractice claims. The existence of the cap reflects the Legislature's intent and stated public policy that noneconomic damages in medical malpractice claims should be limited. Therefore, the existence of a cap on noneconomic damages in the Contract does not in and of itself violate public policy. Unlike in nursing home agreements, where *any* limitation on noneconomic damages violates public policy, in medical malpractice cases there is always a limitation by statute on noneconomic damages. Therefore, to limit noneconomic damages in the Contract, just as the MMA limits them, is not against public policy.

B. The $250,000.00 limitation on noneconomic damages is not unconscionable.

The existence of a cap in the Contract is not what Petitioner complains of. Instead, Petitioner complains that the cap is *too low*. Contrary to the Petitioner's argument that the amount of the cap violates public policy, the actual monetary amount of the cap in the Contract is an issue of unconscionability. In this state, the unconscionability doctrine contains safeguards for parties' rights as it pertains to contract formation and content. Whether a cap of $250,000.00 on noneconomic damages is too low goes to whether the provision is so "outrageously unfair as to shock the judicial conscience." Gainesville Health Care Ctr., Inc. v. Weston, 857 So. 2d 278, 284 (Fla. 1st DCA 2003)(holding that a substantively unconscionable contract is one that "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.")

The doctrine of public policy is ill-equipped to provide guidance to courts on whether a specific amount of cap is enforceable. Unconscionability, on the other hand, is assessed on a case by case basis. See id. On a case by case basis, trial courts can assess whether the actual amount of the limitation in a specific contract is unconscionable. Is a $150,000.00 cap unconscionable? Or, is a $350,000.00 cap unconscionable? For this Court to analyze the amount of the cap from a public policy perspective, would be to invite appeals over every amount from a $1.00 limitation to a $499,000.00 limitation to assess whether that particular amount

violates public policy. Consequently, lower courts would be left with little guidance on whether a particular dollar amount violates public policy.

As it pertains to the limitation in this Contract, a $250,000.00 cap on noneconomic damages is not unconscionable.[13] As the Second DCA held in Frantz, the limitation of $250,000.00 on noneconomic damages for a medical malpractice claim is not shocking to the judicial conscience because the number is the same as the cap chosen by the Legislature in section 766.207.[14] 974 So. 2d at 1196. Similarly, the First DCA in its opinion below rejected Petitioner's argument that the amount of the cap makes the Contract substantively unconscionable.

Indeed, the amount of $250,000.00 for an across-the-board cap on noneconomic damages was suggested to the Legislature by an independent task force formed to investigate and make recommendations to address the medical malpractice insurance crisis. 2003 Task Force Report at p. 221. In its report, the Task Force stated, "The evidence before the Task Force indicates that a cap of $250,000 per incident will lead to significantly lower malpractice premiums." Id. In its Amicus Curiae, Florida Justice Association admits that the amount suggested

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[13] It is worthwhile to note that the Agreement does not limit economic damages in any way. In contrast, the MMA limits economic damages as well as noneconomic damages. § 766.207(7)(a), Fla. Stat.

[14] The arbitration agreement in Frantz provided for a limitation of noneconomic damages at $250,000.00 without requiring an admission of liability. The Second District's opinion does not recite these facts, however they may be found in the parties' briefs. (R.App. C-12)

by the Task Force was opposed by certain interest groups, and what resulted was a "nuanced compromise" involving a multi-tiered cap system for various circumstances. (FJA Amicus Brief at 6). The fact that certain interest groups succeeded in obtaining compromises to the amount of the caps does not suggest that the Task Force's suggested amount for the cap was "rejected" by the Legislature. Indeed, the record shows that the Legislature contemplated a $250,000.00 limitation and subsequently chose that amount for one of the "levels" of caps in the MMA. By this evidence, the limitation in the Contract for the same amount cannot be construed to be so "outrageously unfair as to shock the judicial conscience."

Equally important is the practical result of the $250,000.00 cap in the Contract versus the $250,000.00 cap chosen by the Legislature for arbitration under section 766.207. Under section 766.207, the doctor must give up his or her right to contest liability and, in all likelihood, would do so only in circumstances where his or her liability could be clearly established.[15] In those limited circumstances, the doctor's actions would likely involve clear negligence or reckless conduct. Clearly negligent or reckless actions by a doctor who has accepted arbitration pursuant to section 766.207 would only result in $250,000.00

[15] Presuit notice and investigation as set out by the MMA provides for the exchange of medical records and a comprehensive review and analysis by a licensed medical expert. A doctor would have the benefit of these procedures and know the extent of his or her liability at this early stage.

in noneconomic damages to the patient. Whereas, in situations where a doctor's actions are not as clearly negligent or are clearly *not* negligent, a doctor would not accept liability and arbitrate under section 766.207, and a patient could receive up to $1,000,000 in noneconomic damages. Ironically, the doctor with less culpability could end up responsible for a much higher amount of noneconomic damages.

North Florida Surgeons is not hereby suggesting that the Legislature did not have authority to set the amount of caps on noneconomic damages or that it wrongly did so. To the contrary, it recognizes the difficult position of the Legislature in having to choose the amount of caps and subsequently gain the vote of a majority of legislators. The Legislature did its best to provide incentives for the parties to voluntarily elect arbitration. North Florida Surgeons merely points out that in assessing unconscionability, it is easy to see how a $250,000.00 limitation in situations where a doctor's liability is questionable, and maybe even nonexistent, is acceptable and fair, given that clearly negligent and reckless conduct has a cap at $250,000.00.

A cap on noneconomic damages exists in all medical malpractice cases in Florida. Indeed, it is the public policy of this state to limit a patient's noneconomic damages because they are not based on monetary loss and are arbitrarily awarded. There is no specific dollar amount for the cap. Rather, many different amounts are used throughout the MMA. Likewise, the limitation on noneconomic damages

here in the amount of $250,000.00 is not unconscionable since it is the same amount recommended by the Task Force and the same amount chosen by the Legislature for situations in which the doctor chooses not to contest liability.

IV. If the Court decides the Damages Agreement is unconscionable, it can be severed from the Contract and still allow the parties to arbitrate the claim.

As stated above, the existence of a cap on noneconomic damages does not violate public policy, however the amount of the cap may, in certain circumstances, be unconscionable. The $250,000.00 cap in this Contract is not unconscionable; however if this Court finds otherwise, the provision can be severed and the parties can still arbitrate the claim. Petitioner asserts that because the damages limitations violate public policy they cannot be severed from the contract. (Initial Brief at 12.) Petitioner relies on this Court's recent decisions in Shotts and Gessa. However, Petitioner misunderstands the rule from those cases.

In Shotts, this Court determined that the comprehensive procedural rules in the arbitration contract violated public policy and could not be severed because those rules were "interdependent and common" to the agreement to arbitrate and went to the "very essence" of the contract. 36 Fla. L. Weekly S665b. Noting that the rules also contained substantive issues such as eliminating a cause of action for negligence, the Court reasoned that the trial court would have to rewrite significant portions of the agreement and "to add an entirely new set of procedural rules and

burdens and standards." Id. The Court ultimately concluded that without the procedural rules, there would remain no "agreement" left. Id.

In contrast, this Contract has drastically different provisions. First, unlike the procedural rules in Shotts, the damages limitations are separately stated from the parties' agreement to arbitrate. The Arbitration Agreement and the Damages Agreement are independent provisions that have no connection to each other. The Arbitration Agreement states the parties' agreement to arbitrate the claim under the Florida Arbitration Code. There is no reference to any limitation of damages in the Arbitration Section. The Damages Agreement states the parties' agreement to limit noneconomic damages.

Either section of the Contract can stand alone; arbitration without limiting damages or litigation with limited damages. They are not "interdependent and common" to each other and the Damages Agreement does not go to the "essence" of the Arbitration Agreement. Unlike the agreement in Shotts, if a court severed the Damages Agreement, it would not have to rewrite any part of the agreement; the remaining part contains all the necessary terms and is independently enforceable. Therefore, Petitioner's reliance on Shotts to invalidate the entire Contract is misplaced.

In Gessa, this Court determined that a limitation of liability provision was against public policy and was not severable from an arbitration agreement for two

reasons. 36 Fla. L. Weekly S676a. First, the limitation provision was incorporated by reference into the arbitration agreement. Id. Second, and more importantly, the parties expressly stated their intent that the limitation was an important part of their overall agreement to arbitrate. Id. In other words, it went to the "essence" of the agreement.

Unlike the agreement in Gessa, the Damages Agreement in the Contract is an unconnected and self-contained provision. It was not incorporated by reference into the Arbitration Agreement of the Contract and the parties did not expressly state their intent that it went to the "essence" of the agreement *to arbitrate*.

The holding of the Fourth DCA in Voicestream Wireless Corp. v. US Communcations, Inc., 912 So. 2d 34 (Fla. 4th DCA 2005) is more relevant here. In that case, the court severed a separate limitation of damages provision because, although it was contained in the same overall agreement, it did not go to the essence of the agreement to arbitrate. Id. at 38. Noting that severability is supported by the Florida Arbitration Code, the court severed the offending provision and upheld the parties' agreement to arbitrate. Id. at 39; see also Fonte v. AT&T Wireless Serv., Inc., 903 So. 2d 1019 (Fla. 4th DCA 2005)(holding that a provision prohibiting the award of attorneys' fees can be severed without affecting the intent of the parties to arbitrate).

The analysis of severability includes more than simply assessing whether the offending provision is somehow related to the overall agreement. It must go to the "essence" of the agreement. Local No. 234 of United Ass'n v. Henley & Beckwith, Inc., 66 So. 2d 818, 821 (Fla. 1953). Every provision in a contract necessarily relates to the purpose or subject matter of the transaction. However, such a relationship is insufficient to preclude severance. The analysis of whether a provision goes to the "essence" of the agreement should focus on the agreement left *after* a provision is severed. Does the severed provision go to the essence of the *remaining* provision? The provision that remains must be left whole, with the parties' promises still intact. To analyze otherwise, would nullify the severability doctrine altogether since every provision is an "agreement" between the parties and has one purpose or another. Take for instance the severed provision in Fonte. A provision that parties pay their own attorneys' fees is an "agreement" in and of itself and certainly the payment of attorneys' fees goes to the "essence" of that "agreement". However, it does not go to the essence of the *remaining* agreement; that is, the agreement to arbitrate.

Given the fact that the Florida Arbitration Code favors severability, and the fact that the Florida Legislature has shown a strong preference for arbitration of medical malpractice claims, this Court should sever the Damages Agreement if it finds that it is unconscionable. There would be no need for the court to "rewrite"

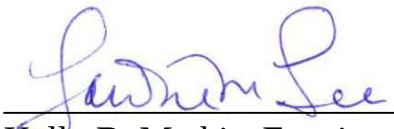
any part of the Arbitration Agreement because the *remaining* provision would still be whole, with the parties' original promises to arbitrate left intact. By so doing, the ultimate public policy of the Legislature to have medical malpractice claims arbitrated would be satisfied.

CONCLUSION

The decision of the First DCA in the instant action does not conflict with the decisions of other District Courts or itself since the NHRA cases are completely distinguishable. Lacking conflict jurisdiction this court should dismiss the appeal. Alternatively, should this court retain jurisdiction based on an important public policy it should find that the Contract, including both the Arbitration Agreement and the Limitation of Damages Agreement, are valid and AFFIRM the decision of the First DCA in its entirety.

Respectfully Submitted,

MATHIS & MURPHY, P.A.



Kelly B. Mathis, Esquire
Florida Bar No.: 0768588
Laurie M. Lee, Esquire
Florida Bar No.: 0668257
1200 Riverplace Blvd, Suite 902
Jacksonville, FL 32207
(904) 396-5500; (904) 396-5560 (fax)
Attorneys for Respondents, Gary John Bowers, M.D., Benjamin A. Piperno, III, M.D. and North Florida Surgeons, P.A.

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, **Cynthia S. Tunnicliff, Esquire**, Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, FL 32302 via U.S. mail this 23nd day of February, 2012.

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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.

MATHIS & MURPHY, P.A.
1200 Riverplace Blvd, Suite 902
Jacksonville, FL 32207
Telephone No.: (904) 396-5500
Facsimile No.: (904) 396-5560

By:_____
Laurie M. Lee, Esquire
Florida Bar No.: 0668257