

**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' REPLY BRIEF

EDWARDS & RAGATZ, P.A.

Thomas S. Edwards, Esquire

Florida Bar No.: 395821

tse@edwardsragatz.com

Eric C. Ragatz, Esquire

Florida Bar No.: 0092053

ecr@edwardsragatz.com

501 Riverside Avenue, Suite 601

Jacksonville, Florida 32202

Telephone: (904) 399-1609

Facsimile: (904) 399-1615

Attorneys for the Appellant

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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”.

ARGUMENT

I. INTRODUCTION

The parties agree that *de novo* review is the appropriate standard.

North Florida Surgeons attempt to distinguish *Gessa v. Manor Care of Fla., Inc.*, 36 Fla. L. Weekly S676 (Fla. Nov. 23, 2011) and *Shotts v. OP Winter Haven, Inc.*, 36 Fla. L. Weekly S665 (Fla. Nov. 23, 2011) as controlling authority by arguing that the Medical Malpractice Act is not a remedial statute (Ans. B. p.12) and, if it is, that the remedial purpose was not defeated by changing plaintiff's remedies. (Ans. Br. p. 19). These arguments are wrong and fly directly in the face of findings of this court in both *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993) and *St. Mary's Hospital, Inc., v. Phillipe*, 769 So. 2d 961 (Fla. 2000).

II. THE MEDICAL MALPRACTICE ACT IS REMEDIAL.

The Medical Malpractice Act restricted plaintiff's right to noneconomic damage recovery (non-economic caps), however it granted other rights, which did not exist at common law, including the availability of attorney's fees, prejudgment interest, altered standards of proof under certain circumstances, and a right to expedited determination of plaintiff's claims. See generally *Echarte*, 618 So.2d at 194 and *Saint Mary's Hospital*, 769 at 972 and see ss. 766.201, 766.207-212, Fla.

Stat. Florida cases are legion that a remedial statute is one “...which confers **or changes a remedy**.” (Emphasis supplied). See *Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388 (Fla. 5th DCA 2002); *Blankfeld v. Richmond Healthcare, Inc.*, 902 So. 2d 296, 298 (Fla. 4th DCA 2005); *Lacey v. Healthcare and Retirement Corporation of America*, 918 So. 2d 333 (Fla. 4th DCA 2005); *Fonte v. AT and T Wireless Services, Inc.*, 903 So. 2d 1019, 1024 (Fla. 4th DCA 2005); and *Adams v. Wright*, 403 So. 2d 391, 394 (Fla. 1981).

In *Adams v. Wright* this court stated:

"A remedial statute is 'designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good.' It is also defined as '(a) **statute giving a party a mode of remedy for a wrong, where he had none, or a different one, before**.' Black's Law Dictionary, Fifth Edition 1979." (emphasis supplied)

Adams, 403 So.2d at 394.

Thus, the Medical Malpractice Act is a remedial act. It changed the remedy for a wrong relating to medical malpractice, and created different remedies for the plaintiff.

The word “remedial” derives from the same root as “remedy”. The Medical Malpractice Act provides the statutory “remedy” for an individual plaintiff. Thus, the statute is clearly a remedial statute under Florida Law. Defendants' attempts to

argue to the contrary were made because tampering with remedial rights is fatal under the terms of *Gessa* and *Shotts*.

III. THE DEFENDANT'S ARBITRATION AGREEMENT DEFEATS THE PURPOSE OF THE MEDICAL MALPRACTICE ACT.

The Florida Legislature specifically stated that the purpose of the Medical Malpractice Act was to reduce the high cost of medical negligence claims "...by requiring early determination of the merit of claims, by providing for early arbitration of claims, thereby reducing delays in attorney's fees, and by imposing reasonable limitations on damages, while preserving the right of either party to have its case heard by a jury." See § 766.201(d), Florida Statutes. In subsection 2 of § 766.201, the Florida Legislature provided its plan for reducing those costs. The Legislature identified two separate components.

The plan required pre-suit investigation and also required arbitration which "...shall be voluntary and **shall be available except as specified.**" (emphasis supplied) See § 766.201(2). The Legislature further mandated that:

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 limitation¹ on non-economic damages **where the defendant concedes willingness to pay economic damages and reasonable attorney's fees.**

3) Limitations on the non-economic damages components of large awards to provide increased predictability of outcome of the claims resolution process for ensure anticipated losses planning, **and to facilitate early resolution of medical negligence claims.** (emphasis supplied)

See § 766.01(b), Florida Statutes.

The Florida Legislature expressly conditioned the limitation – a \$250,000 cap on non-economic damages - upon the defendant conceding their “...willingness to pay economic damages and reasonable attorney's fees”. This requirement was taken away by North Florida Surgeons’ arbitration agreement.

These same “Legislative Intent” provisions were analyzed in both *University of Miami v. Echarte*, 618 So.2d 189 (Fla.1993) and *Saint Mary's Hospital v. Phillipe*, 769 So.2d 961 (Fla. 2000).² In upholding the constitutionality of the caps found in Chapter 766 this court found that there was a quid pro quo provided to the plaintiff. In both *Echarte* and *Saint Mary's Hospital*, the court found that the quid

¹ This limitation is the cap of \$250,000 on non-economic damages.

² In considering the Legislature’s view, it is notable that this year the Legislature considered Legislation that would have granted healthcare providers the statutory right to insert different caps into the Medical Malpractice Arbitration Agreements. That Legislation failed. See Reply App. A.²

pro quo was the plaintiff's right to a "commensurate benefit". See *Echarte*, 618 So.2d at Page 194 and *Saint Mary's Hospital*, 69 So.2d at 967, 968.

As discussed below, this fiduciary deceptively obtained waiver of the plaintiff's rights, in a way where the plaintiff could not possibly have understood that the rights were being taken away. In *Saint Mary's Hospital*, this court held that the statute recited in the arbitration agreement was "...neither clear nor unambiguous". *Saint Mary's Hospital*, 769 So.2d at 969. North Florida Surgeon's arbitration agreement was worded to lead a lay person to believe they were getting the damages provided under Florida law (s. 766.207), without revealing that North Florida Surgeons was required to concede liability under this statute, to use this damage statute.

Defendants claim that the only purpose or intent of the Medical Malpractice Act was to reduce the plaintiff's rights. That is simply wrong. If that was the only purpose and intent of the Medical Malpractice Act, then the Act would be unconstitutional as discussed in both *Echarte* and *Saint Mary's Hospital*.

In *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993), this court identified the "new rights and remedies" available to plaintiffs in medical malpractice actions which were expressly designed to serve as "...the incentives for claimants to voluntarily submit to such a process, ...". See *Echarte*, 618 So. 2d at 194 and See *Saint Mary's Hospital Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000) –

(identifying and explaining the “new rights” created for a plaintiff under the comprehensive statutory scheme of the Medical Malpractice Act).

The new rights identified in *Echarte* as the “quid pro quo” for the plaintiff’s caps, are the very rights taken away by defendant North Florida Surgeons arbitration agreement. The plaintiff had the right to the “incentives” designed to push the defendant to resolve the case quickly and inexpensively. Rights given as a quid pro quo under a constitutional analysis are necessarily remedial rights warranting protection under Florida law.

This court also identified those “new rights” as necessary to the comprehensive statutory scheme in discussion in *Saint Mary’s Hospital*, 769 So. 2d at 970 (“...the most significant incentive for the defendant’s to concede liability and submit the issue of damages to arbitration is the \$250,000.00 cap on non-economic damages.”). By contractually taking the incentive (the lower cap) for defendant to resolve cases quickly and inexpensively, the purpose of the statutory scheme – to “require early determination of claims” – was defeated. There was no incentive for defendant to do what the legislature wanted to achieve.

In *Saint Mary’s Hospital* this court expressly held that the arbitration provisions of the Medical Malpractice Act, found at 768.207 – 768.212, Florida Statutes, are not voluntary. This Court stated:

Arbitration is not voluntary according to Section 766.207(7)(k) because “a claimant who rejects a defendant’s offer to arbitrate shall be subject to the provisions of Section 766.209(4),” which limits the non-economic damages to be awardable at trial at \$350,000.00. Therefore instead of five claimants having to divide \$250,000.00 under the arbitration limitations, they are left to divide \$350,000.00, which clearly has no effect on the equal protection concerns. (emphasis supplied)

See Saint Mary’s Hospital, 769 So. 2d at 972.

In both *Echarte* and *Saint Mary’s Hospital*, this court held that this Act uses a combination of incentives and sanctions, including a comprehensive arbitral scheme, which was not “voluntary” because sanctions could be imposed for the failure to follow it. This court found that the legislative intent of the Medical Malpractice Act could only be accomplished through this comprehensive, integrated and interrelated scheme, with a course of tiered caps and associated sanctions and incentives designed to reduce the cost of medical malpractice insurance and health care. *See Saint Mary’s Hospital* at 970 and *Echarte* at 194.

In both *Echarte* and *Saint Mary’s Hospital*, this court stated as follows:

The claimant benefits from **the requirement that the defendant quickly determined the merit of any defenses and the extent of its liability. The claimant also saves the costs of attorney and expert witness fees which would be required to prove liability.** Further a claimant who accepts the defendant’s offer to have

damages determined by an arbitration panel **receives the additional benefits of:**

1. The relaxed evidentiary standard for arbitration proceedings as set out by Section 120.58, Florida Statutes (1989);
2. Joint and several liability of multiple defendants in arbitration;
3. Prompt payment of damages after the determination by the arbitration panel;
4. Interest penalties against the defendant for failure to promptly pay the arbitration award; and
5. Limited appellate review of the arbitration award requiring a showing of “manifest injustice”. (emphasis supplied)

Echarte, 618 So. 2d at 194 and *Saint Mary’s Hospital*, 769 So. 2d at 970.

One of the key statements from this court in *Saint Mary’s Hospital* analysis of these issues is as follows:

On the other hand **the most significant incentive** for the defendants to concede liability and submit the issue of damages to arbitration **is the \$250,000.00 cap** on non-economic damages. (emphasis supplied)

Id.

The defendant points out that in *Echarte* the Court also addressed the “overpowering public necessity” portion of a *Kluger*³ analysis, in addition to, the

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

“quid pro quo” test. Defendant is correct. However, what defendant did not acknowledge is that the *Echarte* Court went on to state that there was an “overwhelming public necessity” because the problem was complex and multifaceted. The Court found that the support for this statutory scheme **required** all elements of the statute to work integrally together to achieve its stated purpose. See *Echarte*, 618 So. 2d at 197 (in addressing components of the solution for the malpractice system problems “....all [components] are necessary to address the complex problems with the multiple causes...”). The *Echarte* Court found that it was necessary to embrace “...the plan as a whole, rather than focusing on one specific part of the plan...”. *Id.*

Out of rank self interest, the defendant deftly took away the very item that the legislature, and this Supreme Court, identified as the defendant’s “most significant incentive” to expedite the case and reduce costs – the express purpose of this complex legislative scheme. See Section 766.201, Florida Statutes. This was done in a deceptive way, designed to mislead the plaintiff into believing that they were receiving full damages under Section 766.207, Florida Statutes. In any other setting this would be considered fraudulent conduct by a fiduciary. See *First Union Nat’l Bank v. Turney*, 824 So. 2d 172 (Fla. 1st DCA 2001).

IV. GESSA AND SHOTTS HOLDINGS PROVIDE THAT THE ARBITRATION AGREEMENT IS VOID.

This court decided the cases of *Gessa v. Manor Care of Florida Inc.*, 36 Florida Law Weekly S676 (Fla. November 23, 2011) and *Shotts v. OP Winterhaven Inc.*, 36 Florida Law Weekly S665 (Fla. November 23, 2011) at the end of this past year. These two cases expressly hold that when a party uses a contract of adhesion arbitration agreement to reduce or eliminate statutorily protected rights, the arbitration agreement is void as against public policy. 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; And *See Gessa* at p.11. The defendant labors greatly to argue that the Medical Malpractice Act is not a remedial act and that the arbitration agreement herein does not defeat the legislative purpose of the Medical Malpractice Act. As described above, it is wrong on both counts. *Gessa* and *Shotts* require that the arbitration agreement herein is void as against public policy.

The defendant's arbitration agreement is governed by Florida law. The defendant chose Florida law in its arbitration agreement. The Federal Arbitration Act defers to a choice of law in this contract. *See generally American Airlines Inc. v. Wolens*, 513 U.S. 219, 228 – 233 (1995) and *Volt v. Stanford University*, 489

U.S. 468 (1989). In *Volt*, the U.S. Supreme Court held that a choice of law provision incorporating state rules will not be set aside by federal law. Defendant chose to incorporate Chapter 766 and Section 766.207, as well as the Florida Arbitration Code. Thus, North Florida Surgeons is bound by Florida law, based upon its own contract.

Furthermore, validity of an arbitration agreement is controlled by principles of state contract law. See *Siefert v. U.S. Homes Corporation*, 750 Southern 2d 633, 636 (Florida 1999); *Doctors Associates Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) and *Shotts* at Pages 13 and 14.

Under Florida law, this arbitration agreement fails to comport with remedial statutory protections for plaintiff or with the legislative intent of the Medical Malpractice Act. Thus, it is void as against public policy.

V. THE DAMAGE SECTION CANNOT BE SEVERED.

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.”).

The defendant claims that the damages provision in this agreement is not part of the arbitration contract. See Ans, Br. at Pages 46 and 47. These claims are incorrect. A review of the arbitration contract reveals that the damages provisions are incorporated as part of the arbitration agreement. Page 2 and Page 3 of the 4 page agreement signed by plaintiff contained the arbitration agreement and damage limitations. App. A. Both of these pages are captioned “arbitration”.⁴ *Gessa* did not permit severance of a damage cap. *Gessa*, No. SC09-768, Slip Op. at p. 11 –

⁴ It is notable that the arbitration agreement was apparently signed only by Dr. Bowers – one of the two defendant-physicians. Dr. Piperno never signed the agreement. Defendant made inappropriate arguments in its brief about the signing of the agreement. There was no evidence submitted to this court regarding those facts because plaintiff was precluded from doing any discovery or presenting any evidence in advance of arbitration agreement being enforced. Thus there is no enforceable agreement with Dr. Piperno. Defendant’s factual arguments over how this agreement got signed should be disregarded.

(“...[Gessa] contends that the limitation of liability provisions violate public policy and are not severable. We agree.”).

VI. THIS CONTRACT FOR NECESSARY PROFESSIONAL SERVICES IS VOID.

Defendant and its Amicus argued that this contract is neither void nor unconscionable. Plaintiff was precluded from presenting any evidence regarding unconscionability. In this case, the contract at issue dealt with necessary professional services – medical care supplied by a fiduciary. Because this was a “contract” for “necessary professional services”, any limitations on the rights of a plaintiff under Florida law are void as against public policy. *See generally Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999) and *Tunkl v. Regents*, 383 P. 2d 441 (Cal. 1963).

VII. CHAPTER 766 IS A COMPREHENSIVE ARBITRAL SCHEME.

When a state law provides for arbitration and contains procedural rules, federal law will not trump the state law designed to encourage arbitration. *See Volt v. Stanford University*, 489 U.S. 468, 474 – 476 (1989) – (when a party adopts California law and the California statutes do not require the parties to proceed in arbitration for procedural reasons, the federal arbitration law would not trump the state law in the agreement). In this case, Florida law provides a comprehensive

arbitral scheme relating to medical malpractice. The arbitral scheme incentivizes arbitrations. Defendant disregarded those incentives and eviscerated the entire statutory scheme.

Because there is a comprehensive arbitral scheme, the defendant must follow the Medical Malpractice Act arbitral scheme in any case involving medical malpractice. Contrary to the claims of North Florida Surgeons and its Amicus, Plaintiff Franks has NOT taken the position that all arbitration in medical malpractice is precluded. Plaintiff offered to arbitrate pre-suit. Defendant was only willing to arbitrate if it could first eviscerate plaintiff's rights so that any arbitration was rigged in its favor. Plaintiff had no objection to arbitration under the Medical Malpractice Act.

CONCLUSION

The court should find the arbitration agreement violated public policy and is void. The case should be remanded with instructions for the lower courts to vacate their opinions 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, an evidentiary hearing should be conducted to determine if the contract was properly executed in compliance with fiduciary standards and without fraud, unconscionability or violations of public policy.

/s/

Thomas S. Edwards, Jr., Esquire

Florida Bar NO.: 395821

EDWARDS & RAGATZ, P.A.

501 Riverside Avenue, Suite 601

Jacksonville, Florida 32202

Phone : (904) 399-1609

Attorney for Donna Franks, as

P. R. of the Estate of Joseph James Franks,

Sr., Deceased

Plaintiff/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant/Petitioner Franks' Reply Brief has been furnished to **James T. Murphy, Esquire**, 1200 Riverplace Blvd., Suite 902, Jacksonville, Fl. 32207; and **Andrew S. Bolin, Esquire**, 201 North Franklin Street, Suite 2900, Tampa, Fl. 33602, **Brian S. Gowdy, Esquire**, Creed & Gowdy, P.A., 865 May Street, Jacksonville, FL. 32204-3310 and **Cynthia S. Tunnickliff, Esquire**, Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., P.O. Box 10095, Tallahassee, Fl. 32302-2095, on this 26th day of March, 2012 via USPS.

/s/
Thomas S. Edwards, Jr., Esquire
Florida Bar NO.: 395821
EDWARDS & RAGATZ, P.A.
501 Riverside Avenue, Suite 601
Jacksonville, Florida 32202
Phone: (904) 399-1609
Attorney for Donna Franks, as
P. R. of the Estate of Joseph James Franks,
Sr., Deceased
Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document is in compliance with the Rule's font requirements.

/s/
Attorney