September 29, 2005

. . . [T]he saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time.

–Supreme Court Justice George Sutherland
Associated Press v. NLRB (1937)

Dear Justices of the Supreme Court of Florida:

As advocates for Florida’s many victims of medical malpractice, we are opposed to the Florida Medical Association’s petition to incorporate the restrictions of Amendment 3 into the Rules of Professional Conduct.

Tragically, the restrictive effects of Amendment 3 have been significantly underreported by the media. For, since its passage, our small firm has had 27 potential clients tell us that before they came to us, they had been turned down by at least one law firm who could not take their cases because of Amendment 3. For many, we were the third firm they had visited. Every one of these men and women at length expressed to us their frustration in trying to find representation under the specter of this amendment—a frustration magnified by the pain from their injuries, or by their anguish from having recently lost a loved one. And while we could not take all of these cases, the men and women whom we were able to represent were extraordinarily grateful that we offered them the chance to waive Amendment 3’s restrictions. They certainly understood, with the clarity that comes through being on the receiving end of this amendment, precisely what it was designed to do: “. . . to render it economically impossible for claimants and their legal representatives to proceed with actions to redress legitimate injuries.”

Advisory Opinion to the Attorney General Re: The Medical Liability Claimant’s Compensation Amendment, 880 So. 2d 675, 685 (Fla. 2004) (Lewis, J., dissenting). With eerie prescience, Justice Lewis writes these words as if he had already seen, as we have, the faces of these patients after they had discovered that Amendment 3 makes it impossible for them to seek justice.

Tired and frustrated, these brave men and women were also made quickly aware of just who Amendment 3 was intended to benefit. Indeed, the very fact that the FMA has “given” this “right” to malpractice plaintiffs, and now wishes to control how they exercise it, demonstrates that it is the FMA and its confederates, not injured patients, in whose interest this amendment was created! After all, if the FMA and FPIC wish to help injured patients, why
are they making it harder for them to seek redress? And it is this same selfishness and shortsightedness, that has prompted these groups to attempt to make waiver of Amendment 3 illegal.

By way of this petition, these supposed ‘reform’ groups want you to help them gain permanent control of two critical features of the American jurisprudential landscape as they operate in medical malpractice cases: waiver and the contingency fee. First, we have the concept of waiver. Its logic is quite simple: although our federal and state constitutions provide us with numerous rights, there are occasions in which the exercise of these rights would result in a less favorable legal outcome. Consequently, we are given the freedom to waive these rights when we so choose. Indeed, both Florida and federal cases uniformly hold that rights bestowed under the state and federal constitutions can be waived. And, thankfully, our adversary system ensures that our opponents in litigation cannot wrest control of this freedom to waive our rights, and force us to surrender it to our disadvantage. Petitioners, then, are turning a blind eye to the wisdom of waiver in hopes of securing for themselves a permanent litigation advantage, and asking you to divest Florida’s injured patients of the protections afforded by waiver.
Petitioners also ask you to ignore a civil litigant’s due process right to counsel and right to contract in their selfish attempt to dictate what their adversaries can be paid for their work. Though many myths surround its true operation, the contingency fee is the “poor man’s key to the courthouse.” See Professor Herbert Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, *Washington University Law Quarterly* 80 (2002), pp. 739-794. For, obviously, if access to the legal system depended upon a citizen’s ability to pay a lawyer $300 or more per hour for his or her services, most Americans would be excluded from the civil justice system altogether. The contingency fee system encourages lawyers to accept all meritorious cases, regardless of the client’s ability to pay. However, Amendment 3 discourages lawyers from taking medical malpractice cases at all, given the expense and complexity inherent to these cases. And contrary to its proponents’ assertions, this amendment does not seek to sift the meritorious cases from the supposedly frivolous ones, but seeks to put an effective end to medical malpractice litigation altogether. Should the FMA’s petition be approved, then, and the rules changed, Amendment 3’s fee restrictions will totally restrict the ability of a citizen injured by medical malpractice to recover for the injuries he or she has suffered. For these men and women, it will be as if the courthouse did not exist.

Put simply, prohibiting the waiver of Amendment 3 will destroy the rights of injured Floridians to seek redress for their injuries. For these reasons, your Honors, we respectfully ask that you dismiss the FMA’s petition and grant Florida’s patients the freedom to waive the restrictions of this dangerous and destructive Amendment.

**Certificate of Service**

I CERTIFY that a copy of the foregoing has been furnished via Federal Express to the Clerk of the Supreme Court of Florida, and via U.S. Mail to John F. Harkness, Jr., 651 E. Jefferson Street, Tallahassee, FL 32399, and to Stephen H. Grimes, P.O. Drawer 810, Tallahassee, FL 32302 on September ____, 2005.

Respectfully submitted,

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Florida Bar #: 224308