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**THE SUPREME COURT
OF FLORIDA**

AARON FRANKLIN BROWN,

Case No.: SC13-9999

Petitioner,

Case No.: 1D12-3383

L.T. No.: 16-2010-CA-001445
(Duval County)

v.

NORTH FLORIDA SURGEONS, P.A. and
G. STEVEN WEBB, M.D.,

Respondents/Defendants.

**PETITIONER'S BRIEF IN SUPPORT OF
JURISDICTION**

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INTRODUCTION

In this brief, the parties will be referred to as follows:

Plaintiff; Petitioner; Aaron Franklin Brown

Defendants; Respondents; North Florida Surgeons, P.A.;
G. Steven Webb, M.D., Dr. Webb; P.A.

References to items in Petitioner's Appendix are given as A-

References to pages in the record transmitted to the First District are given
as Vol. ____, R ____

All emphasis in the Brief appears in the original unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This is a medical negligence case that was commenced in Duval County Circuit Court to recover for injuries allegedly sustained as a result of a gastric bypass procedure performed by Defendant, G. STEVEN WEBB, M.D. It is alleged that Dr. Webb was an employee of Co-Defendant, NORTH FLORIDA SURGEONS, P.A., and that Defendant, MEMORIAL HEALTHCARE GROUP, INC. d/b/a MEMORIAL HOSPITAL JACKSONVILLE, INC., is vicariously liable under agency theories. (Vol.1, R1)

Dr. Webb and NORTH FLORIDA SURGEONS, P.A. filed a motion to dismiss the action and compel arbitration (Vol. 1, R34). This motion was based upon an arbitration provision contained in a three-page "North Florida Surgeons Financial Agreement" signed by Mr. Brown prior to his first surgery (Vol. 1, R40-42). The motion attached a copy of the agreement which is reproduced on the following page of this brief. Significantly, the agreement contained a "Limitation of Damages" provision which Plaintiff contended was invalid.

On May 9, 2012, a non-evidentiary hearing was held by the trial court. Plaintiff filed a Memorandum In Opposition to the Motion to Dismiss and Compel in which Plaintiff argued that the agreement was invalid for numerous reasons (Vol. 2, R165).

NORTH FLORIDA SURGEONS FINANCIAL AGREEMENT

ARBITRATION

THIS AGREEMENT is made between North Florida Surgeons, P.A., their physicians, agents, employees, servants, or any of the foregoing, referred to hereinafter as "Doctor" and _____, referred to hereinafter as the "Patient". It is the intention of the parties to this Agreement to bind not only themselves, but also their heirs, personal representatives, guardians or any persons deriving claims through or on behalf of the patient.

It is understood by the Patient that he or she 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.

It is further understood, that in the event of any controversy or dispute, which might arise between the Doctor and the Patient, regardless of whether the dispute concerns the medical care rendered, including any negligence claim relating to the diagnosis, treatment, or care of the Patient, or payment of surgical fees, or any other matter whatsoever, then the parties agree that the dispute shall be resolved by arbitration as provided by the Florida Arbitration Code, Chapter 682 (Florida Statutes). This arbitration shall be in lieu and instead of any trial by Judge or Jury. Each party shall choose one arbitrator and the two arbitrators shall choose a third arbitrator. The panel of arbitrators shall hear and decide the controversy, and the decision shall be binding on all parties and may be enforced by a court of law if necessary.

In the event that either party to this Agreement refuses to go forward with arbitration, the party compelling arbitration reserves the right to proceed with arbitration, the appointment of the arbitrator, and hearings to resolve the dispute, despite the refusal to participate or the absence of the opposing party. The arbitrator shall go forward with the arbitration hearing and render a binding decision without the participation of the party opposing arbitration or despite his or her absence at the arbitration hearing.

Prior to commencing any action under this Agreement, Patient must comply with the presuit notice and investigation requirements of Chapter 766, Florida Statutes.

Limitation of Damages

Patient agrees that in the event of any dispute with Doctor, for any reason whatsoever, including any negligence claim relating to the diagnosis, treatment, or care of the Patient, Patient's non-economic damages (including, but not limited to, damages for pain and suffering) shall be limited to a maximum of \$250,000 per incident, and shall be calculated on a percentage basis with respect to capacity to enjoy life, pursuant to the formula contained in Florida Statutes, Section 766.207. For example, if the Patient's injuries resulted in a 50% reduction in his or her capacity to enjoy life, this would warrant an award of not more than \$125,000 in non-economic damages. This limit applies regardless of the number of claimants or defendants in the arbitration proceeding.

This limitation of damages provision does not limit or restrict in any way the Patient's right to seek all economic damages actually incurred by the Patient, including any medical expenses and lost wages.

The Patient has had an opportunity to read this Doctor-Patient Agreement, or to have it read to him or her if necessary. The Patient understands English or has had the Doctor-Patient Agreement translated for him or her by _____. The Patient has had an opportunity to ask questions about this Doctor-Patient Agreement. The Patient understands this Agreement and has no unanswered questions. The Patient has not been coerced or compelled to sign this Agreement, and does so of his or her own free will.

BY SIGNING THIS AGREEMENT, I ACKNOWLEDGE THAT I HAVE CAREFULLY READ, UNDERSTAND AND AGREE TO THE ABOVE TERMS AND CONDITIONS.

Patient Signature: _____ Date: 5-18-06
Parent, Guardian or Legal Representative Signature: _____
Physician Signature: _____

The reasons included that the limitation of damages, and hence entire arbitration agreement: (1) violated the public policy established for medical malpractice arbitration by *Florida Statute Chapter 766*; (2) that it was against the public policy of Florida for a physician to attempt to limit his liability before treatment; (3) that the agreement failed to contain “clear and unambiguous” language required of an exculpatory or limitation of liability provision; and (4) as a fiduciary Dr. Webb could not enter into an unfair agreement with his patient.

After taking the matter under advisement the trial court entered an order on June 15, 2012 (Vol. 2, R259-260) which granted the motion to compel arbitration and dismissed the action as against Dr. Webb and his professional association (Vol. 2, R259-260). In its brief order, the trial court found that *Franks v. Bowers*, 62 So.3d 16 (Fla. 1 DCA 2011) was “the controlling case on the subject”. (Vol. 2, R260).

Franks v. Bowers is another case involving North Florida Surgeons, P.A. and a different one of its physicians. The issue in that case is the validity of the arbitration and limitation of damages provisions contained in their “Financial Services Agreement”¹. These are the same arbitration and limitation of damages provisions involved in this case. This Court accepted conflict jurisdiction of

¹The argument made to this Court in *Franks v. Bowers* is that these provisions are contrary to the public policy established by the arbitration provisions of *Fla.Stat. Chapter 766*.

Franks v. Bowers, Case No. SC11-1258. Oral argument was heard on October 3, 2012, but the Court has not yet rendered its decision.

Plaintiff appealed the trial court order to the First District. After the briefs were submitted, Plaintiff moved the First District to stay that appeal and await a decision from this court in *Franks v. Bowers*. The First District denied that motion, entered an order dispensing with oral argument, and then on March 22, 2013, entered its *per curiam* citation opinion (A1) which affirmed the trial court order, citing to *Franks v. Bowers*. Plaintiff filed a timely motion for rehearing on April 4, 2013 which was denied by Order of April 24, 2013 (A2).

SUMMARY OF ARGUMENT

The First District Court of Appeal issued a PCA citation opinion specifically citing *Franks v. Bowers*, 62 So.3d 316 (Fla. 1 DCA 2011). This case is presently under review by this Court, *Franks v. Bowers*, 74 So.3d 1083 (Fla. 2011), Case No. SC11-1258.

When the cited authority for a Florida appellate Court's *per curiam* decision is an opinion under review (or one that has been reversed) by this Court, this Court has conflict jurisdiction to review the District Court's decision. *Jollie v. State*, 405 So.2d 418 (Fla. 1981). *Fla. Const.*, Art. V, §3(b)(4); *Fla.R.App.P.* 9.030(a)(2)(A)(iv).

This case involves exactly the same "Financial Services Agreement" and the same group of surgeons, North Florida Surgeons, P.A., that are involved in *Franks v. Bowers*. This Court's decision in that case will control the same issue in this case.

ARGUMENT

This is a straightforward case in which the argument, on the jurisdictional point, is not much longer than the summary of the argument.

The decision of the First District Court of Appeal is a “citation PCA” which cites *Franks v. Bowers*, 62 So.3d 16 (1 DCA), *review granted*, 74 So. 3d 1083 (Fla. 2011). There are limited circumstances in which a decision of this type is reviewable by this Court, but include PCA opinions which cite a case that is presently pending before this Court or a case which has been reversed by this Court. *Jollie v. State*, 405 So.2d 418 (Fla. 1981); *Walker v. State*, 682 So.2d 555 (Fla. 1996); *Taylor v. State*, 601 So.2d 540 (Fla. 1996); *Arias v. State*, 90 So.3d 269 (Fla. 2012); *Francis v. State*, 75 So.3d 237 (Fla. 2011); *Rose v. North American Van Lines*, ---So.3d---, 2009 WL 1324044, (Fla. 2009).

In *Jollie*, this Court announced the principle that it has conflict jurisdiction in a case like ours:

We thus conclude that a district court of appeal *per curiam* opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute *prima facie* express conflict and allows this Court to exercise its jurisdiction. 405 So. 2d at 420.

The cited precedent in the First District Court of Appeals decision is *Franks v. Bowers* which is presently pending before this Court. Oral arguments were heard on October 5, 2012. This Court has jurisdiction pursuant to *Jollie* and *Fla. Const.*, Art. V §3(b)(4); *Fla. R. App. P.* 9.030(a)(2)(A)(iv).

If not for the *Jollie* rule, a litigant such as Plaintiff would be in the position of losing his case on appeal simply because the case cited was decided first. As this Court recognized in *Jollie*, a District Court of Appeal does not need to write essentially the same opinion in several cases involving the same principle of law. But neither should fairness permit the first case to be decided with an opinion to seek review, while cases coming later are denied the opportunity for review in this Court.

Plaintiff requests that this Court exercise jurisdiction in this case and allow merit briefs to be submitted.

CONCLUSION

Because the PCA opinion by the First District Court of Appeal specifically cites the *Franks v. Bowers* case which is a case presently under review by this Court, this Court has jurisdiction to review the instant case. Plaintiff requests that this Court exercise that jurisdiction, accept this case for review, and allow this case to proceed before it on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Brief in Support of Jurisdiction was furnished via Electronic Mail to **JAMES T. MURPHY, ESQUIRE**, Mathis & Murphy, P.A., 1200 Riverplace Boulevard, Suite 902, Jacksonville, Florida 32207, jmurphy@mathislaw.net, Attorney for Defendants/Respondents, G. Steven Webb, M.D. and North Florida Surgeons, P.A. and **C.J. GIDEON, JR., ESQUIRE**, Gideon, Cooper & Essary, PLC, 315 Deaderick Street, Suite 1100, Nashville, Tennessee 37238, cj@gideoncooper.com, blake@gideoncooper.com, Attorneys for Memorial Healthcare Group, Inc. d/b/a Memorial Hospital Jacksonville, this 16th day of May, 2013.

/s/Robert F. Jordan
Attorney

CERTIFICATE OF FONT AND SIZE

I HEREBY CERTIFY that the foregoing brief typed herein is fourteen points and the font is Time New Roman.

s/Robert F. Jordan

Robert F. Jordan

Florida Bar No. 219355