

**IN THE
SUPREME COURT
OF THE
STATE OF FLORIDA**

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

Petitioner/Appellant

v.

CASE NO.: SC 11-1258

L.T. No.: 1D10-3078, 16-2010-CA-00474-XXX

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

Respondent/Appellee

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER FRANKS' INTIAL BRIEF

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In this brief “A. ___” will refer to the Appendix and specific Exhibit referenced with corresponding page number.

Plaintiff, Donna Franks as Personal Representative of the Estate of her husband Joseph Franks will be referred to as “Plaintiff”, “Franks” or “Estate of Franks”).

Defendants, North Florida Surgeons and their physicians, Drs. Piperno and Bowers will be referred to collectively as “defendant”, “NFS” or “N. Fla. Surgeons”.

STATEMENT OF THE CASE AND FACTS

In this wrongful death medical malpractice case, the First District held that plaintiff's statutory rights under the Medical Malpractice Act were reduced in an arbitration agreement prepared by the doctor's group but plaintiff was nonetheless obligated to proceed in arbitration. (A. A3-6). This conflicts with *Romano* and is incompatible with this court's recent opinions in *Shotts* and *Gessa*.¹

The case was brought by Plaintiff, Donna Franks as Personal Representative of the Estate of her husband, Joseph Franks, against defendants, North Florida Surgeons and their physicians, Drs. Piperno and Bowers. (A. C1). North Florida Surgeons allege a binding pre-dispute arbitration agreement was executed between it and Mr. Franks when he sought medical care from the practice for evaluation of an enlarged lymph node (a lump) in the groin area. (A. B1-4; D1-3). The arbitration agreement reduced the rights plaintiff had under the Medical Malpractice Act (Chapter 766). §§766.101-766.316, Fla. Stat. (2009). This appeal was taken after arbitration was compelled following a hearing without evidence.

Joseph Franks was a patient under the care and treatment of North Florida

¹ *Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62 (Fla. 4th DCA 2004). *See also Shotts v. OP Winter Haven, Inc.*, No. SC08-1774, slip op. at 31 (Fla. Nov. 23, 2011); *Gessa v. Manor Care of Fla., Inc.*, No. SC09-768, slip op. at 16-17 (Fla. Nov. 23, 2011).

Surgeons from September 2008 until his untimely death five (5) months later, in February 2009. (A. C4-5). The death of this 67 year old gentleman was allegedly due to the negligent failure to prevent, manage and treat acute pulmonary emboli following a routine left inguinal hernia procedure. (A. C6-9). The alleged medical negligence occurred many months after execution of the arbitration agreement, when Franks underwent a left inguinal hernia repair. (A. C6-9; D2).

Because no discovery was allowed, there is no evidence as to how the document got signed. The one page arbitration agreement was within a four page document entitled, “North Florida Surgeons Financial Agreement” which addressed insurance billing issues on the first page. (A. B1-4). The agreement is a small type, single spaced four page document. (A. B1-4).

The patient signature lines are on page three and page four, not on the second page with the arbitration agreement. (A. B2-4). The “Financial Agreement” included sections on patient information, privacy notice acknowledgment, financial responsibility, responsibility to provide proof of insurance and obtain [managed care] referral [all on page one]; arbitration and limitation of damages [on page two without any place for a patient signature or acknowledgement]; insurance waiver, credit card on file and a non-coverage services waiver with acknowledgement/patient signature [on page three]; and

assignment of benefits, assignment of Medicare benefits and signature [on page four]. (A. B1-4).

On the page containing the arbitration agreement language:

1. There was a blank for the patient's name which was not filled in (A. B2);
2. There was no place for a signature on that page (A. B2);
3. The agreement expressly adopted the Florida Arbitration Code (Chapter 682), §§682.02-682.22, Fla. Stat. (2009) (A. B2);
4. The agreement referenced The Medical Malpractice Act (Florida Chapter 766), the Florida Constitution and section 766.207, Florida Statutes, (A. B2);
5. The agreement changed and limited patient rights under Chapter 766 (A. B2);
6. The agreement did not tell the patient that their statutory rights were changed or reduced;
7. The agreement stated that the patient would receive awarded damages "...pursuant to the formula contained in Florida Statutes, section 766.207." (A. B2);
8. The agreement did not explain that as a precondition to the damage limitation in section 766.207, a healthcare provider must agree to

- arbitrate only the amount of damages and provide other benefits to plaintiff;
9. The NFS arbitration agreement did not agree to arbitrate only damages;
 10. There was no explanation provided to the patient as to what statutory rights were given up in this agreement;
 11. There was no reference to any federal law or the federal arbitration code;
 12. There was no express language mandating that an arbitrator decide disputes over the validity of the arbitration agreement;
 13. The agreement expressly adopted Chapter 682, including section 682.03, Florida Statutes providing that the court shall determine issues relating to the validity and enforceability of the arbitration agreement (A. B2); and
 14. There was no “severability provision” in the agreement.

The Arbitration agreement expressly required patient Franks to participate in a Chapter 766 “pre-suit” prior to any arbitration. (A. B2). There was no express requirement for NFS to participate in the pre-suit.

A Chapter 766 “pre-suit” was timely performed by the Estate of Franks. (A. C6, ¶24). During the mandated pre-suit process Frank’s Estate offered to arbitrate under section 766.207. Defendant NFS did not accept. (A. E2). As discussed in argument below, the arbitration under section 766.207 required NFS to arbitrate

only the issue of damages, pay for the arbitration, pay some of plaintiff's attorney's fees, accept joint liability and follow a mandated expeditious process.

Plaintiff Franks then filed suit. (A. C). In response, Defendant NFS filed a Motion to Compel Arbitration and Dismiss – moving to compel the NFS arbitration agreement - not the Chapter 766 arbitration agreement offered by plaintiff. (A. D).

NFS motion maintained that NFS could enforce the arbitration agreement with section 766.207 caps on damages, without the section 766.207 procedures, protections and benefits for the plaintiff (i.e. admission of liability by defendant/arbitrate only the issue of damages; defendant pays the cost of arbitration; defendant pays plaintiff attorney's fees, expedited statutory arbitration process overseen by an Administrative Judge, etc.). (A. D). Plaintiff Franks responded with:

1. A document entitled “Legal Grounds for Motion to Strike Arbitration” - raising legal issues/objections to arbitration, raising various legal grounds for voiding the arbitration agreement including public policy violations and changes to plaintiff's rights under Florida law (A. G);
2. A separate Request for Discovery and an Evidentiary Hearing on the validity of the arbitration agreement, including how it got executed, if the legal grounds were denied (A. F); and

3. A Memorandum of Law in Opposition to ... NFS Motion to Dismiss and Compel Arbitration. (A. E).

On April 29, 2010, the Circuit Judge held a hearing on plaintiff's motions and on North Florida Surgeon's Motion to Compel Arbitration under their agreement. (A. H). Memoranda were submitted by all parties. (A. E; I; J). No discovery or evidence was permitted. (A. H).

The plaintiff's Motion seeking discovery and an evidentiary hearing was denied, along with plaintiff's other motions. (A. K). Defendant's motion was granted and Arbitration was compelled under the NFS arbitration agreement – not under the Chapter 766 arbitration procedure offered by plaintiff and rejected by defendant. (A. K10).

The Circuit Judge expressed concerns over whether the arbitration provisions violated public policy, both during the hearing, and in the resulting order compelling arbitration. (A. H8-21, 41; K5-10). One of the stated concerns was that the NFS arbitration agreement provided a cap on damages that is significantly less than the section 766.118 statutory cap of one million² dollars

² Paragraph six of the Judge's Order mistakenly states the applicable cap for this matter is \$750,000.00/\$1,500,000.00 (§766.118(3), Fla. Stat.) which is the cap for non-practitioners. This matter deals with practitioners so the applicable cap is actually \$500,000.00/\$1,000,000.00 (§766.118(2), Fla. Stat.) which still exceeds the North Florida Surgeons Financial Services Agreement's \$250,000.00 cap.

available to plaintiff in court. (A. K5, 8-10). Nonetheless, the order indicated that the Judge was bound by Florida law to order arbitration. (A. K10).

A timely appeal to the First District followed. (A. L). The First District upheld the trial court and remanded for proceedings in arbitration. *Franks v. Bowers*, No. 1D10-3078, slip op. at 6 (Fla. 1st DCA Mar. 16, 2011); (A. A6). The First District held that the NFS arbitration agreement changed and limited patient's rights provided by the Medical Malpractice Act (Chapter 766) but found no basis to void the arbitration agreement. *Franks*, No. 1D10-3078, slip op. at 3-6; (A. A3-6).

A timely Petition to this Court followed, based upon conflict jurisdiction, claiming that the *Franks* decision below conflicted with *Romano* which held that an arbitration decision which changed a plaintiff's rights under Florida law was void for public policy reasons. On November 8, 2011 this court accepted Jurisdiction.

SUMMARY OF THE ARGUMENT

The NFS arbitration agreement made an express choice of law. (A. B2). It adopted Florida law to govern this dispute. (A. B2). Under Florida law the Court was obligated to void the arbitration agreement on public policy grounds.

Arbitration is supposed to be an alternative forum for resolution of a dispute where the parties can vindicate the same legal rights as they have in court.

Romano, 861 So.2d at 62. When one party attempts to use an arbitration agreement to change the other party's legal rights and remedies, the agreement is void. *Id.* at 62-63.

The First District acknowledged that the NFS Arbitration Agreement changed and limited the rights plaintiff Franks had under the Medical Malpractice Act (Chapter 766), but failed to protect those rights. The Medical Malpractice Act uses a system of tiered caps on non-economic damages to encourage early resolution of valid claims. The stated purpose is to reduce the costs of medical malpractice.

This agreement dispensed with the tiered cap system that encouraged early resolution and took the lowest cap available for physicians. However, the arbitration agreement accepted none of the obligations required in exchange for the low cap. These mandated statutory obligations had a remedial purpose – to encourage early and inexpensive resolution of claims to reduce medical malpractice costs.

The rights that were limited and changed were remedial rights because they were the same rights which were acknowledged as new rights, supporting the “quid pro quo *Kluger*³ analysis” in *University of Miami v. Echarte*, 618 So.2d 189, 193-

³ *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973).

94 (Fla. 1993). Thus, the arbitration agreement violated public policy because it took away remedial statutory rights found in *Echarte*.

This Court's recent opinions in *Shotts* and *Gessa* apply to this case and require a finding that the NFS Arbitration agreement is void. Like those two nursing home arbitration cases, these healthcare providers used a contract of adhesion to limit, reduce and change the plaintiff's statutory rights.

The Medical Malpractice Act was found in *Echarte* to be a comprehensive act with interdependent provisions which had to work together to achieve the stated purpose. The approach taken in the NFS Arbitration Agreement (\$250,000 non-economic caps without any obligation to pay and expedite the case) was rejected by the legislature when creating the current legislative scheme.

In this arbitration agreement, plaintiff's damages were capped below the amounts provided to this plaintiff in court by Chapter 766. The non-economic damage caps for a plaintiff in court were \$500,000/\$1,000,000 - higher than non-economic damage caps for a plaintiff in Chapter 766 arbitration (\$250,000.00 diminished by a formula). As precondition to Chapter 766 arbitration, a defendant must agree to arbitrate only the amount of damages in the arbitration and defendant was required to pay numerous other items not required in court (joint and several liability, costs of arbitration, attorney's fees, etc.).

Thus, in Chapter 766 arbitration a defendant could get a lower cap than in court BUT ONLY by accepting responsibility for the damages (no liability defenses) and by agreeing to pay for many of plaintiff's cost of arbitration. The NFS agreement provided plaintiff none of these benefits, but unilaterally took all the advantages (lower cap on damages). Thus, the means to encourage early inexpensive resolution were also lost.

The arbitration agreement also violates the public policy of Florida for other reasons. In a personal injury action, an injured party's tort cause of action is not dependent on a contract, but is instead based upon the defendant's duty to meet society's standards of safety. Disclaimers, limitations and exculpatory clauses may not impair personal injury actions for public policy reasons. This case involves professionals providing a service necessary to the community, so the common law public policy protections are heightened.

"A consumer should not be charged with bearing the risk of physical injury when ... [he or she buys a product or services]."⁴ When a professional is involved, the public policy issues overwhelmingly favor accountability for basic standards of reasonable conduct, to avoid injury to clients/patients and the public.

⁴ *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So.2d 899, 902 (Fla. 1987).

The parties are not on an equal footing in negotiating a contract because this involves necessary professional services. Thus, tort principles, not contract principles, govern these responsibilities. Just as the Economic Loss Rule governs economic contractual losses and limits tort “invasion” into the contract action – there is a counterbalance under common law principles. Public policy prohibits a professional, providing necessary services to the community, from contractually limiting responsibility for breaches of the duty of professional care. “While provisions of a contract may impact a legal dispute, including an action for professional services, the mere existence of such a contract should not serve, per se, to bar an action for professional malpractice.”⁵ Defendant’s contractual limitations voided this contract because it took away basic tort rights protecting plaintiff and the public.

Defendant incorporated the Medical Malpractice Act into the agreement. In this case, plaintiff offered to arbitrate under a comprehensive arbitral scheme established by the Florida Legislature. Defendant’s failure to accept the plaintiff’s offer to arbitrate under the Medical Malpractice Act was a waiver of the right to arbitrate.

⁵ *Moransais v. Heathman*, 744 So.2d 973, 983 (Fla. 1999).

The portions of the arbitration agreement that offend public policy are not severable under *Shotts* and *Gessa*, because the contractual rights of the parties could be altered by removing them.⁶ Therefore, the contract is void. In addition, defendant did not include a “severability” clause in this contract of adhesion and therefore is left without a contract if any part is voided.

If the underlying Franks decision stands, hospitals, physicians, and other healthcare providers will use the First District opinion to justify agreements which impair plaintiff’s rights. There will be no enforceable community safety standards. Rights set by the legislature and common law protections will be illusory. Any person needing medical care will need a lawyer to navigate documents created by their fiduciary healthcare provider or they will have no right to expect compliance with fundamental standards of healthcare. Professionals should not be permitted to take away common law or statutory rights designed to enforce community standards of care.

ARGUMENT

I. The Standard of Review for all issues is “de novo”.

When a claim is based on written materials before this Court, the issue is a pure question of law, subject to de novo review. *See Aills v. Boemi*, 29 So. 3d

⁶ *Shotts*, No. SC08-1774, slip op. at 38; *Gessa*, No. SC09-768, slip op. at 10-12.

1105, 1108 (Fla. 2010); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 573 (Fla. 1st DCA 1999) (decision construing contract presents an issue of law and is subject to de novo standard of review); *see also Shotts*, No.SC08-1774, slip op. at 8; *Gessa*, No. SC09-768, slip op. at 9. In this case, there was no discovery or evidentiary hearing permitted, despite a request by plaintiff. The Circuit Judge and the First District ruled purely based upon an arbitration agreement. This is the same written record presented to this court. Thus, the standard of review for all issues herein is “de novo” review. *Id.*

II. The issue of whether this arbitration agreement is voidable is governed by Florida law.

A. The arbitration agreement chose Florida law and federal law respects this choice of law.

The arbitration agreement herein expressly adopts Florida law. (A. B2). The arbitration agreement expressly references the Florida Arbitration Code (Chapter 682), incorporated the Florida Medical Malpractice Act (Chapter 766), the Florida Constitution and expressly references section 766.207. (A. B2). There is no reference anywhere in the agreement to federal law or the Federal Arbitration Code.

It is a well-settled rule of federal law that federal law will honor a party's voluntary contractual commitments. *See, e.g., Am. Airlines, Inc. v. Wolens*, 513

U.S. 219, 228-33 (1995) (federal law will not preempt a party's voluntarily assumed contractual obligations). Thus, this arbitration agreement is governed by Florida law.

Defendant NFS was obligated to follow Florida law as it related to this comprehensive arbitral scheme. This agreement adopted the Florida Medical Malpractice Act (Chapter 766). (A. B2). Thus, NFS could not pick and choose which parts of the law to follow. Federal arbitration law does not trump a state's right to set appropriate arbitral procedures under state law. *See Volt v. Stanford Univ.*, 489 U.S. 468, 474-76 (1989) (Choice of law provision incorporating state rules will not be set aside by federal law.). This agreement recited Florida law, including Chapter 766 and section 766.207. (A. B2). In *Volt*, the US Supreme Court held that when a party adopted California law, and California statutes did not require the parties to proceed in arbitration for procedural reasons, the federal arbitration law would not trump the state law in the agreement. *Volt*, 489 U.S. at 474-76.

Similarly, federal law will not trump the state (Florida) law incorporated into this contract. The agreement in this case adopted both Chapter 682 (Florida Arbitration Code) and Chapter 766. Chapter 766 is the later passed act and contains a complete and comprehensive set of arbitration rules and procedures that

are specific to medical malpractice arbitration.⁷ Under Chapter 766, when plaintiff offered to arbitrate under section 766.207 and defendant declined, the statutes expressly provide:

(3) If the defendant refuses a claimant's offer of voluntary binding arbitration:

(a) The claimant **shall proceed to trial....** (emphasis supplied)

See §766.209(3)(a).

The Florida statute at issue (section 766.207) provides that to arbitrate in medical malpractice, with caps lower than permitted in court, defendant has to accept certain responsibilities, including complete liability for damages. *See* §766.207. Otherwise; plaintiff has the right to “proceed to trial”. In trial plaintiff has the right to higher caps on non-economic damages.⁸ *See* §766.118.

⁷The Medical Malpractice Act is specific to this type of case, while Chapter 682 is a general act. *See State Farm Mut. Auto Ins. Co. v. Nichols*, 932 So. 2d 1067, 1073 (Fla. 2006)(“In considering this issue, we note the ‘long-recognized principle of statutory construction that where two statutory provisions are in conflict, the specific statute controls over the general statute.’ *State v. J.M.*, 824 So. 2d 105, 112 (Fla. 2002)(citing *State ex rel. Johnson v. Vizzini*, 227 So. 2d 205, 207 (Fla. 1969))).

⁸ At trial plaintiff has the right to \$500,000/\$1,000,000 instead of the arbitration cap of \$250,000 with formulaic reduction.

There is no federal policy favoring arbitration under a particular set of procedures. *See Volt*, 489 U.S. at 474. The federal courts will not interfere with state rules which encourage arbitration. *Id.*

The medical malpractice statutes set arbitration with specific rules. *See* §§766.207–766.212. The legislature’s arbitral scheme contained in Chapter 766 was explicitly structured to encourage early and inexpensive resolution of cases. This law was adopted in the agreement herein – though NFS improperly tried to unilaterally change the some of the rules to favor itself. Florida law does not permit this attempt to violate public policy. *Shotts*, No.SC08-1774, slip op. at 31; *Gessa*, No. SC09-768, slip op. at 16-17. As discussed below⁹, the statute NFS adopted in its agreement permits plaintiff to “proceed to trial” when NFS declined to follow the statutory arbitration rules.

B. Whether a valid arbitration agreement exists is controlled by principles of state contract law.

Both state and federal law are clear that state law controls whether or not a valid written agreement to arbitrate exists. *See Seifert v. U.S. Home Corp.*, 750 So.2d 633, 636 (Fla. 1999); *Doctors Assoc. Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). This court recently stated in *Shotts*:

⁹ *See* page 29 below.

The issue of "whether a valid written agreement to arbitrate exists" is controlled by principles of state contract law: although the states may not impose special limitations on the use of arbitration clauses, the validity of an arbitration clause is nonetheless an issue of state contract law. Section 2 states that an arbitration clause can be invalidated on such grounds as exist "at law or in equity for the revocation of a contract." Thus, an arbitration clause can be defeated by any defense existing under the state law of contracts. As the [United States Supreme] Court explained in [*Doctors Associates Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)], "generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [the Federal Arbitration Act]." *Powertel, Inc. v. Bexley*, 743 S.2d 570, 574 (Fla. 1st DCA 1999). (emphasis in original).

Shotts, No. SC08-1774, slip op. at pp. 13 and 14.

Thus, if this court finds that the law of Florida voided this arbitration agreement, then the agreement is invalid regardless of whether Florida or federal law applies.

C. The trial court was obligated to decide if the arbitration agreement violated public policy.

The trial court must determine the question of whether a valid contract exists. *See Seifert v. U.S. Home Corp.*, 750 So.2d 633, 636 (Fla. 1999). If the contract violated public policy it is void. *Shotts*, No. SC08-1774, slip op. at 24-25; *Gessa*, No. SC09-768, slip op. at 16-17. The plaintiff placed squarely before the trial court the issue of whether or not the arbitration agreement violated the public

policy of the State of Florida. (A. E1-2). As described below, the lower courts should have ruled that this agreement violated public policy and was void.

This arbitration agreement did not contain any express language requiring that a court defer decisions regarding the viability of the arbitration agreement to an arbitrator. The agreement was silent on those issues, but instead specifically adopted the Florida Arbitration Act – Chapter 682. (A. B2). When a challenge to an arbitration agreement is posited by one of the parties, the Florida Arbitration Act expressly provides that the court – not an arbitrator - will determine the validity of arbitration agreements. *See* §682.03 – (“If the court shall find that a substantial issue is raised as to the making of the agreement or provision, it shall summarily hear and determine the issue and, according to its determination, shall grant or deny the application.”). Thus, based upon the wording of the agreement, and based upon *Seifert*, *Shotts*, and *Gessa*, the court, not the arbitrator, should determine whether the arbitration agreement is void based upon violations of Florida's public policy.

III. This arbitration agreement was void as it violated public policy.

A. The agreement violated public policy because it limited remedial statutory rights and remedies.

The arbitration agreement herein is void because “...the limitations of remedies provisions in the present case violate public policy, for they directly undermine specific statutory remedies created by the Legislature.” *See Shotts*, No. SC08-1774, slip op. at 31. The Circuit Court and the First District acknowledged that this arbitration agreement changed, and reduced, the patient’s rights set by the Medical Malpractice Act (Chapter 766). *Franks*, No. 1D10-3078, slip op. at 3-6; (A. A3-6). This arbitration agreement took away the patient’s right to a higher non-economic damage cap and to a “commensurate benefit” under Chapter 766 as identified in *Echarte*. 618 So. 2d at 194. The reasoning of *Shotts* and *Gessa* dictate that this arbitration agreement is void for public policy reasons unless defendant demonstrates that the changes to plaintiff’s rights did not affect remedial rights (i.e. rights that were new or different from the rights at common law).

In *Echarte* the Court analyzed whether the Medical Malpractice Act (Chapter 766) was constitutional. *Id.* at 191-98. To find caps on plaintiff’s right to non-economic damages constitutional, the court had to find that the medical malpractice legislation granted plaintiff new “commensurate benefits” to comply with the dictates of *Kluger*. *Echarte*, 618 So. 2d at 194. This court stated:

We find that **the statutes at issue provide a commensurate benefit to the plaintiff** in exchange for the monetary cap, and thus, we hold the statutes satisfy the right of access to the courts test set forward

in *Kluger v. White*, 281 So.2d 1 (Fla.1973). [Emphasis Supplied]

Id. at 190.

Thus, in *Echarte*, the court found that plaintiffs received a “quid pro quo” (i.e. replacement rights) for the rights given up (capped non-economic damages). *Id.* at 190, 194. Otherwise, there was no basis for upholding the constitutionality of the statutes which took away common law rights in the form of caps on non-economic damages. *Id.* at 193-94. The “quid pro quo” was a tiered cap system, which granted plaintiffs new rights, incentivized fast handling of claims and granted sanctions to plaintiffs if a defendant did not handle the claim quickly under certain circumstances. *Id.*

NFS deftly eliminated those new statutory rights from their arbitration agreement. Worse, the agreement sidestepped the legislative mandate to use tiered caps to encourage “... **prompt resolution of medical negligence claims...**”. See §766.201(2). In creating a comprehensive statutory scheme of rights and duties, the legislature set out a mandatory process that could not be abrogated by contract for public policy reasons. [“Arbitration shall be voluntary **and shall be available except as specified.**” (Emphasis supplied). See §766.201(2).]

Only a lawyer or other person sophisticated in the intricate statutory scheme could have understood the deceptive changes to plaintiff’s rights made by NFS.

The changes were not explained in this contract of adhesion created by this fiduciary. NFS took the lowest tier of caps found in Chapter 766 (\$250,000 with a reduction formula) but failed to accept preconditions required for the caps (expedited handling of the case, pay costs and pay damages without contesting liability). NFS took away plaintiff's right to court damages (\$500,000/\$1,000,000), took for itself the lowest tier cap (\$250,000 with a reduction formula) and did not comply with the statute in doing so (did not agree to arbitrate only the amount of damages). Thus, NFS side-stepped an express statutory pre-condition for this lower cap and did not reveal this to the patient.

Florida law has long adhered to the basic premise that “the plaintiff should be able to obtain the same relief via arbitration as would be available in court.”¹⁰ See *Romano*, 861 So. 2d at 62. More recently, this court upheld those basic principles in *Shotts* and *Gessa*, when nursing home arbitration agreements were found void as against public policy for changing rights a patient had under Florida law. *Shotts*, No.SC08-1774, slip op. at 2, 6-7; *Gessa*, No. SC09-768, slip op. at 2-4.

¹⁰ Federal law is in accord - *Brasington v. EMC Corp.*, 855 So.2d 1212, 1215 (Fla. 1st DCA 2003) citing to *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth Inc.*, 473 U.S. 614, 626 (1985).

Likewise, this arbitration agreement changed remedial rights. Remedial acts are laws designed to correct or remedy a problem or laws designed to redress an injury. *See St. John's Vill. One, Ltd. v. Dep't of State*, 497 So.2d 990, 993 (Fla. 5th DCA 1986); *Campus Commc'ns Inc. v. Earnhardt*, 821 So.2d 388, 396 (Fla. 5th DCA 2002). By definition, a remedial statute is one which either confers or creates a new remedy or which changes an existing remedy. *Id.* A remedy is the means employed in enforcing a right or in redressing an injury. *Id.*

Chapter 766 changed the rights and remedies of parties in medical malpractice cases. *Echarte*, 618 So. 2d at 193-94. It took away some remedies from plaintiffs (tiered caps on damages) but granted other new rights (attorney's fees, prejudgment interest, expedited processes, etc.). *Id.* The First District opinion herein acknowledged that NFS Arbitration Agreement took away numerous rights granted to plaintiff by Chapter 766, yet, the court below held that the changes did not impair remedial rights. *Franks*, No. 1D10- 3078, slip op. at 3-6); (A. A3-6).

The rights that were taken away were remedial rights, because they were new and different rights as compared to common law rights. In addition, the new rights were identified in *Echarte* as new rights necessary to effectuate the stated intent of Chapter 766. *Echarte*, 618 So. 2d at 193-94. In *Echarte*, the court found

the new rights for a plaintiff included “... substantial **incentives for both** claimants and defendants to submit their cases to binding arbitration, thus reducing attorney’s fees, litigation costs and delay.” *See Id.* at 191 n.12; see also § 766.201. However, an analysis of the NFS Arbitration Agreement reveals that the “substantial incentives”¹¹ created by Chapter 766 for a defendant to arbitrate under Chapter 766 were completely written out of the NFS Arbitration Agreement. The NFS arbitration agreement eviscerates the plaintiff’s rights, while leaving intact all advantages to defendant (low caps on damages), with no incentive to process claims quickly, timely or consistent with the Chapter 766 standards. Under this agreement plaintiff must still go to the time and expense of proving liability and causation.

In NFS’ Arbitration Agreement, the plaintiff’s non-economic damages are capped at \$250,000 with a formula to reduce even that low amount based on impairment of “enjoyment of life”. (A. B2). Those lower caps were only available under Chapter 766 if defendant “accepted responsibility for plaintiff’s damages” and agreed to an expedited procedure giving plaintiff certain and timely benefits coupled to this lower non-economic damage cap. *Echarte*, 618 So. 2d at 193-94.

¹¹ A lower cap in exchange for an admission of responsibility for damages and sanctions for failing to arbitrate under section 766.207- 766.212, Fla. Stat.

Thus, NFS took the benefits (lower caps on damages) of the statutory arbitration (766.207) but accepted none of the responsibilities (only arbitrate amount of damages, joint and several responsibility, pay fees, costs, etc.). *See* §766.209. Absent this expedited guarantee of a damage award, plaintiff had the right to significantly higher non-economic damages in court (§766.118 – \$500,000.00/\$1,000,000.00).

Echarte held that this was a comprehensive legislative scheme that required all parts of the scheme in order to meet the legislative intent of reducing medical costs by encouraging early resolution of cases. *Echarte*, 618 So. 2d at 193-94. Thus, by limiting these rights, the NFS arbitration agreement violated the standards stated in *Romano*, *Shotts* and *Gessa*.

The agreement herein also limited plaintiff's rights in a way expressly rejected by the legislature. In the battles leading up to passage of this legislation, the legislature specifically rejected a \$250,000 cap on non-economic damages unless the defendant accepted responsibility for all damages in the case, and did not make plaintiff prove liability and causation. *See* History of the Legislative battle in 2003 - *Amicus Brief of Florida Justice Association in Support of Appellant* at 3-8, No. 1D10-3078 (Fla. 1st DCA Aug. 3, 2010) and *see* §766.201 and §§766.207- 766.212. Otherwise, plaintiff has the right to higher damages

(\$500,000/1,000,000) while expending more time and litigation costs to prove liability and damages. *See* §766.118.

The statements of legislative intent in a legislative Chapter are the polestar by which the court must interpret the statute. *See Bruner v. GC-GW, Inc.*, 880 So. 2d 1244, 1246 (Fla. 1st DCA 2004). The First District's analysis failed to address express statements of legislative intent in Chapter 766 (§766.201.) and failed to consider key findings by this Court in *Echarte*. It also failed to address the interrelated way in which the statute used the tiered caps on damages to encourage early resolution of cases. Those statutory benefits – and tiers - were removed. Any leverage the legislature gave a plaintiff to encourage early resolution of valid claims was gone – as was the benefit to the public. Reduced cost of litigation was the method to achieve reduced costs of healthcare to the public. *See* §766.201. That was the goal of this legislative scheme. That goal was subordinated to NFS interests in this agreement.

In section 766.201, the legislature provided a statement of legislative intent. The statement of legislative intent provided specifics of how it intended to achieve its goals. In sub-section 2 the legislature stated:

"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, pre-suit investigation and arbitration. Pre-suit 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.**" (emphasis supplied).

See §766.201(2).

This mandatory language stating that this specific arbitration procedure "...shall be available except as specified..." was ignored by the lower courts.

In addressing the mandatory arbitration scheme in this Chapter, the legislative intent went on to require:

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 non-economic damages **where the defendant concedes willingness to pay** economic damages and reasonable attorney's fees. (emphasis added)

See §766.201 (2)(b).

The court below focused only on the language providing for "...reasonable limitations on damages...". The court ignored the goal of "...requiring early determination of the merit of claims..." and ignored the requirement for the defendant to "...concede willingness to pay economic damages and reasonable attorney's fees.". *See* §766.201(1)(d). The Medical Malpractice Act implemented each of these "intent" provisions in §§766.207-766.212 and §766.118. The First District's opinion permitted the defendant, North Florida Surgeons, to eviscerate all

of the protections for the plaintiff discussed in the legislative intent (§766.201) – and the statutes (§766.118, §§766.207-766.209).

Thus, under this agreement, plaintiff cannot proceed in arbitration to collect the damages that would be available in court proceedings (\$500,000/1,000,000). *See* §766.118. The low caps on damages that apply under the NFS arbitration agreement cannot be obtained in Chapter 766 without limiting the issues in arbitration to only damages – which NFS refused to do in this case. The arbitration agreement crafted by North Florida Surgeons neatly avoided any provisions that would encourage NFS and its insurer to resolve claims early or to comply with the mandatory arbitration process contained in the legislative intent and the statutes.

If the rights taken away by this agreement are not remedial rights for a plaintiff, then there is no basis for upholding the statutory scheme as constitutional as discussed in *Echarte*, 618 So. 2d at 193-94. If these were new rights, which were remedial benefits to the plaintiff, then under *Romano*, *Shotts*, and *Gessa*, it was error for the First District to permit this contractual arbitration agreement to stand.

The arbitral scheme set out in §§766.207 – 766.212 is a comprehensive arbitration scheme that the defendant does not have the right to selectively alter. Defendant has the right to arbitration, but must only use arbitration as an

alternative forum to vindicate the same rights and remedies as the parties would have in court under the existing law. *See Romano*, 861 So. 2d at 62. NFS must follow Florida law (Chapter 766) and allow the plaintiff's rights to be vindicated consistent with Florida law (*Shotts* and *Gessa*). *Shotts*, No.SC08-1774, slip op. at 31; *Gessa*, No. SC09-768, slip op. at 16-17. Upon failing to meet these standards, the defendant should find its agreement voided as violating public policy. *Id.*; and *Romano*, 861 So. 2d at 62.

It is notable that NFS had the opportunity to comply with the Florida statutes. Instead NFS waived its rights. Plaintiff offered to arbitrate under Chapter 766. Each party had benefits and duties thereunder. *See* §§766.207 – 766.212. Had NFS accepted, NFS would have been vested in the right to arbitrate with low caps (\$250,000 with reduction formula). *See* §766.207(7)(b).

By failing to accept the plaintiff's offer to arbitrate under Chapter 766 (an part of the NFS arbitration agreement) NFS waived arbitration. Plaintiff had the right "to proceed to trial" based upon NFS declining Chapter 766 arbitration. *See* §766.209(3)(a). NFS should not be permitted to avoid this express waiver of arbitration rights and still impose the caps that are only available if it agreed to this statutory arbitration process. This contractual maneuvering was designed to avoid statutory obligations and is void. NFS waived its right to arbitrate by failing to

follow the process called for in its own agreement (§766.207). Under Florida statute Franks had the right to “...proceed to trial...”. The law of arbitration does not supplant this waiver by NFS which vested plaintiff’s right to go to trial. *See Volt supra*.

The relationship between healthcare providers and patients is a fiduciary relationship. *Nardone v. Reynolds*, 333 So.2d 25, 39 (Fla. 1976). A ruling that a healthcare provider’s arbitration agreement can restrict the statutorily guaranteed rights of a patient re-writes Florida law and fundamentally changes the careful balance struck in the Legislature after multiple heated sessions and special sessions. *See Echarte*, 618 So. 2d at 193-94; *Kluger*, 281 So. 2d at 3-5; and *Amicus Brief of Florida Justice Association in Support of Appellant* at 3-8, No. 1D10-3078 (Fla. 1st DCA Aug. 3, 2010). Healthcare providers should not be permitted to re-write the statutory rights of patients as a pre-condition to care.

B. The arbitration agreement was void as against public policy because this contract limited a patient’s tort remedies relating to professional services necessary to the public.

Under Florida law parties have the right to agree to arbitrate. *See* Chapter 682 and §§766.207-766.212. However, when one party contractually changes the tort rights of the other, that impairs fundamental common law principles designed to protect both individuals and society, as a whole. Prosser, *Handbook of the Law of*

Torts, § 4 at 25-26 (Fifth ed. 1984). Part of the purpose of tort law includes protecting the public from bearing the expense of an individual's wrongdoing.

When professionals provide services necessary to the public, any contractual limitations or changes to fundamental tort rights, violate common law principles of public policy, just as they do when remedial rights are involved. *See Moransais*, 744 So. 2d at 983 - ("...the mere existence of such a contract should not serve per se to bar an action for professional malpractice.") Common law rights are also statutorily based. *See* §2.01, Fla. Stat. (2009). Thus, the arbitration contract should be voided when it violates public policy by restricting basic common law tort principles designed to protect the public and community safety standards.

A consumer's cause of action for personal injury does not depend upon the validity of his contract with the person from whom he acquires a product or services, and will not be affected by any contractual disclaimer or other self-serving agreement. *See Restatement of Torts Second*, Pages 355-356; *Moransais*, 744 So.2d at 983; and *Hartman v. Opelika Mach. & Welding Co.*, 414 So.2d 1105, 1109 (Fla. 1st DCA 1982). "The purpose of a duty in tort is to protect society's interest in being free from harm, [cite omitted], and the cost of protecting society from harm is borne by society in general." *See Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 S.2d 1244, 1246 (Fla. 1993).

When services (particularly professional services) reasonably necessary to the community are involved, the common law voids a contract which limits or impairs a professional's responsibility to meet basic standards of care to the beneficiary of the services. *See generally Moransais*, 744 So. 2d at 983-984. *See also Tunkl*, 383 P.2d at 444-47; *City of Santa Barbara*, 161 P.3d at 1099 (“On the one hand is the freedom of individuals to agree to limit their future liability; balanced against that are public policies underlying our tort systems: As a general matter, we seek to maintain or reinforce a reasonable standard of care in community life and require wrongdoers – not the community at large – to provide appropriate recompense to the injured parties.”).

This court stated in *Chandris v. Yanakakis*, 668 So. 2d 180 (Fla. 1995), “A contract that contravenes an established interest of society can be found to be void as against public policy.” *Id.* at 185. This is true whether the rights involved are common law rights or statutory rights. In *City of Miami v. Benson*, 63 So. 2d 916 (Fla. 1953), this court found:

It is stated that the bill of complaint does not allege that any specific statute was violated by reason of these contracts. As heretofore pointed out, **a specific statute declaring what is the public policy of the state is not necessary.** 'Public policy is the cornerstone--the foundation--of all Constitutions, statutes, and judicial decisions';..." [citations omitted] (Emphasis supplied)

Id. at 921.

At common law, a contract is void when it impairs rights important to the public good. *See Kluger*, 281 So. 2d at 5 (contractual insurance waiver voided by common law right to property damage); *Capelouto v. Orkin*, 183 So. 2d 532, 534 (Fla. 1966) (common law voided contracts which impaired the right to freely work); *Fallschase Dev. Corp. v. Blakey*, 696 So. 2d 833, 834-35 (Fla. 1st DCA 1997) (contract violating common law rule against perpetuities is void); and *Posner v. Posner*, 233 So. 2d 381, 382 (Fla.1970) (contracts inducing divorce void because they violate common law).¹²

In this case, a physician's group improperly attempted to use a contract of adhesion to limit responsibility for violations of basic standards of medical care (the "prevailing professional standard of care") by conditioning a patient's right to services upon a contract that limits recovery when the physician fails to meet basic care standards. The common law protects these rights and prohibit contract invasion into fundamental tort principles.

¹² Federal cases relating to the federal common law are *in accord*: *The Kensington*, 183 U.S. 263, 275-77 (1902)(Shipper could not contractually limit tort right to damages to \$250 for property lost on trip – carrier's limitation on negligence responsibility violate public interest and public policy); *United States v. Bradley*, 35 U.S. 343, 362-363 (1836)("...there is no difference between a transaction void at common law, and void at statute...").

The common law recognizes a balance between tort rights and contract rights. In cases discussing the “Economic Loss Rule”, courts have held that common law principles of public policy permit courts to restrict the use of tort claims in actions based upon contract rights, when only contractually contemplated damages occur. *See E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 873-74, 876 (1986), *Fla. Power & Light Co.*, 510 So. 2d at 902; *Moransais*, 744 So. 2d at 979-81, 983-84; *Indem. Ins. Co. v. Am. Aviation*, 891 So. 2d 532, 536-37, 542-44 (Fla. 2004). In each of these cases, the courts held that basic contract principles should not be expanded by tort law because the principles of the action were governed by the contractual relationship of the parties. *Id.* Otherwise “...contract law would drown in a sea of tort.” *E. River S.S. Corp.*, 476 U.S. at 866. However, economic loss rule cases also acknowledge that other common law principles should apply when the product at issue caused harm to other property or to people. *See Fla. Power & Light Co.*, 510 So. 2d at 900-02; *Moransais*, 744 So. 2d at 979-81, 983-84; *Hartman*, 414 So. 2d at 1109.

In the field of product liability, courts identified the unique place for each of these categories of claim – contract and tort. *See Fla. Power & Light Co.*, 510 So. 2d at 900-02; *Moransais*, 744 So. 2d at 979-81, 983-84. Application of the economic loss rule permits parties to set economic expectations through contract when the product causes injury to itself, but does not harm anyone or anything

other than the product that was the subject of the original bargain. *Id.* However, when a product harms other property or harms a person, different standards apply. *Fla. Power & Light Co.*, 510 So.2d at 900-901 ("The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury...a consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market..."); *Hartman*, 414 So.2d at 1109 ("The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and will not be affected by any disclaimer or other agreement..." – citing to *Restatement of Torts Second*, Pages 355-356).

A plaintiff may bring products claims for breach of warranty. Contract defenses are applicable to those claims. However, when a plaintiff brings a product claim in tort (strict liability or negligence), contract defenses do not apply. *See generally, West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80, 87-88 (1976)(UCC implied warranty claims and defenses do not preclude or affect negligence or strict liability claims under Florida law), *See generally Moransais*, 744 So. 2d at 983-984 (Economic loss rule and contract principles would not impair claims against professionals based upon tort principles); *Fla. Power & Light Co.*, 510 So. 2d at 900-02; *Hartman*, 414 So. 2d at 1109.

Thus, the common law always recognized that when a personal injury occurs, the tortfeasor may not employ contractual limitations to impair basic tort duties. *Id.* Our common law recognized that:

The "prophylactic" factor of preventing future harm has been quite important in the field of torts. **The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer.** When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course **a strong incentive to prevent the occurrence of harm.** Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive. (emphasis supplied)

Prosser, *Handbook of the Law of Torts*, § 4 at 25-26 (Fifth Ed. 1984).

The counter-weight to the “Economic Loss Rule” is the common law tort rule that enforces a “Rule of Basic Safety Standards” in the face of a contract that limits a duty to meet standards of care set by the community. This is particularly true for professionals providing necessary services to the community. *Moransais*, 744 So. 2d at 983.

In *Moransais*, this court stated:

While provisions of a contract may impact a legal dispute including an action for professional services, **the mere existence of such a contract should not serve per se to bar an action for professional malpractice.** Further the mere existence of a contract between the professional services corporation and a consumer **does not eliminate the professional obligation of the professional who actually renders the service** to the consumer or the common law action that a consumer may have against a professional provider. (emphasis supplied)

Id.

In another "Economic Loss Rule" case this court stated:

Thus, the **"basic function of tort law is to shift the burden of loss from the injured plaintiff to one who is at fault ... or to one who is better able to bear the loss and prevent its occurrence."** Barrett, *supra* at 935. The purpose of a duty in tort is **to protect society's interest in being free from harm**, *Spring Motors Distributors Inc. v. Ford Motor Company*, 98 N.J. 555, 489 A.2d 660 (1985), and the cost of protecting society from harm is born by society in general. Contractual duties, on the other hand come from society's interest in the performance of promises. *Id.* (emphasis supplied)

See Casa Clara Condo. Ass'n, Inc., 620 So.2d at 1246.

At common law, tort remedies and contract remedies were treated differently. The two claims did not intermingle. Contract rights were based upon parties on an equal footing "... keeping their promises..." and paying for the agreed expectations. By contrast, tort remedies were established to "... protect the weak from the insults of the stronger ..." and to protect the public in general. *See Sir William Blackstone, Commentaries on the Laws of England in Four Books*, Volume 2, Page 2 (1753).

Just as some types of contract actions should be governed by contract law with no invasion of tort remedies (*see* the Economic Loss Rule) certain types of tort remedies should not be controlled by attempts to contractually impair basic tort rights – or limit tort responsibility (a Rule of Basic Safety Standards). The courts

of other states have recognized that professionals hold a unique status in our society. *See Tunkl*, 383 P.2d at 444-47; *City of Santa Barbara*, 161 P.3d at 1099. They provide services that are necessary to the public. *Id.* Florida also recognizes these unique responsibilities. *See Moransais*, 744 So. 2d at 983. For that reason professionals may not avoid basic standards of care because the parties are not on an equal footing in negotiating for their necessary professional services. *See Tunkl*, 383 P.2d at 444-47; *City of Santa Barbara*, 161 P.3d at 1099-1101; *Moransais*, 744 So. 2d at 983. Permitting professionals to provide services that are conditioned upon contracts of adhesion that mandate that the consumer waive claims, limit rights or otherwise subject themselves to contractual limitations in exchange for obtaining necessary services, is a violation of fundamental public policy necessary to protect our communities. *Id.*

The California Supreme Court recognized that "An exculpatory clause which affects the public interest cannot stand ...". *City of Santa Barbara*, 161 P.3d at 1100; *Tunkl*, 383 P.2d at 444.. The *Tunkl* the court held:

While obviously no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk the law would otherwise have placed upon the other party, the above circumstances pose a different situation. **In this situation the releasing party does not really acquiesce voluntarily in the contractual shifting of the risk, nor can we be reasonably certain that he receives an adequate consideration for the transfer. Since the service is one which each member of the public, presently or**

potentially, may find essential to him, he faces, despite his economic inability to do so, the prospect of a compulsory assumption of the risk of another's negligence. (emphasis supplied)

Tunkl, 383 P.2d 446-47.

Thus, the court held that exculpatory clauses which affect the public interest cannot stand.

Thirty years later the Supreme Court of California revisited these issues in *City of Santa Barbara* by evaluating the propriety of a physician employing an exculpatory clause with patients. *City of Santa Barbara*, 161 P.3d 1096-1101. This California Supreme Court case has facts strikingly similar to this case. The California Supreme Court observed:

Courts and commentators have observed that such releases pose a conflict between contract and tort law. On the one hand is the freedom of individuals to agree to limit their future liability; balanced against that are public policies underlying our tort systems: As a general matter, **we seek to maintain or reinforce a reasonable standard of care in community life and require wrongdoers – not the community at large – to provide appropriate recompense to the injured parties**. (emphasis supplied)

Id. at 1099.

The court went on to state that an exculpatory provision may stand only if it does not impair the public interest. *Id.* at 1100. In following the guidance of *Tunkl*, the California Supreme Court outlined the circumstances where public

policy provides tort protections for individuals and the community regardless of contractual limitations imposed by the tortfeasor. *Id.* The court stated:

It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing **a service of great importance to the public, which is often a matter of practical necessity for some members of the public.** The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses the **decisive advantage of bargaining strength**¹³ against any member of the public who seeks his services. **In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation,** and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the **person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.** Citing to *Tunkl*, supra, 60 Cal.2d 92, 98-101, 32 Cal. Rptr. 33, 383 P.2d 441, footnotes omitted. (emphasis supplied)

Id.

The public policy of this state is no different than observed by the California Supreme Court. *See Moransais*, supra. *See also Witt v. La Gorce Country Club*

¹³ It should be notable that the American Arbitration Association – the largest arbitration association in the United States – refuses to honor pre-dispute arbitration agreements in the consumer healthcare setting because they concluded after a joint study with the AMA, the ABA and AAA that the consumer was not on an equal footing in negotiating these contracts. *See Plaintiff's Memorandum of Law*; (A. E24-25).

Inc., 35 So. 3d 1033, 1039 (Fla. 3rd DCA 2010) (contractual damage limitations for professional geologist's malpractice do not limit the personal liability of the professional geologist.).

In the present case, a professional (a physician) provided a contract of adhesion to a patient seeking necessary medical services relating to a lump found in his groin which potentially required immediate surgery. Patient was confronted with a contract of adhesion that contained limitations and changes to basic statutory rights which were set to protect the community. The agreement stated that the patient "... is not required to use the aforesaid practice or any physician named for general surgery and that there are numerous other physicians in Northeast Florida who are qualified to do general surgery." (A. B2). The intent of this statement is clear – accept our contract of adhesion or you will not get care from this group.

In the day and age of managed care, many patients must obtain gatekeeper approval for specialty care (surgical care). Otherwise, under managed care, patients must see physicians who are listed on their health plan or they must pay for surgery out of their own pocket. Patients do not get to see a physician on a

moment's notice.¹⁴ This kind of leveraged contractual coercion by a professional from whom a patient seeks potentially urgent or necessary medical care is abhorrent and violates public policy. The patient is not on an equal footing.

Professionals owe a duty to meet basic standards of professional care in fulfilling their duty to patients and the community – whether set by common law, or set by statute. *See Tunkl*, 383 P.2d at 444-47; *City of Santa Barbara*, 161 P.3d at 1099-1101; *Moransais*, 744 So. 2d at 983; *Witt*, 35 So. 3d at 1039; and 766.102, Fla. Stat. - (addressing standards of care/ proof in medical malpractice cases – the ‘prevailing professional standard of care’). The public policy purpose behind enforcing these standards includes protecting society from bearing the cost of wrongdoing and to enforce basic safety standards for the community. Limitations on damages have the same deleterious effect as exculpatory clauses. A wrongdoer avoids personal responsibility for their wrongs and imposes those costs on society. Professionals providing necessary services should not be able to avoid standards of care important to the community by use of a contract of avoidance.

This court should announce a clear rule – like *Tunkl* - that prohibits, for public policy reasons, exculpation contracts, limitations of liability and other

¹⁴ There is no evidence relating to these issues because plaintiff was not granted an evidentiary hearing, which was requested.

similar contractual avoidances used by anyone in negotiating for services necessary to the public. This rule should specifically include professionals – particularly healthcare professionals. They clearly provide services necessary to the public. This rule does not prohibit arbitration agreements – it would only prohibit changing the rights parties would have in court under the agreement.

Alternatively, the court should mandate clear and unequivocal parameters by which such exculpation/limitation contracts can be obtained. This court set such standards in the legal field – see Rules Regulating the Florida Bar 4-1.5(f) – (waiver of constitutional rights) and (i) – (arbitration clauses by lawyers). Common law and statute sets such standard for trustees. *See First Union Nat’l Bank v. Turney*, 824 So. 2d 172, 188-89 (Fla. 1st DCA 2001) and Chapter 736 (§§736.0801 et seq.). A patient is just as dependent on healthcare practitioners as they are on trustees and attorneys.

In this case, the deceptive attempt to cap damages and change legal rights should be found invalid due to the fiduciary nature of the physician/patient relationship. *See Nardone v. Reynolds*, 333 So. 2d 25, 39 (Fla. 1976) (physician is a fiduciary). *Gainesville Healthcare Center, Inc. v. Weston*, 857 So. 2d 278 (Fla. 1st DCA 2003) holds that a healthcare provider does not violate fiduciary duties when seeking an arbitration agreement with a patient. *Id.* at 280. However, when

the arbitration agreement changes, reduces or limits common law or statutory rights of the patient, then, as a fiduciary, there is a duty of proper disclosure or the contract is voidable for public policy reasons. *See generally, First Union Nat. Bank v. Turney*, 824 So. 2d 172, 188-89 (Fla. 1st DCA 2001).

The disclosure failures were never considered by the court below because an evidentiary hearing was refused. These disclosure failures should allow Franks to void this contract. Furthermore, if an evidentiary hearing were held, under a “sliding scale” analysis this agreement would be void for unconscionability, as well as, fraud in the inducement. *See Romano*, 861 So. 2d at 62; *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1133-35 (11th Cir. 2010).¹⁵

IV. There is no severance clause and the portions of the arbitration agreement that offend public policy may not be severed because they are integral to the contract.

Recent binding authority from this Court dictates that this agreement must be voided. *Shotts* and *Gessa* state that the provisions which offend public policy in an arbitration agreement may not be severed from the contract, if removal of the offending provisions would require a court to rewrite the rights, procedures or liabilities of the parties. *Shotts*, No. SC08-1774, slip op. at 16-17; *Gessa*, No.

¹⁵ *Pendergast* found that Florida law is muddled on the standards to be followed in finding unconscionability and certified the question to this court.

SC09-768, slip op. at 10-11. Like *Shotts* and *Gessa*, this case involves provisions that impact procedural rights and the right to damages. Thus, if those provisions are voided, the entire agreement must be voided because the courts do not re-write the rights and remedies of the parties.

In *Shotts*, this court voided the agreement despite a severability clause. This agreement does not have a severability clause. *Shotts* struck the arbitration agreement in its entirety, despite a severability agreement because “...the trial court would be forced to rewrite the agreement and to add an entirely new set of procedural rules and burdens and standards, a job that the trial court is not tasked to do.” *Id.* at 38. Thus, in the present case, if any part of the agreement is voided, the entire agreement fails. *Shotts*, No. SC08-1774, slip op. at 16-17; *Presidential Leasing, Inc. v. Krout*, 896 So. 2d 938, 942 (Fla. 5th DCA 2005); and *Lacey v. Healthcare & Ret. Corp.*, 918 So. 2d 333, 335 (Fla. 4th DCA 2005) – (“The presence of an unlawful provision in an arbitration agreement may serve to taint the entire arbitration agreement, rendering the agreement completely unenforceable.”).

Shotts and *Gessa* involve the same issues as this case. In *Shotts* this court found that the AHLA procedural controls contained in the arbitration agreement were voided for public policy reasons because they changed plaintiff’s rights under

Florida law. In *Gessa*, damage limitations were voided for the same reasons.

Thus, the law required removal of the offending provisions from the two nursing home arbitration contracts for public policy reasons. This court found that removal of either procedural controls (AHLA Rules) or removal of damage limitations (caps on damages) from the arbitration agreement voided the respective agreements because the provisions could not be removed without potentially impacting or changing contractual rights. *Id.*

In this case, the offending provisions within the arbitration agreement involve the standards by which the arbitration must be conducted. For example, the Medical Malpractice Act arbitration statute requires specific statutory procedures and involvement of an administrative claims Judge. This arbitration agreement incorporated different arbitration procedures (see arguments above). If those provisions are voided, then a court must pick and choose which “rules” will apply. Thus, the Court would be required to rewrite the contractual rights of the parties just as in *Shotts*.

Likewise, this court held in *Gessa* that " ... the limitation of liability provisions in the present case, which place a \$250,000 cap on noneconomic damages and waive punitive damages, are not severable from the remainder of the agreement." *Gessa*, No. SC09-768, slip op. at 11. Because this court found in

Gessa that the limitation of liability provisions were void as against public policy, the provisions were voided. However, the provisions could not be severed, without rewriting the rights of the parties in the agreement. *Id.* at 11, 15-17. Thus, the agreement was therefore voided. *Id.*

In this case, the damage limitations violate Florida law. See arguments above. Our contract must be voided for the same reasons as stated in *Gessa*. Thus, this matter must be remanded to the trial court with instructions to void the agreement and permit to the parties to litigate their rights in court.

Based upon *Shotts* and *Gessa*, it is clear that the provisions of this contract cannot be severed, even if there had been a severability provision. However, in this case, the defendant North Florida Surgeons did not include a severability clause within their arbitration agreement. The contract should be voided in its entirety.

CONCLUSION

The court should find the arbitration agreement violated public policy and is void. The case should be remanded with instructions for the lower court to vacate its opinion and enter an order requiring the Circuit court to deny the motion to dismiss and to enter an order permitting plaintiff to proceed in court.

Alternatively, discovery and an evidentiary hearing should be conducted to determine if the contract was properly executed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant/Petitioner Franks' Initial Brief has been furnished to James T. Murphy, Esquire, 1200 Riverplace Blvd., Suite 902, Jacksonville, Fl. 32207; Brian S. Gowdy, Esquire, 865 May Street, Jacksonville, Florida 32204 and Andrew S. Bolin, Esquire, 201 North Franklin Street, Suite 2900, Tampa, Fl. 33602, on this _4th ____ day of January, 2012 via USPS [☒]; Facsimile [☐]; Efile/Email [☒].

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document is in compliance with the Rule's font requirements [Times New Roman 14].

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