

**IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC11-1258**

DONNA MARIE FRANKS, as Personal
Representative of the Estate of
JOSEPH JAMES FRANKS, SR., deceased

Petitioner,

v.

L.T. Case Nos.: 1D10-3078
16-2010-CA-00474

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

Respondents.

**ON APPEAL FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA**

**AMICUS CURIAE BRIEF OF
FLORIDA JUSTICE ASSOCIATION
IN SUPPORT OF PETITIONER**

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STATEMENT OF AMICUS IDENTITY AND INTEREST

The Florida Justice Association (“FJA”) files this amicus curiae brief in support of Petitioner. The FJA is a voluntary statewide association of approximately 3,000 trial lawyers whose practices emphasize litigation for the protection of the personal and property rights of individuals. The FJA has a substantial interest in this case because the Respondents’ arbitration agreement impairs the rights of medical malpractice claimants under Chapter 766, Florida Statutes.

For the benefit of the Court, the FJA is attaching as Exhibit A to this brief a variety of form arbitration agreements between medical providers and their patients. None of these agreements are identical in all respects, and of course, only the arbitration agreement of Respondent North Florida Surgeons, P.A. (the “Agreement”) is at issue in this case. However, the various agreements share one common feature – they all attempt to abrogate the remedies, rights, and limits contained in Chapter 766 and its comprehensive arbitration scheme. This common feature concerns the FJA. As argued below, Chapter 766 is a legislative compromise that did not completely satisfy anyone. It did not satisfy groups who advocate for patients (like the FJA) or groups who are for “tort reform.” With these arbitration agreements, medical providers effectively are circumventing the legislative process and compromise that resulted in Chapter 766.

SUMMARY OF ARGUMENT

Petitioner's initial brief aptly explains why Respondents' Agreement contravenes the will of the Florida Legislature, is void for public policy, and is unconscionable. In addition to considering Petitioner's arguments, the FJA believes that two other considerations should inform the Court as it decides this case. First, the arbitration code in Chapter 682 is not a valid basis for upsetting Florida's statutory law on medical malpractice (Chapter 766), a law that is the result of significant legislative compromises and that created a detailed comprehensive arbitration scheme specifically for medical malpractice disputes. *Infra* Argument I, at 2-10. Second, the fiduciary nature of the doctor-patient relationship is an important consideration for this Court in determining the enforceability of any doctor-patient agreement, including the form Agreement at issue in this case. *Infra* Argument II, at 11-13.

ARGUMENT

I. Chapter 766 is a Comprehensive Legislative Compromise Designed to Specifically Govern the Arbitration of Medical Malpractice Disputes, and It Controls Over Chapter 682's General Arbitration Code.

Petitioner's initial brief states the rights and remedies provided to patients under Chapter 766, and the limitations on those rights and remedies that inure to the benefit of medical malpractice defendants. (*See* Initial Br. 18-29.) Our purpose in this amicus brief is to put these rights, remedies, and limitations in their

historical context and to explain how they supersede Chapter 682's arbitration code. Therefore, we first recount how Chapter 766's detailed voluntary arbitration scheme is the result of a legislative compromise to strike a balance between the rights of patients (advocated by the FJA) and concerns by others about the rising cost of medical malpractice premiums.¹ *Infra* Argument I.A., at 3-8. Then, we explain how Chapter 766's more recently enacted, comprehensive arbitration scheme, targeted specifically at medical malpractice disputes, controls over Chapter 682's arbitration code. *Infra* Argument I.B., at 8-10.

A. The rights, remedies, and limitations in Chapter 766, including its detailed comprehensive arbitration scheme, are the result of a legislative compromise.

This history lesson begins over twenty years ago in 1988. That year, the Legislature convened for a special three-day session to address what was described by some as a “medical malpractice insurance crisis.” Donna O’ Neal, *Legislators’ 3-Day Task: End Malpractice Crisis*, Orlando Sentinel, Feb. 1, 1988, at B1; Ed

¹ The FJA has filed amicus briefs in other cases challenging the constitutionality of Chapter 766's damages caps, including a case currently pending before this Court, *see McCall v. United States*, SC11-1148. In those briefs, the FJA has argued that the Legislature's desire to reduce the cost of medical malpractice insurance premiums did not constitutionally justify the damages caps. The FJA stands by its prior position on the constitutionality of the damages caps. In this appeal, however, the constitutionality of the damages caps is not at issue. What is at issue is whether Respondents, by way of the Agreement, may further limit the rights of patients to recover damages for malpractice to levels *below* the damages caps in Chapter 766. If this Court decides in *McCall* that Chapter 766's damages caps are unconstitutional, then such a decision will serve only to bolster Petitioner's argument, supported by the FJA, that the Agreement's reduced damages caps are void for public policy.

Birk, *Legislature Prepares for Medical Malpractice Session*, The Associated Press, Jan 31, 1988. Going into the session, one of the primary areas of disagreement amongst legislators and interest groups was a proposal for voluntary arbitration that would place limits on non-economic damages. Legislators and interest groups (doctors, lawyers, hospitals, and insurance companies) could not agree on whether there should be any such limit in the first place, and if a limit were imposed, whether it should be set at \$100,000, \$250,000, or some higher level. O' Neal, *supra*; Donna Blanton, *Don't Put Off Malpractice Session*, Orlando Sentinel, Jan. 26, 1988, at B1; Diane Herth, *Medical Arbitration Proposal Seeks to End Malpractice Fights*, South Florida Sun-Sentinel, Local, Jan. 31, 1988. Those advocating for medical doctors believed that the \$250,000 limit was too high and should be lowered to \$100,000. Herth, *supra*; Birk, *supra*.

A bill, of course, passed, and the voluntary arbitration provisions were codified at sections 766.207 to 766.212. Ch. 88-1, §§ 54 to 58, Laws of Fla.; §§ 766.207 to 766.212, Fla. Stat. (1988). Although these provisions have changed over the years, the critical parts that were passed in 1988 still exist today. *Compare* ch. 88-1, §§ 54 to 58, Laws of Fla. *and* §§ 766.207 to 766.212, Fla. Stat. (1988) *with* §§ 766.207 to 766.212, Fla. Stat. (2009).

The interest groups on both sides of the 1988 debate bill were dissatisfied with the resulting bill. Trial lawyers, advocating for their injured clients, were

unhappy that there were any damages caps at all and promised to challenge their constitutionality in court. Mark Silva and Paul Anderson, *Malpractice Bill Passes Legislature: Will Not Lower Rates Doctors Pay, Critics Say*, Miami Herald, Front, Feb. 5, 1988. Such a challenge was brought five years later, and it was unsuccessful. *See Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993). On the other hand, groups representing doctors were dissatisfied that a lower cap of \$100,000 was not enacted, and they vowed to overturn the legislative compromise by going directly to the people with a proposed constitutional amendment. Silva and Anderson, *supra*. That effort also failed, as the people rejected the proposed constitutional amendment. Maya Bell, *State Says No to Amendment 10, Award Limits*, Orlando Sentinel, Local/State, Nov. 9, 1988.

The next “medical malpractice insurance crisis” occurred fifteen years later in 2003. This time, it took not one special session, but four special sessions spanning five months for legislators to reach an agreement on a medical liability “reform” bill. Julie Kay and Steve Ellman, *Done Deal: Lawmakers Finally Reach Agreement on Caps for Pain and Suffering Damages*, 44 Broward Daily Business Review, Aug. 14, 2003, at 1; Michael Romano, *At last, Fla. Legislature passes reform bill, establishes cap*, 33 Modern Healthcare, Aug. 18, 2003, at 10. Governor Bush and groups advocating for doctors originally insisted on a \$250,000 across-the-board cap on non-economic damages. Romano, *supra*; Kay

and Ellman, *supra*. And that was the amount of the cap in the original bill enacted by the House in the first special session. H.R. 0063B, Spec. Sess. A (Fla. 2003).

But the Senate, led by the now-deceased Senator Jim King, refused to give into the House, Governor Bush, or the interest groups pushing for the \$250,000 across-the-board cap. Kay and Ellman, *supra*; *see also* S. 002D, Spec. Sess. D (Fla. 2003). The eventual caps enacted and signed into law were a nuanced compromise, with the cap levels differing depending on the circumstances of the case. *See* ch. 2003-416, § 54, Laws of Fla. Because the instant case involves a death and because Respondents have declined arbitration under Chapter 766, the cap for non-economic damages for this case is one million dollars – considerably higher than the \$250,000 across-the-board cap sought by Governor Bush and others. *See* § 766.118, Fla. Stat. (2003).

Like with the 1988 bill, interest groups on both sides of the debate were dissatisfied with the 2003 bill. Romano, *supra*; Kay and Ellman, *supra*. Groups advocating for doctors – like the Florida Medical Association – opposed the bill, insisting that only the \$250,000 cap would have been effective in lowering doctors’ insurance premiums. Romano, *supra*; Kay and Ellman, *supra*. On the other side, groups advocating for patients – like the FJA (then known as the Academy of Florida Trial Lawyers) – expressed its opposition to the bill for entirely different reasons. The FJA opined (and still believes today) that the amounts of damages

should be determined by juries, not arbitrary legislative limits. Romano, *supra*; Kay and Ellman, *supra*.

The legislative skirmishes of 1988 and 2003 have resulted in a detailed, comprehensive arbitration scheme. *See* §§ 766.207 to 766.212, Fla. Stat. (2009). This scheme applies, of course, only to disputes involving medical malpractice (not to any other type of dispute in tort or otherwise). *See id.* §§ 766.207 to 766.212; *see also id.* § 766.201(2)(b). This comprehensive arbitration scheme contains many rights, remedies, and limitations. *See* Ex. B (attached to this brief) (summarizing the right, remedies, and limitations of Chapter 766's arbitration scheme). But, as more fully argued in the initial brief, the arbitration scheme in Respondents' form agreement (and the form agreements of other medical providers) contravenes Chapter 766's detailed comprehensive arbitration scheme, a scheme specifically designed for medical malpractice disputes. (*See* Initial Br. 18-29.)

Nevertheless, some medical providers, like the Respondents, claim that they may ignore Chapter 766's detailed comprehensive arbitration scheme. They claim that, by obtaining a patient's signature on a form arbitration agreement, they may ignore the rights, remedies, and limitations of Chapter 766's arbitration scheme. They may do this, they say, because of the arbitration code in Chapter 682. They claim that Chapter 682 permits them to selectively pick and choose from, or

disregard altogether, Chapter 766's comprehensive arbitration scheme. Respondents are wrong. They must either accept Chapter 766's comprehensive arbitration scheme or defend their actions in court. *Infra* Argument I.B., at 8-10.

B. Chapter 766's more recently enacted, comprehensive arbitration scheme governs specifically medical malpractice actions, and thus Chapter 766's scheme supplants Chapter 682's arbitration code and any contravening arbitration agreements.

Respondents' form Agreement requires patients to comply with the pre-suit notice and investigation requirements of Chapter 766, but, inconsistently, also states that "the parties agree that the dispute shall be resolved by arbitration as provided by the Florida Arbitration Code, Chapter 682 (Florida Statutes)." (Petitioner's App. B, at 2.) The First District's holding in this case effectively allows Respondents to use the general arbitration code in Chapter 682 to supersede the specific medical malpractice arbitration and pre-suit scheme set forth in Chapter 766.

This holding violates the well-settled principle that "a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms." *E.g., Maggio v. Fla. Dep't of Labor and Employment Sec.*, 899 So. 2d 1074, 1079-80 (Fla. 2005) (internal quotations omitted). In *Maggio*, the issue facing this Court was whether the pre-suit requirements of Chapter 768 for filing a tort claim against the sovereign applied to a claim under the Florida Civil Rights Act (FCRA), which is located in Chapter

760. *Id.* at 1077. This Court held that the pre-suit requirements of Chapter 768 did not apply because Chapter 760 had its own detailed specific pre-suit requirements that applied specifically to FCRA actions. *Id.* at 1080. This Court held this even though it acknowledged that the two separate statutory pre-suit requirements did not expressly conflict with one another. *Id.*

This same rule of statutory construction applies where, as here, two statutory schemes conflict with one another. *See Murray v. Mariner Health*, 994 So. 2d 1051, 1061 (Fla. 2008) (“[W]here two statutory provisions are in conflict, the specific provision controls the general provision.”). In this case, Chapter 766’s comprehensive arbitration scheme and Chapter 682’s arbitration code are in conflict with one another. This is demonstrated by the multiple provisions in the Agreement (which, Respondents claim, is authorized under Chapter 682) that cannot be reconciled with Chapter 766’s voluntary arbitration scheme. (*See* Initial Br. 18-29.) Accordingly, because Chapter 766 governs specifically the arbitration of medical malpractice disputes, it must control over Chapter 682, which speaks generally to the arbitration of all disputes.

One other standard canon of statutory construction establishes that Chapter 766’s arbitration scheme supplants Chapter 682’s arbitration code: “It . . . is well settled that when two statutes are in conflict, the more recently enacted statute controls the older statute.” *E.g., McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994).

Chapter 766's arbitration scheme was largely enacted in 1988 and then it was significantly modified in 2003. *Supra* Argument I.A., at 3-8. On the other hand, Chapter 682's arbitration code was enacted more than thirty years prior in 1957. *See* ch. 57-402, § 22, Laws of Fla. Thus, Chapter 766's arbitration scheme must control over Chapter 682's arbitration code.

If medical providers like Respondents desire to arbitrate medical malpractice disputes with their patients, they must accept Chapter 766's entire, comprehensive arbitration scheme.² They may not use Chapter 682's generally applicable arbitration code as a means to circumvent Chapter 766's arbitration scheme, a scheme specifically tailored for medical malpractice disputes. In other words, they may not accept only the provisions of Chapter 766 that they prefer and disregard the provisions of Chapter 766 they do not like. To hold otherwise would render meaningless and superfluous the legislative compromises of 1988 and 2003.

² To be clear, we are not suggesting that, in this case, Respondents are entitled to arbitrate under Chapter 766. Respondents waived any such entitlement right when they declined Petitioner's offer to arbitrate under Chapter 766. (Initial Br. 4-5.)

II. The Fiduciary Nature of the Doctor-Patient Relationship is an Important Consideration in Determining the Enforceability of Any Doctor-Patient Agreement, Including Form Arbitration Agreements.

Medical doctors have a fiduciary relationship with their patients. (Initial Br. 32 & n.17.) “Trust is central to the patient-physician relationship.”³ Consequently, medical doctors have “ethical obligations to place [their] patients’ welfare above their own self-interest and above obligations to other groups, and to advocate for their patients’ welfare.” AMA Code Opinion 10.015. Medical doctors may not “place their own financial interests above the welfare of their patients.” *Id.* Opinion 8.03 (available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion803.shtml>) (last visited on January 9, 2012).

In analyzing whether a doctor-patient agreement is enforceable, the fiduciary nature of the doctor-patient relationship should be a paramount consideration. Granted, doctors generally may be free to choose which patients they serve.⁴ But,

³ See Am. Med. Assoc., Council on Ethical and Judicial Affairs, CEJA Report 1-A-01, at 2 (2001), available at http://www.ama-assn.org/ama1/pub/upload/mm/369/ceja_1a01.pdf; see also Am. Med. Assoc., Code of Medical Ethics (“AMA Code”), Opinion 10.015, available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion10015.shtml>; *United States v. Willis*, 737 F. Supp. 269, 272 (S.D.N.Y.1990) (“It is difficult to imagine a relationship that requires a higher degree of trust and confidence than the traditional relationship of physician and patient.”).

⁴ Am. Med. Assoc., Principles of Medical Ethics, ¶ VI (2001) (available at <http://www.cirp.org/library/statements/ama>) (last visited on July 29, 2010).

when a doctor does choose to serve a patient, any agreement between the doctor and the patient he has accepted – including arbitration agreements like the one in this case – must be viewed through the prism of trust that is at the core of the doctor-patient relationship.⁵ This relationship of trust should require doctors to fully and fairly disclose to patients any rights that the patients are forfeiting.

As the Council on Ethical and Judicial Affairs of the American Medical Association has indicated, the doctor-patient relationship is not an ordinary commercial relationship governed by the principle of “buyer beware”:

The patient-physician relationship is held to high standards of conduct, as embodied by the *Code of Medical Ethics*. This characterization of the patient-physician relationship differs significantly from the contractual view of the relationship in which patients seek care and physicians provide it. Ethically, it would be insufficient to view health care as an ordinary service and to all care that patients request from physicians to be governed by the maxim “let the buyer beware.”

CEJA Report 1-A-01, at 2.

In a similar vein, attorneys have a fiduciary relationship with their client that requires them to exercise a higher standard of good faith than is required in an ordinary commercial relationship. *E.g., Brigham v. Brigham*, 11 So. 3d 374, 386 (Fla. 2009). Thus, for example, attorneys are ethically required to provide a full,

⁵ See *supra* note 3; see also *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 396-97 (Fla. 2005) (noting the well-settled principle that arbitration agreements must be construed in the same manner as non-arbitration agreements).

thorough, and detailed disclosure to a client of her rights under the Medical Liability Claimant's Compensation Amendment in order for any waiver of those rights to be deemed knowing and voluntary, and thus enforceable. *See* Fla. R. Prof. Conduct 4-1.5(f)(4)(B)(iii) (providing process for client to waive rights under Art. I, § 26, Fla. Const.); *see generally In Re Amendment to Rules Regulating the Florida Bar-Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct*, 939 So. 2d 1032 (Fla. 2006) (noting the purpose of the rule was to ensure waiver was knowing and voluntary). By comparison, the Agreement in this case does not provide nearly the same level of protection to the Respondents' patients as Rule 4-1.5(f)(B)(ii) provides to clients of attorneys. Medical doctors, as fiduciaries, should not be permitted to enforce arbitration agreements that waive or impair their patients' rights under Chapter 766 unless the agreement contains a full, thorough, and detailed disclosure of the rights being waived. (*See* Initial Br. 32.)

CONCLUSION

For the foregoing reasons and the reasons argued in Petitioner's initial brief, the FJA requests that the Court quash the First District's opinion affirming the trial court's order compelling arbitration under the Respondents' Agreement and Chapter 682.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to **Laurie M. Lee, Kelly B. Mathis, and James T. Murphy**, 1200 Riverplace Blvd., Suite 902, Jacksonville, FL 32207; **Andrew S. Bolin**, Beytin, McLaughlin, McLaughlin, Bolin & Wille, 201 North Franklin Street, Suite 2900, Tampa, FL 33602; and **Thomas S. Edwards, Jr., Eric C. Ragatz, and Katherine E. Loper**, Edward & Ragatz, P.A., 501 Riverside Avenue, Suite 601, Jacksonville, FL 32202 by United States Mail, this 11th day of January, 2012.

/s Bryan S. Gowdy
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s Bryan S. Gowdy
Attorney