IN THE SUPREME COURT OF FLORIDA

DONNA FRANKS, as P.R. of the Estate of JOSEPH JAMES FRANKS, SR., Deceased,

Petitioner/Appellant,

vs.

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

Respondents/Appellees.
_____/

CASE NO. SC11-1258
L.T. No. 1D10-3078,
16-2010-CA-00474-XXX

BRIEF OF *AMICI* CURIAE, FLORIDA JUSTICE REFORM INSTITUTE, FLORIDA MEDICAL ASSOCIATION, AND FLORIDA OSTEOPATHIC MEDICAL ASSOCIATION

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The Institute is an advocacy organization for civil justice and tort reform, comprised of concerned citizens, businesses, business leaders, and others aligned in their mission to promote fair and equitable legal practices within Florida's civil justice system. The Institute works to restore faith in the Florida judicial system and protect Floridians from the social and economic toll that is incurred from rampant litigation. The Institute regularly appears before legislative, executive, and judicial tribunals in support of enforcing contractual obligations and the use of arbitration as an alternative means of resolving disputes.

The FMA and FOMA represent physicians in Florida on issues of legislation and regulatory affairs, medical economics and education, public health, and other issues. The FMA and FOMA advocate for physicians and their patients to ensure availability of high quality physicians in the State of Florida. Towards that end, the FMA supports the arbitration clauses in financial agreements which limit arbitrated non-economic damages so as to ensure that Florida can attract quality physicians.

SUMMARY OF ARGUMENT

The District Court decision here under review is correct. The trial court upheld the enforceability of arbitration agreements entered between doctor and patient. Arbitration agreements are consistent with the public policy of the state of Florida and do not infringe upon the medical malpractice claim procedures governed by Chapter 766, Florida Statutes. The Legislature has not – as it has done in other arenas – restricted the parties' rights to enter arbitration agreements outside of Chapter 766. Rather, the Legislature has repeatedly amended Chapter 766 to reduce the cost of medical malpractice insurance premiums by encouraging the early settlement of claims and placing certain limitations on noneconomic damages.

The Legislature was correct to conclude that arbitration agreements such as the one entered between Appellant and Appellee further the public policy of reducing malpractice insurance costs. Both the percentage of paid non-economic damages and the total medical malpractice insurance premium have decreased between 2004 and 2010.

Moreover, arbitration outside of Chapter 766 does more to advance the Legislature's stated public policy than arbitration with Chapter 766. Finally, arbitration agreements do not present any threat to the relationship between doctor and patient.

ARGUMENT

I. CHAPTER 766 IS NOT THE EXCLUSIVE VEHICLE FOR ARBITRATION OF MEDICAL MALPRACTICE CLAIMS

It is well settled that "[i]n Florida as well as under federal law, the use of arbitration agreements is generally favored by the courts." Global Travel Marketing, Inc. v. Shea, 908 So. 2d 392, 397 (Fla. 2005). Moreover, "[b]oth federal and Florida public policy favor resolving disputes through arbitration when the parties have agreed to do so." Orkin Exterminating Co. v. Petsch, 872 So. 2d 259, 263 (Fla. 2nd DCA 2004). Consequently, courts should not construe a statute to bar arbitration of a particular claim absent an explicit statutory prohibition against it. See Sharpe v. Lytal & Reiter, Clark, Sharpe, Roca, Fountain, Williams, 702 So. 2d 622, 624 (Fla. 4th DCA 1997).

In Sharpe, the Fourth District considered whether Chapter 620, Florida Statutes, the Florida Partnership Act ("FPA"), prohibits parties to a partnership agreement from agreeing to submit the issue of dissolution to arbitration. 702 So. 2d at 622. The appellant argued that section 620.715(1), Florida Statutes (1995), which states that the court "shall adjudge a dissolution" of the partnership, confers exclusive jurisdiction of partnership dissolutions on the courts and acts as a bar to dissolution by way of arbitration under Chapter 682.

The Fourth District noted that courts "broadly construe the FAC to uphold an agreement to arbitrate" and that "'[i]f civil rights, antitrust and securities fraud claims are not inappropriate for arbitration, it is very difficult to imagine a civil claim in which an agreement to arbitrate would not be enforced.'" Id. (quoting Pierce v. J.W. Charles-Bush Securities, Inc., 603 So. 2d 625, 628 (Fla. 4th DCA 1992). Moreover, "[i]n order to find a legislative intent to preclude the submission of a class of claims to arbitration… the legislature would have to state such a requirement in unambiguous text." Id. at 624. The Fourth District thus held:

> Because the FPA provision thus lacks specific text granting the courts exclusive jurisdiction over partnership dissolution claims, we conclude that the words "[t]he court shall adjudge a dissolution" were not intended by the legislature to disable other forms of dispute resolution-such as arbitration-from resolving dissolution claims by partners.

Id. Courts have similarly found that arbitration agreements are not barred by the Florida Deceptive and Unfair Trade Practices Act (the "FDUTPA") because the act lacks specific language prohibiting same. Petsch, 872 So. 2d at 261; Value Car Sales, Inc. v. Bouton, 608 So. 2d 860, 861 (Fla. 5th DCA 1992); Aztec Medical Services, Inc. v. Burger, 792 So. 2d 617, 620-21 (Fla. 4th DCA 2001).

Here, Chapter 766 does not – either explicitly or implicitly – prohibit parties from entering arbitration agreements governed by the provisions of Chapter 682, Florida Statutes, the Florida Arbitration Code (the "FAC"). As more specifically set forth in Appellee's Answer Brief, the binding arbitration provisions of Chapter

766 are clearly *permissive*. See Fla. Stat. § 766.207. Moreover, nowhere in Chapter 766 does the Legislature explicitly prohibit arbitration under the FAC. See generally Fla. Stat. ch. 766. Had the Legislature wanted to foreclose arbitration outside of Chapter 766, it could have done so "in unambiguous text" as it has done elsewhere.[1] See, e.g., Toiberman v. Tisera, 998 So. 2d 4, 6 (Fla. 3rd DCA 2008) (holding that plain language of section 44.104, Florida Statutes, which generally authorizes voluntary binding arbitration to settle civil disputes, prohibits arbitration of disputes involving child custody, visitation or child support by virtue of language stating "[t]his section shall not apply to any dispute involving" such matters). Absent such language, there is no basis to conclude that – simply by virtue of their existence – the Chapter 766 arbitration provisions were intended by the Legislature to supplant and foreclose arbitration under Chapter 682.

Further, even if the Legislature did intend for Chapter 766 to be the exclusive vehicle for arbitration of medical malpractice disputes, such law would be preempted by the Federal Arbitration Act (the "FAA"). This issue is thoroughly addressed in Appellees' Answer Brief; the Amici would only add that the United States Supreme Court released an opinion on February 21, 2012, in Marmet Health Care Center, Inc. v. Brown, 2012 WL 538286 (2012), which directly addresses this

[1]Of course, even if the Legislature explicitly prohibits arbitration of a particular type of claim, such prohibition may still be preempted by the Federal Arbitration Act. See infra pp. 5-7.

issue. In its per curiam opinion, the Court reversed the West Virginia Supreme Court's ruling that "as matter of public policy under West Virginia law" an arbitration clause in a nursing home agreement was unenforceable with respect to disputes involving negligence. Id. at *1. The Court ruled that the state Court's conclusion that the FAA did not preempt state law "was both incorrect and inconsistent with clear instruction of the precedents of this Court." Id. The Court went on to state that the analysis of any outright prohibition on arbitration of a particular type of claim "'is straightforward: The conflicting rule is replaced by the FAA.'" Id. at *2.

Here, Chapter 766 does not provide for arbitration of medical malpractice claims unless the defendant admits liability. Thus, if Chapter 766 does in fact prohibit medical malpractice arbitration outside of the statute, the statute precludes health care providers from submitting the issue of liability to binding arbitration and thus constitutes a de facto bar on the ability of health care providers to enter arbitration agreements. Moreover, even if the defendant is willing to concede liability, the plaintiff's consent to proceed to voluntary arbitration is still required. See Fla. Stat § 766.207. Consequently, the defendant does not have an absolute right to arbitration under Chapter 766 and, if the Court determines that Chapter 766 is intended to prohibit arbitration outside of the Chapter, such a prohibition is unlawful under the FAA.

II. ARBITRATION AGREEMENTS OUTSIDE OF CHAPTER 766 ADVANCE THE PUBLIC POLICY UNDERLYING THE STATUTE MORE THAN ARBITRATION AGREEMENTS WITHIN CHAPTER 766

A. The Public Policy of Chapter 766 is to Facilitate Early Resolution of Claims through Arbitration and Limitations on Noneconomic Damages

"The first rule of statutory interpretation is that '[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.'" Streeter v. Sullivan, 509 So. 2d 268, 271 (Fla. 1987). Here, there is no need to delve into the history of legislative skirmishes and compromises to divine the public policy behind the binding arbitration provisions of Chapter 766 because the Legislature expressly codified such policy in section 766.201(2), Florida Statutes, which states with respect to arbitration:

> (b) 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.
>
> 2. A conditional limitation on noneconomic damages where the defendant concedes willingness to pay economic damages and reasonable attorney's fees.
>
> 3. Limitations on the noneconomic damages components of large awards to provide increased predictability of outcome of the claims

> resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims.

The Legislature thus concluded that for arbitration to have a meaningful impact on reducing the costs of malpractice claims, arbitration must provide for limits on noneconomic damages. Such limits are important because courts and scholars alike have acknowledged the inherent difficulty in estimating awards of non-economic damages. E.g., Bravo v. U.S., 532 F. 3d 1154, 1171 (11th Cir. 2008) ("there is no formula proscribed by law to calculate noneconomic damages" because they are "largely speculative and difficult to determine"); Neil Vidman, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 Duke L.J. 217, 254-55 (Nov. 1993) ("it is also clear that jurors uniformly commented on the difficulty of putting a price on pain and suffering and used different methods of calculating the awards. Some roughly split the difference between the defendant's and the plaintiff's suggested figures… . Other jurors indicated that they just came up with a figure that they thought was fair"). Indeed, in its 1992 Annual Report to Congress, the Physician Payment Review Commission stated:

> Much of the unpredictability and inconsistency of malpractice awards is due to non-economic damages (i.e., pain and suffering), which constitute about half of total payments . . . . Such damages are highly subjective. Reducing this unpredictability and removing the open-ended nature of these damages would probably improve decisionmaking during the course of a lawsuit.

See Physician Payment Review Commission, Annual Report to Congress at p. 201 (1992). Non-economic damage caps combat this inherent uncertainty by – as the Florida Legislature stated – "provid[ing] increased predictability of outcome of the claims resolution process for insurer anticipated losses planning" while also serving "to facilitate early resolution of medical negligence claims." Fla. Stat. § 766.201.

B. The Legislature's Policy of Encouraging Pre-Suit Claims Resolution Through Arbitration and Noneconomic Damage Limits Has Successfully Reduced the Costs of Malpractice Claims

Empirical evidence shows that the Legislature's policy of encouraging pre-suit claims resolution been successful in significantly reducing the costs of malpractice claims and, in turn, malpractice insurance premiums. While the decline in costs cannot be attributed solely to the Legislature's policy, the policy's impact cannot be denied.

According to the Florida Office of Insurance Regulation (the "OIR"), medical malpractice insurers reported 2,520 closed claims in Florida in 2010.[2] See Florida Office of Insurance Regulation, *Annual Report on Medical Malpractice Financial Information Closed Claim Database and Rate Filings* (2011). Of those 2,520 claims, approximately 43% resulted in no indemnity payments to the

[2]There is a significant lag time between the time a claim is filed and the time it is closed; thus, most of the claims reported closed in 2010 were actually filed in previous years.

plaintiff. Of the remaining paid claims, insurers paid approximately $246 million to plaintiffs for economic losses and $171 million to plaintiffs for noneconomic losses.[3] Combined loss adjustment expenses – including defense attorneys' fees and costs – for both paid and unpaid claims amounted to approximately $172 million.

The OIR data reveals that, of the approximately 1,436 claims in which the plaintiff received compensation, the average paid economic loss was approximately $171,486 and the average paid non-economic loss was $119,400.[4] One of the most striking features of these numbers is that the average non-economic loss of a paid claim is far less than the $250,000 limit imposed by both section 766.207 and the arbitration agreement at issue here. Moreover, according to the OIR, in 2004 insurers reported 3,574 closed claims in Florida. See Florida Office of Insurance Regulation, *Annual Report on Medical Malpractice Financial Information Closed Claim Database and Rate Filings* (2005). While the 2004 Report does not distinguish those claims for which no indemnity was paid, the Report does show that insurers paid approximately $328 million to plaintiffs for economic losses and approximately $195 million to plaintiffs for noneconomic losses. This is significant for two reasons: one, the aggregate non-economic loss

[3]The calculation of economic losses includes anticipated future economic loss payments.

[4]Numbers extrapolated from the OIR Report.

payments were $20 million less in 2010 (even before adjusting for inflation); and two, the ratio of economic to non-economic damage payments decreased from approximately 1.68:1 in 2004 to 1.44:1 in 2010. In other words, regardless of the total number of paid claims, the percentage of non-economic damages paid has significantly decreased in the seven years since the 2003 reforms were enacted.

Corresponding to the decrease in non-economic damage payments, the total medical malpractice insurance written premium for Florida has decreased from $860 million in 2004 to $559 million in 2010. See 2011 OIR Report. In other words, the arbitration and noneconomic damage limitations of Chapter 766 are accomplishing their stated purpose of lowering medical malpractice premiums in Florida. This experience is consistent with that of the nearly 30 other states which have imposed similar damage limitations. See U.S. Dep't of Health and Human Services, *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing Our Medical Liability System* (2002) at pp. 14-15 ("[s]tates with limits of $250,000 or $350,000 on non-economic damages have average combined highest premium increases of twelve to fifteen percent, compared to forty-four percent in states without caps on noneconomic damages"); David Hyman et. al., *Estimating the Effects of Damage Caps in Medical Malpractice Cases: Evidence from Texas*, 1 J. Legal Analysis 355 (2009).

C. The Use of Arbitration Agreements Outside of Chapter 766 Furthers the Statutorily Expressed Public Policy of Reducing the Costs of Malpractice Claims

Given the effectiveness of the noneconomic damage limitations in advancing the Legislature's stated public policy, the question becomes whether the effects of the policy are thwarted by permitting arbitration agreements outside of Chapter 766. One of the findings of the oft-cited 2003 Report of the Governor's Select Task Force on Health Care Professional Liability Insurance was that voluntary binding arbitration under Chapter 766 "is effectively dead in Florida as a result of the St. Mary's case." See Governor's Select Task Force, *Report on Health Care Professional Liability Insurance* (2003) at p. 300. In St. Mary's Hospital Inc. v. Phillipe, 769 So. 2d 961 (Fla. 2000), the Supreme Court ruled that the pre-2003 version of section Chapter 766 did not limit the aggregate non-economic damages awardable to multiple claimants. In response, the Legislature amended the statute to explicitly set forth such limits. Yet even after the amendment, voluntary binding arbitration remains underutilized. See Mirya Holman et. al., *Most Claims Settle: Implications for Alternative Dispute Resolution From a Profile of Medical Malpractice Claims in Florida*, 74 Law & Contemp. Probs. 103 (2011). From 1990 through 2008, only 4% of claims were resolved during voluntary binding arbitration, with the utilization of such arbitration peaking in 1996 and again in 2004. Id. at 114. This despite the fact that the average payment to plaintiffs of

claims resolved through arbitration was $219,673 – approximately $80,000 *more* than the average payment on all claims (paid and unpaid) but still over $50,000 *less* than the average payment on paid claims – and that claims resolved through arbitration lasted approximately 1.96 years, or over one year less than the 3.25 year average resolution time for all claims. Id. at 120-21.

When a defendant proceeds to voluntary binding arbitration under Chapter 766, the $250,000 limit on noneconomic damages applies. Similarly, the arbitration agreement here provides for a $250,000 limit on noneconomic damages. The difference, of course, is that voluntary binding arbitration under Chapter 766 is predicated on the defendant's admission of liability. The admission of liability may explain why defendants are loathe to pursue voluntary binding arbitration under Chapter 766. However, if a plaintiff can establish liability under an arbitration agreement such as the one at issue here, s/he would receive no less through such arbitration than through voluntary binding arbitration under Chapter 766.[5] Thus, arbitration outside of Chapter 766 – pursuant to an arbitration agreement of the kind at issue here – actually better accomplishes the public policy of Chapter 766 by guaranteeing the resolution of claims through arbitration and thereby substantially reducing the costs, both in time and expense, of malpractice litigation.

[5]And if the plaintiff rejects an offer of voluntary binding arbitration, the plaintiff is still ultimately limited to recovery of up to $350,000 in noneconomic damages.

III. ARBITRATION AGREEMENTS OUTSIDE OF CHAPTER 766 DO NOT VIOLATE THE FIDUCIARY DUTY OF PHYSICIANS TO PATIENTS

There is no question that physicians owe a fiduciary duty to their patients. See American Medical Association Principles of Medical Ethics (available at *http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page?*). However, physicians are also "free to choose whom to serve, with whom to associate, and the environment in which to provide medical care." Id. Implicit in the argument that an agreement to arbitrate constitutes a breach of the physician's fiduciary duty is that the quality of medical care rendered by the physician is somehow negatively impacted by the existence of the agreement. There is absolutely no empirical evidence to support this conclusion, and no Florida court has found that a physician violates his or her fiduciary duty to provide quality medical care by virtue of entering a pre-dispute arbitration agreement with a patient. On the contrary, courts in other jurisdictions have held that arbitration agreements do not implicate the fiduciary duty of, for example, a nursing home to its resident. Owens v. National Health Corp., 263 S.W.3d 876, 890 (Tenn. 2007) ("the arbitration agreement is not unenforceable on the breach-of-fiduciary-duty ground asserted by the plaintiff"); see also McGuire, Cornwell & Blakey v. Grider, 765 F. Supp. 1048, 1051 (D.Colo. 1991) (arbitration agreement between attorney and client did not constitute breach of attorney's

fiduciary duty to client); Chambers v. O'Quinn, 305 S.W.3d 141, 151 (Houston [1st Dist.] 2009) (same).

In Owens, the Tennessee Supreme Court also noted that no fiduciary duty arose between the nursing home and resident before the nursing home agreement was signed. 263 S.W. 3d at 890. Thus, notwithstanding any fiduciary duty owed to the resident upon execution of the agreement, the nursing home necessarily could not breach a duty that had yet to arise. Id. Similarly an arbitration provision in an agreement between doctor and patient for prospective non-emergency treatment could not constitute a breach of the doctor's fiduciary duty when the fiduciary relationship only arose upon execution of the agreement. Moreover, an arbitration agreement – even if executed after the fiduciary relationship arose – does not implicate the physician's fiduciary duty when it does not limit or restrict the patient's rights, does not infringe on the patient's right to receive quality medical care, and does not give the physician any disincentive to provide the same.

CONCLUSION

For the foregoing reasons and those set forth in Appellees' Answer Brief, the Amici respectfully request that the Court affirm the District Court's decision upholding the enforceability of the arbitration agreement.

Respectfully submitted this _____ day of February, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to JAMES T. MURPHY, ESQUIRE, and LAURIE M. LEE, ESQUIRE, of Mathis & Murphy, P.A., 1200 Riverplace Boulevard, Suite 902, Jacksonville, Florida 32207-1806; BRIAN S. GOWDY, ESQUIRE, of Creed & Gowdy, P.A., 865 May Street, Jacksonville, Florida 32204-3310; ANDREW S. BOLIN, ESQUIRE, of Beytin, McLaughlin, McLaughlin, Bolin & Willie, 201 North Franklin Street, Suite 2900, Tampa, Florida 33602-5817; and THOMAS S. EDWARDS, ESQUIRE, and KATHERINE E. LOPER, ESQUIRE, of Edwards & Ragatz, P.A., 501 Riverside Avenue, Suite 601, Jacksonville, Florida 32202-4937, this _____ day of February, 2012.

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CERTIFICATE OF COMPLIANCE

In compliance with Fla. R. App. P. 9.210(a), the font size used in this *Amici Curiae* Brief is Times New Roman, size 14.

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