No. _____

In The
Supreme Court of the United States

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

Petitioners,

vs.

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

Respondent.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

PETITION FOR A WRIT OF CERTIORARI

KELLY B. MATHIS
Counsel of Record
K.B. MATHIS, P.A.
1200 Riverplace Blvd., Ste. 902
Jacksonville, Florida 32207
(904) 396-5500
kmathis@mathislaw.net

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Does a state law rule denying enforcement of a private pre-dispute arbitration agreement between a physician and patient violate the Federal Arbitration Act (FAA)?

2. Can a state law rule limiting the availability of arbitration to only that specifically provided by state statute, and precluding all other arbitration, stand in light of the FAA?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT

North Florida Surgeons, P.A. is a privately owned Florida corporation and has no subsidiary or parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISION

STATUTES

OTHER AUTHORITY

PETITION FOR A WRIT OF CERTIORARI

Petitioners Gary John Bowers, M.D., Benjamin M. Piperno, III, M.D., and North Florida Surgeons, P.A. respectfully petition for a writ of certiorari to review the judgment of the Florida Supreme Court in this case.

———♦———

OPINIONS BELOW

The opinion of the Supreme Court of Florida appears at App. 1 to the Petition and is reported at 38 Fla. L. Weekly S416a (Fla. June 20, 2013).

The opinion of the Court of Appeal of Florida, First District, appears at App. 40 to the Petition and is reported at 62 So. 3d 16 (Fla. 1st DCA 2011).

The opinion of the trial court, Fourth Judicial Circuit, in and for Duval County, Florida, appears at App. 46 to the Petition and is not reported.

———♦———

JURISDICTION

This Petition seeks to review an opinion of the Supreme Court of Florida issued June 20, 2013. No rehearing was requested nor was an extension of time sought to file a Petition for a Writ of Certiorari. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1257(a).

———♦———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Supremacy Clause of the Constitution, Art. VI, Cl. 2

Provides, in pertinent part:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Florida Statutes, § 766.207(2)

> **766.207 Voluntary binding arbitration of medical negligence claims. –**
>
> * * *
>
> (2) Upon the completion of pre-suit investigation with preliminary reasonable grounds for a medical negligence claim intact, the parties may elect to have damages determined by an arbitration panel.

Florida Statutes, § 766.201(2)(b)

> **766.201 Legislative findings and intent –**
>
> * * *
>
> (b) 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.

[The entire Florida Medical Malpractice Act § 766.201, et seq. is contained in the appendix.]

The Federal Arbitration Act ("FAA")

> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 2

STATEMENT OF THE CASE

This case arises from the Florida Supreme Court's refusal to enforce a pre-dispute arbitration agreement because the physicians refused to admit liability for negligence before ever seeing the patient. The Florida Supreme Court wrongfully held that no arbitration would be allowed in Florida for medical malpractice disputes except that provided by statute. The Federal Arbitration Act clearly preempts this rule.

Although the Florida Medical Malpractice Act (the "MMA") broadly encourages the use of arbitration,

it specifically provides for arbitration only in a single, narrow context. When the healthcare provider is willing to concede liability, arbitration and a cap on damages is made available. The Florida Supreme Court's holding is that this is the *only* arbitration allowed in the State of Florida for medical negligence cases. No private arbitration agreement will be enforced. Since no other contract in the State of Florida requires one of the parties to concede liability before commencing the activity which is the subject of the contract, the holding runs afoul of the FAA.

A. The Arbitration Agreement

Petitioners Gary Bowers, M.D., Benjamin Piperno, M.D. and North Florida Surgeon, P.A. (collectively referred to as "North Florida Surgeons"), provide medical care to patients in north Florida.

On September 19, 2008, several days before his first appointment, Mr. Joseph Franks received and signed various new patient documents from North Florida Surgeons. These documents contained an arbitration agreement which provided:

> It is further understood that in the event of any controversy or dispute which may 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).

App. 2-3. The Arbitration Agreement also provided that, "this arbitration shall be in lieu and instead of any trial by jury." App. 3. The documents further contained a provision entitled, "Limitation of Damages" which limited the amount of recoverable non-economic damages to $250,000.00 per incident. App. 4. Both the Arbitration Agreement and the Limitation of Damages provisions are referred to collectively as the "Financial Agreement" by the Florida court.

B. The Underlying Allegations

On January 23, 2009, Dr. Bowers performed surgery on Mr. Franks for a left inguinal hernia. Mr. Franks suffered complications from the surgery and ultimately expired on February 3, 2009.

C. Trial Court Proceedings

Mrs. Franks, as Personal Representative, filed a Complaint in Circuit Court alleging medical negligence. App. 46. In response, North Florida Surgeons filed a Motion to Compel Arbitration. After hearing, the trial court concluded that the arbitration agreement was not unconscionable and, based on the public policy favoring arbitration, compelled the parties to arbitration. *Ibid*.

D. First District Court of Appeal

On appeal, Mrs. Franks argued that the contract was void against public policy and unconscionable. App. 41. The First District Court of Appeal upheld the arbitration agreement finding that, "the arbitration clause, as applied in this instance, affords meaningful relief and is consistent with the legislative purpose and the public policy which led to the enactment of the medical negligence provisions in Chapter 766." 62 So. 3d at 18, App. 44. The appellate court further found that, "[t]he differences between the arbitration process in Chapter 766 and arbitration under the Financial Agreement in the present case do not countermand the public policy reflected in Chapter 766 as applied to the claims presented in this case." *Id*., App. 44. The appellate court further reasoned that "[c]hapter 766 itself imposes limitations on non-economic damages and provides for arbitration as a means of dispute resolution." *Id*., App. 44.

E. Florida Supreme Court

On appeal to the Florida Supreme Court, Mrs. Franks again argued that the arbitration agreement violated public policy. App. 2. North Florida Surgeons argued that the Financial Agreement was consistent with the public policy articulated by the state legislature in the MMA and that the FAA required that the arbitration agreement be enforced.[1] The Florida

[1] No contention was made that the facts did not implicate interstate commerce or that the FAA was inapplicable. *See*

(Continued on following page)

Supreme Court quashed the decision of the First District Court of Appeal and held the arbitration agreement unenforceable.

The Florida Supreme Court held that arbitration would not be allowed in a medical malpractice action unless it exactly mirrored the narrow and limited arbitration provided in the MMA. "[W]e find that any contract that seeks to enjoy the benefits of the arbitration provisions under the statutory scheme [Medical Malpractice Act] must necessarily adopt all of its provisions." App. 19. Despite the fact that the arbitration agreement at issue contractually obligated the parties to conduct arbitration pursuant to the Florida Arbitration Code, not the MMA, the Court's decision eliminated an entire class of claims (medical negligence claims) from the availability of arbitration in the State of Florida.

The Court found the fatal flaw in the arbitration agreement to be its removal of the concession of liability which was a part of the arbitration scheme contained in the MMA. App. 19. The Court found that the "substantial incentives" for the claimants to submit to arbitration had been removed under the agreement since it "dispenses with the inherent concession of liability provided by § 766.207." App. 18. The Court's rationale is wholly contained in the following paragraph:

Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 272-273, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995).

> The incentive provided to claimants to encourage arbitration [concession of liability] is a necessary provision of the MMA. We therefore find that the Financial Agreement's avoidance of the incentive contravenes the intent of the statute and, accordingly, the public policy of this state. Because the Legislature explicitly found that the MMA was necessary to lower the cost of medical care in this State, we find that any contract that seeks to enjoy the benefits of the arbitration provisions under the statutory scheme must necessarily adopt all of its provisions.

App. 19.

The Florida court gave lip service to the preclusive effect of the FAA, but completely ignored this court's precedent. App. 21. The Florida court erroneously concluded that since the MMA did not prohibit *all* arbitration under its decision, the FAA did not apply. *Ibid*. By leaving available the single isolated form of arbitration articulated in the statute (requiring concession of liability) and completely discarding all others, the Florida court simply disregarded the FAA. The Florida court then cavalierly concluded that such a restrictive interpretation related only to the arbitration *procedures* and, therefore, was not precluded by the FAA. App. 22. The Florida court then disingenuously concluded that "the FAA does not preempt this Court's determination that the arbitration provision must follow the rules outlined in Chapter 766 because our conclusion does not impede the general enforceability of agreements to arbitrate." App. 24.

In essence, the Florida Supreme Court attempted to justify its finding that the arbitration agreement violates public policy because the legislature must have intended the limited arbitration specifically articulated to be the only type of arbitration consistent with public policy and therefore, the only type of arbitration allowed.[2] Thus, the Florida court mandated that all legislative requirements for statutory arbitration be incorporated into private contracts without recognizing that the FAA prohibits the legislature as well as the judiciary from improperly limiting arbitration agreements. *AT & T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1747, 179 L. Ed. 2d 742 (2011).

To the extent that the Florida court based its decision on the damages clause as the offending provision and the basis for denying arbitration, the FAA has still been violated.

> [A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate. '[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.'

Rent-A-Center West, Inc. v. Jackson, 130 S. Ct. 2772, 177 L. Ed. 2d 403, 412 (2010), citing *Buckeye Check*

---

[2] Of course, as pointed out by the dissent, the majority's decision actually "strikes two blows ***against*** the public policy unambiguously established by the Florida Legislature." (emphasis added). App. 38.

Cashing, Inc. v. Cardegna, 546 U.S. 440, 445, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006). The FAA required the Florida court to compel arbitration.

REASONS FOR GRANTING THE PETITION

It has been repeatedly recognized by this Court that Congress enacted the FAA in response to widespread judicial hostility to arbitration. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013). The instant case demonstrates the prevalence of this hostility even when it runs counter to clearly articulated public policy of the state legislature.

The Florida Medical Malpractice Act (the "MMA") recognized the need for prompt resolution of medical negligence claims and sought to have this objective accomplished by two components: pre-suit investigation and arbitration. § 766.201(2), Fla. Stat. The MMA provided that: "arbitration shall be voluntary and shall be available *except* as specified." *Id*. (emphasis added). The Florida Supreme Court, however, took this broadly permissive directive and restricted it to hold that arbitration shall *not* be available at all, except as specified.

The decision below warrants review for three reasons.

First, the Florida court defied this Court's settled precedent on the preemptive effect on the FAA. This Court has repeatedly made clear that, in "enacting §2

of the [FAA] Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agree to resolve by arbitration." *Southland*, 465 U.S. at 10. Because the state law decision unquestionably prohibits the enforcement of every pre-dispute arbitration agreement in medical negligence cases (for what healthcare provider would admit liability before even seeing a patient) the analysis should be straightforward and clear. The state law rule is pre-empted by the FAA. *See Concepcion*, 131 S. Ct. at 1747. The Florida court adopted a per se rule declaring arbitration agreements adopted prior to the occurrence of negligence unenforceable in medical negligence cases, just like this court specifically struck down in *Marmet*.

Second, the decision below undermines the strong federal policy favoring the enforcement of arbitration provisions as written by improperly subjecting arbitration agreements to their own special requirements. In Florida, only arbitration agreements that are the exact same as the statutory remedy will be enforced. No other contract is subject to this test. No other contract requires one of the parties to admit liability before even engaging in the activity which is the subject of the contract as a condition to enforceability. Thus, arbitration agreements are not subject to the same defenses as "any contract," but to their own special requirement that every provision is strictly dictated by statute with no ability to deviate.

Third, the Florida court grossly misinterprets and misapplies *Volt Information Sciences*. In its attempt to circumvent the FAA, the Florida court simply designates its barrier to the enforceability of arbitration agreements in medical negligence cases a mere procedural rule permitted by *Volt*. Clearly the latitude afforded by *Volt* does not allow a state to bar enforcement under the guise of a procedural rule. Indeed, even a procedure which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" cannot stand. *See Concepcion,* citing *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941). Moreover, the FAA does not allow a state to substitute its own "procedure" for the procedure for which the parties contracted.

The Florida Supreme Court's refusal to allow arbitration in medical actions should not be allowed to stand lest it give precedence to Florida, and every other state, to prohibit arbitration which varies from any of the provisions of a state statutory scheme. At the very least, the decision would allow every state to carve out a special exception to the FAA for medical negligence cases.

I. The decision below conflicts with the FAA and this Court's precedent.

This Court has stated repeatedly that the "primary purpose" of the FAA is to "ensur[e] that private

agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989); *see also Doctor's Associates v. Casarotto*, 517 U.S. 681, 688, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995). In particular, Section 2 of the FAA "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Perry v. Thomas*, 482 U.S. 483, 489, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987) (quoting 9 U.S.C. § 2).

Section 2 of the FAA therefore commands that "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, as a matter of federal law, . . . 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry*, 482 U.S. at 492 n.9 (quoting 9 U.S.C. § 2). What a State absolutely may not do is "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

And this Court has been equally explicit about the breadth of the FAA. The FAA, after all, "seeks broadly to overcome judicial hostility to arbitration agreements . . . in both federal and state courts." *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265,

272-273, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995) (rejecting narrow construction of "interstate commerce" language that would "carv[e] out an important statutory niche in which a State remains free to apply its antiarbitration law or policy"). Its reach "coincid[es] with that of the Commerce Clause." *Id*. at 274-275 (citing, inter alia, *Perry*, 482 U.S. at 490, and *Southland*, 465 U.S. at 14-15). As such, federal law permits "only two limitations on the enforceability of arbitration provisions": (1) "they must be part of . . . a contract 'evidencing a transaction involving commerce'" and (2) "such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.'" *Southland*, 465 U.S. at 10-11 (quoting 9 U.S.C. § 2; emphasis added). "[N]othing in the [FAA] indicat[es] that this broad principle of enforceability is subject to any additional limitations under State law." *Id.* at 11. Once again, however, the state court seeks to create additional limitations to the enforceability of an arbitration agreement. "Section 2 . . . embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable upon 'such grounds as exist at law or in equity for the revocation of any contract.'" *Perry*, 482 U.S. at 489 (emphasis added).

The legislative findings and intent of Florida's Medical Malpractice Act (the "MMA") are clearly set forth in § 766.201, Fla. Stat. The MMA was passed in response to a medical negligence crisis by virtue of

a dramatic increase in medical malpractice liability insurance premiums. The Florida Legislature found:

> 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.

§ 766.201(2), Fla. Stat. Section 766.207 provides for voluntary, binding arbitration of medical negligence claims which allows only damages to be determined by the arbitration panel (i.e., the defendant must concede liability.) This is the only binding arbitration available in the MMA.[3] The binding arbitration outlined in § 766.207 of the MMA applies to the entire class of claims known as medical negligence claims. By limiting arbitration to only that contained in the MMA, the Florida court has adopted a categorical rule denying enforcement of private arbitration agreements in medical negligence cases.

The Florida court's decision effectively prohibits enforcement of arbitration agreements in medical negligence cases. The only "exception" is when a doctor concedes liability before ever seeing the patient,

---

[3] A pre-existing method was also available for non-binding arbitration (§ 766.107, Fla. Stat.) as a method of settlement.

an exception which is functionally non-existent. The Florida court decision likewise precludes post dispute arbitration agreements that do not include a concession of liability. In reality, cases where the liability is so clear to involve a concession of liability are simply settled rather than litigated. In essence, the Florida court has stripped parties of the right to enter into private contracts for the arbitration of an entire class of claims. All medical negligence claims are banned from arbitration.

The Florida court has said that if the claim involves medical negligence, an arbitration agreement between the parties simply will not be enforced. A private arbitration agreement that must exactly mirror a statutory provision is superfluous. Who would enter into a contract where every provision must be already available by statute? By so holding, the Florida court has functionally invalidated all arbitration agreements which are protected by the FAA.

The Florida court decision is in direct contravention to *Southland Corp. v. Keating*, *Concepcion*, and *Marmet Health Care Center v. Brown*, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012). In *Southland*, the California Supreme Court interpreted the State's franchise investment law to require judicial consideration of franchise claims. Here, the Florida court interpreted the MMA to require judicial consideration of medical negligence claims, save for the single exception contained in the MMA itself. The Florida court refused to enforce the parties' contract to arbitrate their medical negligence claim since it differed

from the requirements of the MMA. As a result, only a judicial forum remains for resolution of contested medical negligence claims.

The Florida court has made arbitration in medical negligence cases functionally unavailable. As this Court pointed out in *Southland*, "we see nothing in the Act [FAA] indicating that the broad principle of enforceability is subject to any additional limitations under state law." *Id*. at 11. However, here the Florida court has imposed such limitations to the enforceability of arbitration agreements, contrary to the FAA. In *Southland*, this Court recognized the scope of the FAA to deal with situations where state courts followed state laws which inadequately provided for "technical arbitration by which, if you agree to arbitrate under the method provided by the statute, you have an arbitration by statute[;] but [the statutes] [had] nothing to do with validating the contract to arbitration." *Id.* at 14, citing Senate Hearing on FAA.

The FAA actually "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland* at 858; reemphasized in *Mastrobuono*. Here, the Florida court completely negated the private agreement of the parties to resolve medical negligence claims by arbitration. *Southland* held that since the California Franchise Investment law did not allow for the enforcement of private arbitration agreements for the resolution of claims falling under its purview, it violated the FAA. *Id*. at 15-16. Likewise, the Florida court's construction of

the MMA to prohibit the enforcement of private arbitration agreements also violates the FAA.

To the extent that the Florida court preserved, *in theory*, some limited right to arbitrate medical negligence claims as set forth in the MMA, it does not resolve FAA preemption. The Florida court has functionally abrogated the right to contract for arbitration in all medical negligence cases and, in reality, precluded the arbitration of the issue of liability in all medical negligence cases. Under no circumstance does the arbitration provided by the MMA allow healthcare providers to contest the issue of liability. Since this is the only arbitration available in Florida for medical negligence cases, there simply is no opportunity to contract for the arbitration of liability. A similar rule applied to judicial proceedings would be shocking, i.e., a healthcare provider would only be entitled to a trial upon the concession of liability. Here, however, the Florida court had no compunction applying this precise limitation to arbitration proceedings. This judicially imposed distinction violates the FAA.

The West Virginia Supreme Court similarly ignored the effect of the FAA in *Marmet Health Care Center* "by misreading and disregarding the precedents of this Court's interpretations of the FAA." *Id.* at 1202. In *Marmet*, the state court held the FAA inapplicable to "pre-dispute arbitration agreements that apply to claims for personal injury or wrongful death against nursing homes." *Id*. at 1203. Substitute

the word "doctors" for the words "nursing homes" and this case presents the same issue.

This Court, in *Marmet*, strongly advised that, "[w]hen this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." *Id.* at 1202. In citing § 2 of the FAA, this Court noted that: "The Statute's text includes no exception for personal-injury or wrongful-death claims. It 'requires courts to enforce the bargain of the parties to arbitrate.'" *Id*. at 1203, citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985). Here, the Florida court seeks the same exception, this time for medical negligence claims.

Since the Florida court has created a rule which prohibits outright the arbitration of a particular type of claim, to wit: contested medical negligence actions, the analysis should be straightforward. The decision is displaced by the FAA. *See Concepcion* at 752. The fact that other types of claims, i.e., uncontested medical negligence claims, are theoretically arbitrable does nothing to prevent the head-on conflict with the FAA. The *Marmet* holding is clear.

The fact that an arbitration agreement differs from a statutory remedy is not a basis for denying enforcement of the agreement. Indeed, it is the reason for the need of the FAA in the first place. The cases are replete with examples of arbitration agreements providing remedies that differ from a state statutory scheme and the Federal Courts determining

that the FAA required enforcement of the arbitration agreements nonetheless. *See, e.g.*, *Perry*, *Southland*, *Casarotto*. It is an unavailing argument to contend that the FAA does not require enforcement of arbitration agreements which contravene state statutes. Yet, that is the essence of the Florida court decision.

II. The Florida court rule clearly discriminates against arbitration clauses.

In no other context have the Florida courts held that only contracts which exactly mirror a statutory provision are enforceable. Indeed, such a holding would be otherwise nonsensical since private parties do not need to enter into a contract to establish rights and obligations which exist independently of the contract. Here, however, the Florida court has expressly held that an arbitration agreement "must necessarily adopt all of its [the MMA's] provisions." App. 19. Thus, like *Southland*, the defense to enforcement of arbitration agreements in medical negligence cases is not a defense that exists as to "any contract," but one that exists only for arbitration agreements.

In Florida, arbitration agreements alone must contain only, and all of, the terms of the statute. No other contract is so constricted. "A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the] requirements of § 2." *Perry v. Thomas*, 482 U.S. 483, 492 n.9, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987).

A state law decision simply cannot single out an arbitration provision for suspect status. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996). This Court struck down just such a state law rule in *Casarotto*. In *Casarotto*, the Montana law at issue declared arbitration clauses unenforceable unless the contract contained a notice, typed in underlined, capital letters, on the first page of the contract, that it was subject to arbitration. This Court clearly recognized that this notice requirement related solely to contracts subject to arbitration and not any other contract. Respondents argued that this state law rule was not preempted by the FAA since the notice requirement did not preclude arbitration agreements altogether, but simply attached conditions to their enforcement. This Court held:

> Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. See *Allied-Bruce*, 513 U.S. at 281; *Perry*, 482 U.S. at 493 n.9. By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed "upon the same footing as other contracts." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 41 L.Ed. 2d 270, 94 S.Ct. 2449 (1974) (internal quotation marks omitted). Montana's § 27-5-114(4) directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a

> special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana Statute with respect to arbitration agreements covered by the Act.

Id. at 687. Likewise, Florida's state law rule that only arbitration agreements which mirror the statutory provisions are enforceable imposes a requirement applicable not to *any* contract, but only to arbitration agreements. Thus, it violates the FAA.

Even if this Court determines that the thin reed of arbitration left by the Florida Supreme Court means that it is not a categorical denial of arbitration, it still violates the rule in *Concepcion*. *Concepcion* recognized the power of this Court to analyze the *effect* of the ruling to determine if it creates an obstacle to the accomplishment of the FAA's objectives. *Concepcion* at 759. The FAA preempts not only outright prohibition of the arbitration of a particular type of claim but also "a doctrine normally thought to be generally applicable, such as duress or . . . unconscionability" that is "applied in a fashion that disfavors arbitration." *Id.* at 752. As has been recognized, "*Concepcion* outlaws discrimination in state policy that is unfavorable to arbitration. . . ." *Mortensen v. Bresnan Communications, LLC*, ___ F.3d ___ (9th Cir., decided July 15, 2013). Here, by wiping out all realistic arbitration in the medical negligence context, the state law rule not only discriminates against arbitration but eviscerates it.

In *Concepcion*, this Court considered whether the FAA prohibited states from imposing conditions on the enforceability of certain arbitration agreements and held that it cannot do so. Here, however, the Florida court has specifically conditioned the enforceability of medical negligence arbitration agreements based on its perceived fairness of the terms of the agreement. By holding that only the arbitration agreements which contain the benefits to the patient that are contained in the statutory version of arbitration are enforceable, the Court is imposing a new standard applicable not to any contract, but only to arbitration agreements. In other words, a defense to arbitration is simply that the terms of the private agreement differ from the statute.

In *Concepcion*, this Court easily recognized that the requirement of mandating certain terms in the arbitration agreement, such as the requirement to apply the Federal Rules of Evidence, judicially monitored discovery or ultimate disposition by a jury would violate the FAA. Here, the conditional requirement is the imposition of a concession of liability and all other applicable statutory requirements, a condition that goes even more fundamentally to the availability of arbitration. No greater obstacle to the accomplishment of the FAA's objectives exists than to so narrowly define the circumstances in which arbitration is available as to make it functionally nonexistent. By limiting arbitration only to the issue of damages, the Florida court has completely removed the ability to arbitrate the issue of liability. Although

the parties may agree to limit the issues subject to arbitration, *Id*. at 754, this Court has never allowed the State to do so in complete derogation of the clear terms of the parties' agreement.

III. The Florida court's decision contorts *Volt Information Sciences* beyond recognition.

The Florida court improperly interpreted *Volt Information Sciences* to hold that, "a state statute is not preempted by the FAA where the parties have agreed that their agreement will be governed by state law." App. 22. The *Volt* decision did not hold that the parties can completely obviate the FAA by agreeing to be governed by state law. Such a construction completely guts the FAA and disregards the fundamental premise of the Supremacy Clause. A choice of law provision does not mean that federal law is inapplicable since the doctrine of pre-emption applies to the laws of every state. *See Mastrobuono* and *Perry*.

After quoting extensively from *Volt*, the Florida court held that *Volt* confirmed that the FAA did not preempt the Court's holding that arbitration agreements must follow the "rules" outlined in the MMA since the decision did not "impede the general enforceability of agreements to arbitrate." App. 24. In essence, the Florida court uses *Volt* to justify imposing conditions and limitations on the ***right*** to arbitrate rather than the right to choose the ***procedure*** by which the parties arbitrate. However, "[t]he state law rule examined in *Volt* determined only the

efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself." *Casarotto* at 1656-1657.

Indeed, the Florida court strains credulity to call a pre-dispute concession of liability a mere "procedural rule." App. 24. The "rule" enunciated by the Florida court goes to the heart of enforceability, not the steps parties must take after the right to arbitrate is established. Even accepting the Florida court's word game that such a complete bar constitutes a mere "rule," the "rule" is such an extreme impediment to application of the FAA that it should likewise be stricken. "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion* at 758; *cf. Volt*, n.5, recognizing that the California rules fostered the federal policy favoring arbitration and thus were not preempted by the FAA. The Florida court's "rule" completely eviscerates arbitration agreements in medical negligence cases and therefore violates the FAA.

Volt Information Sciences holds that the FAA allows the *parties* to choose the rules by which the arbitration will be conducted. It does not allow the Court to impose rules to which the parties never agreed. Again, the parties to the arbitration agreement chose the Florida Arbitration Code, not the MMA. In *Volt*, this Court has recognized that § 4 of the FAA confers "the right to obtain an order directing that 'arbitration proceed *in the manner provided for in* [*the parties'*] *agreement*.' " *Volt* at 474 (emphasis in original).

Volt does not prohibit private parties from agreeing to procedural rules. Here, however, the parties contractually agreed to the procedural rules contained in the Florida Arbitration Code, not the MMA. If the central purpose of the FAA is to enforce private agreements according to their terms, the decision below completely fails. In recognizing that the FAA does not prohibit procedural rules, this Court placed great emphasis on the fact that the "*parties* are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479 (emphasis added). The fundamental premise of the FAA is to ensure "private agreements to arbitrate are enforced according to their terms." *Id*. "Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *Concepcion* at 1752. Here, it is the State which seeks to saddle the parties with procedural rules that they did not choose and which completely impede enforcement of the arbitration agreement, despite their clear intention to the contrary. Rather than "rigorously enforcing" the arbitration agreement by its terms, the Florida court imposes conditions that are completely unworkable. *See Am. Express Co. v. Italian Colors Rest*., 133 S. Ct. 2304, 186 L. Ed. 2d 417, 424 (2013). As a result, the FAA precludes its holding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated September 13, 2013.

Respectfully submitted,

KELLY B. MATHIS
Counsel of Record
K.B. MATHIS, P.A.
1200 Riverplace Blvd., Ste. 902
Jacksonville, Florida 32207
(904) 396-5500
kmathis@mathislaw.net

Counsel for Petitioners

Supreme Court of Florida

No. SC11-1258

DONNA FRANKS, etc., Petitioner,

vs.

GARY JOHN BOWERS, M.D., et al.,

Respondents.

[June 20, 2013]

PERRY, J.

Joseph Franks sought medical treatment from Dr. Gary John Bowers and North Florida Surgeons, P.A. (NFS). Subsequently, Joseph suffered a large retroperitoneal hematoma at the operative site due to the external iliac vein being lacerated during surgery. He remained hospitalized until his death. Joseph's wife, Donna Franks, filed a complaint against Bowers and NFS for medical malpractice resulting in wrongful death. Bowers and NFS moved to compel arbitration based on the Financial Agreement signed by Joseph prior to surgery. The trial court entered the order compelling arbitration, "with substantial reservations," and the First District Court Appeal affirmed on appeal. Donna Franks, as personal representative of the Estate of Joseph Franks, seeks review of *Franks v. Bowers,* 62 So. 3d 16 (Fla. 1st DCA 2011), on the ground that it expressly and directly conflicts with this Court's decision in *University of Miami v. Echarte,* 618 So. 2d 189 (Fla. 1993). We have jurisdiction. *See* art. V, § 3(b)(3), Fla. Const.

Franks alleges that the Financial Agreement is void under the public policy enunciated in chapter 766, Florida Statute (2008), because the agreement does not provide the same remedies as provided by the Legislature. Because we find that the damages clause of the arbitration provision of the Financial Agreement violates the public policy pronounced by the Legislature in the Medical Malpractice Act (MMA), and we further find that the offensive clause is not severable from the remainder of the arbitration provision, we quash the decision below compelling arbitration under the agreement with direction for the court to proceed under the guidelines provided in chapter 766, Florida Statutes.

STATEMENT OF THE CASE AND FACTS

On September 25, 2008, Joseph sought medical treatment from Dr. Bowers and NFS. Joseph signed the Financial Agreement prior to his visit. The Financial Agreement was four pages long and included a signature line on the first, third, and fourth pages. The second page included the following provision:

> 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 of 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 Doctor-Patient Agreement refuses to go forward with arbitration, the party compelling arbitration reserves the right to proceed with arbitration, the appointment of the arbitrator, and hearing 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 Doctor-Patient Agreement, Patient must comply with the presuit notice and investigation requirements of Chapter 766, Florida Statutes.

The Patient understands that the Patient has a constitutional right under Article I, Section 21 of the Florida Constitution of Access to Courts as follows: “the courts shall be open to every person for redress of any

> injury, and justice shall be administered without sale, denial or delay." The Patient understands and acknowledges that signed this Doctor-Patient Agreement waives this constitutional right.

Within the same section, this page contains a subheading titled "Limitation of Damages," which provides:

> 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.

On January 23, 2009, Dr. Bowers performed surgery on Joseph without reported complications. Joseph was discharged to his home. On January 25, 2009, Joseph developed pain and he and Donna went to the emergency room. A CT scan revealed a large retroperitoneal hematoma from the operative site due to the external iliac vein being lacerated during surgery. Joseph remained hospitalized until his death on February 3, 2009.

Donna Franks filed a complaint alleging medical malpractice and wrongful death. NFS filed a motion to compel arbitration, which was granted. Franks appealed the order compelling arbitration, arguing that the trial court misconstrued the agreement or that it was otherwise void as being contrary to public policy and unconscionable. *Franks,* 62 So. 3d at 17. The First District Court of Appeal disagreed and held that "the court properly construed and applied the arbitration clause." *Id.* Furthermore, the First District held,

> The differences between the arbitration process in Chapter 766 and arbitration under the Financial Agreement in the present case do not countermand the public policy reflected in Chapter 766, as applied to the claims presented in this case. Unlike the nursing home cases, the Financial Agreement does not eliminate statutory rights which are essential in effectuating legislative intent, or policy. Instead, the arbitration clause, as applied in this instance, affords meaningful relief and is consistent with the legislative purpose and the public policy which led to the enactment

> of the medical negligence provisions in Chapter 766.

Id. at 18. Lastly, the First District found that Franks failed to demonstrate either procedural or substantive unconscionability. *Id.* We disagree with the district court's conclusion that the agreement is consistent with the legislative purpose and public policy contained within chapter 766, and hold that the Limitation of Damages provision contravenes the public policy enunciated therein. We therefore quash the First District's decision and remand for proceedings consistent with this decision.

DISCUSSION

The MMA provides, in relevant part:

> (1) Voluntary binding arbitration pursuant to this section and ss. 766.208-766.212 shall not apply to rights of action involving the state or its agencies or subdivisions, or the officers, employees, or agents thereof, pursuant to s. 768.28.
>
> (2) Upon the completion of presuit investigation with preliminary reasonable grounds for a medical negligence claim intact, the parties may elect to have damages determined by an arbitration panel. Such election may be initiated by either party by serving a request for voluntary binding arbitration of damages within 90 days after service of the claimant's notice of intent to initiate litigation upon the defendant. The evidentiary

standards for voluntary binding arbitration of medical negligence claims shall be as provided in ss. 120.569(2)(g) and 120.57(1)(c).

(3) Upon receipt of a party's request for such arbitration, the opposing party may accept the offer of voluntary binding arbitration within 30 days. . . .

. . . .

(7) Arbitration pursuant to this section shall preclude recourse to any other remedy by the claimant against any participating defendant, and shall be undertaken with the understanding that damages shall be awarded as provided by general law, including the Wrongful Death Act, subject to the following limitations:

(a) Net economic damages shall be awardable, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments.

(b) Noneconomic damages 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, so that a finding that the claimant's injuries resulted in a 50-percent reduction in his or her capacity to enjoy life would warrant an award of not more than $250,000 noneconomic damages.

(c) Damages for future economic losses shall be awarded to be paid by periodic payments

pursuant to s. 766.202(9) and shall be offset by future collateral source payments.

(d) Punitive damages shall not be awarded.

(e) The defendant shall be responsible for the payment of interest on all accrued damages with respect to which interest would be awarded at trial.

(f) The defendant shall pay the claimant's reasonable attorney's fees and costs, as determined by the arbitration panel, but in no event more than 15 percent of the award, reduced to present value.

(g) The defendant shall pay all the costs of the arbitration proceeding and the fees of all the arbitrators other than the administrative law judge.

(h) Each defendant who submits to arbitration under this section shall be jointly and severally liable for all damages assessed pursuant to this section.

(i) The defendant's obligation to pay the claimant's damages shall be for the purpose of arbitration under this section only. A defendant's or claimant's offer to arbitrate shall not be used in evidence or in argument during any subsequent litigation of the claim following the rejection thereof.

(j) the fact of making or accepting an offer to arbitrate shall not be admissible as evidence of liability in any collateral or subsequent proceeding on the claim.

(k) Any offer by a claimant to arbitrate must be made to each defendant against whom the claimant has made a claim. Any offer by a defendant to arbitrate must be made to each claimant who has joined in the notice of intent to initiate litigation, as provided in s. 766.106. A defendant who rejects a claimant's offer to arbitrate shall be subject to the provisions of s. 766.209(3). A claimant who rejects a defendant's offer to arbitrate shall be subject to the provisions of s. 766.209(4).

(l) The hearing shall be conducted by all of the arbitrators, but a majority may determine any question of fact and render a final decision. The chief arbitrator shall decide all evidentiary matters.

The provisions of this subsection shall not preclude settlement at any time by mutual agreement of the parties.

§766.207(1)-(3), (7), Fla. Stat. (2008).

(1) A proceeding for voluntary binding arbitration is an alternative to jury trial and shall not supersede the right of any party to a jury trial.

(2) If neither party request or agrees to voluntary binding arbitration, the claims shall proceed to trial or to any available legal alternative such as offer of and demand for judgment under s. 768.79 or offer of settlement under s. 45.061.

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

(a) The claim shall proceed to trial, and the claimant, upon proving medical negligence, shall be entitled to recover damages subject to the limitations in s. 766.118, prejudgment interest, and reasonable attorney's fees up to 25 percent of the award reduced to present value.

(b) The claimant's award at trial shall be reduced by any damages recovered by the claimant from arbitrating codefendants following arbitration.

(4) If the claimant rejects a defendant's offer to enter voluntary binding arbitration:

(a) The damages awardable at trial shall be limited to net economic damages, plus noneconomic damages, not to exceed $350,000 per incident. The Legislature expressly finds that such conditional limit on noneconomic damages is warranted by the claimant's refusal to accept arbitration, and represents an appropriate balance between the interests of all patients who ultimately pay for medical negligence losses and the interests of those patients who are injured as a result of medical negligence.

(b) Net economic damages reduced to present value shall be awardable, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments.

> (c) Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to s. 766.202(9), and shall be offset by future collateral source payments.
>
> (5) Jury trial shall proceed in accordance with existing principles of law.

§ 766.209, Fla. Stat. (2008). We previously discussed, in depth, the intent and purpose of these provisions, stating:

> The Legislature enacted the statutory scheme at issue following the recommendations and study made by the Academic Task Force for Review of the Insurance and Tort Systems (Task Force). In studying medical malpractice insurance costs, the Task Force found that the primary cause of increased malpractice premiums has been the substantial increase in loss payments to claimants and not excessive insurance company profits nor the insurance industry underwriting cycle. Further, the Task Force found that the dramatic increase in the size of amounts of paid claims was the major cause of the increase in total claims payments; the frequency of claims against physicians increased only slightly. In particular, the size and increasing frequency of the very large claims were found to be a problem. Finally, attorneys' fees and other litigation costs were found to represent approximately 40 percent of the total costs of insurance companies, while claimants received 43.1 percent of insurers' total incurred costs. During the past eleven years,

> the average cost of defending a malpractice claim had increased at an annual compound rate of seventeen percent.
>
> Academic Task Force for Review of the Insurance and Tort Systems, Medical Malpractice Recommendations at 10-11 (Nov. 6, 1987) (footnotes omitted) (on file with H.R. Comm. On Ins., The Capitol). The Task Force recommended implementation of a medical malpractice plan designed to stabilize and reduce medical liability premiums. The recommended plan included that parties conduct a reasonable investigation preceding malpractice claims and defenses in order to eliminate frivolous claims and defenses, and incentives for parties to arbitrate medical malpractice claims in order to reduce litigation expenses. The Legislature adopted the Task Force's recommendations and findings in chapter 88-1, Laws of Florida, and section 766.201, Florida Statutes (Supp.1988).

Echarte, 618 So. 2d at 191-92 (footnotes omitted). We explained why the Legislature rejected a no fault system similar to the one adopted by the Financial Agreement, stating:

> [M]edical malpractice arbitration statutes are less restrictive than the workers' compensation statutes, and . . . the Task Force specifically considered and rejected both a no-fault alternative system of compensation and a mandatory insurance pool as means to

> control increases in the medical malpractice insurance rates.

Echarte, 618 So. 2d at 194.

> Furthermore, in considering a no-fault system, the Task Force stated that for most medical injuries the Task Force does not recommend a no fault compensation alternative to the tort system. This negative conclusion is compelled by findings that a comprehensive no fault system for all medical injures would be prohibitively expensive, many times more expensive that the existing medical malpractice systems. In order to develop a no fault system at reasonable cost, it is necessary to establish a framework for distinguishing compensable events from non-compensable events. In most areas of medical injury, this is not economically feasible at the present time. For example, defining the compensable event for a no fault plan to cover medical injuries in emergency rooms and trauma centers would require terms broad enough to include injuries of every degree to any part of the body resulting from an unlimited variety of medical interventions. Because of its expansive potential, such a broad definition of the compensable event would make no fault insurance costs prohibitively expensive, at worst, and impossible to predict, at best.
>
> Medical Malpractice Recommendations at 31-32. The Task Force also rejected a proposal which would require all physicians to

> buy into a state-operated insurance pool in order to provide a mandatory first layer of medical malpractice insurance. The Task Force explained that such a plan "could effectively destroy any existing vitality and competitiveness in the private market for medical malpractice insurance in the state of Florida." Medical Malpractice Recommendations at 49. Further, the Task Force noted that placing all physicians in a state-operated insurance pool would have the effect of charging physicians who practice in low risk areas of medicine higher premiums in order to subsidize the high cost of premiums for physicians who practice in high risk areas. The Task Force specifically rejected such mandatory insurance plans as being overly intrusive into the insurance market and economically undesirable. *Id.*
>
> The Task Force's recommendations to the Legislature not to adopt a no-fault system or mandatory insurance program are based on an extensive study of the complex causes of the increases in medical malpractice rates. According to the Task Force's report the solutions the Legislature implemented to meet the workers' compensation problem are not effective to answer the medical malpractice insurance liability crisis. The unique facts surrounding medical malpractice required the Legislature to tailor a different solution to solve the crisis.

Echarte, 618 So. 2d at 194-95. Finally, relating to the purpose of the MMA, we accepted the Legislature's

statement of finding presented in the preamble of the chapter, stating:

> [T]he Legislature set out its factual findings in the preamble of chapter 88-1, which initially enacted the Task Force's recommendations. In fact, the preamble in chapter 88-1 states in part:
>
> [I]t is the sense of the Legislature that if the present crisis is not abated, many persons who are subject to civil actions will be unable to purchase liability insurance, and many injured persons will therefore be unable to recover damages for either their economic losses or their non-economic losses. . . .
>
> Ch. 88-1. This preamble clearly states the Legislature's conclusion that the current medical malpractice insurance crisis constitutes an "overpowering public necessity." Moreover, the Legislature made a specific factual finding that "[m]edical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased unavailability of malpractice insurance for some physicians." § 766.201(1)(a).
>
> The Legislature's factual and policy findings are supported by the Task Force's findings in its report.

Echarte, 618 So. 2d at 196 (emphasis added). Accordingly, we have clarified the stated policy and intent of the Act – to address the "overpowering public necessity" created by the medical malpractice insurance

crisis. And, the MMA does "redress an existing grievance." Specifically, the MMA presents the Legislature's careful balancing of the rights of patients and the needs of doctors in order to address the medical malpractice crisis. Further, the MMA was enacted to limit the remedies available to patients, which represents a change to the remedy available to patients.

We have said that parties are free to contract around a state law so long as there is nothing void as to public policy or statutory law. *See, e.g., Green v. Life & Health of America,* 704 So. 2d 1386, 1390 (Fla. 1998). However, a contractual provision that contravenes legislative intent in a way that is clearly injurious to the public good violates public policy and is thus unenforceable. *See generally Mullis v. State Farm Mut. Auto Ins. Co.,* 252 So. 2d 229 (Fla. 1971). We do not take lightly the freedom of contract, but we find that the Financial Agreement blatantly contravenes the intent provided by the Florida Legislature, discussed above.

We have previously stated that "[t]he arbitration provisions were enacted to provide '[S]ubstantial incentives for both claimants and defendants to submit their cases to binding arbitration, thus reducing attorneys' fees, litigation costs, and delay.'" *Chester v. Doig,* 842 So. 2d 106, 107 (Fla. 2003) (quoting § 766.201(2)(b), Fla. Stat. (1997)). The Financial Agreement requires the parties to submit to financial arbitration and therefore meets the first stated goal of the MMA. However, the "substantial incentives" for the claimants to submit to the arbitration have been

removed under the agreement. We previously explained the incentives for claimants to voluntarily submit to such a process, stating:

> The claimant benefits from the requirement that a defendant quickly determine 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 a 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."
>
> On the other hand, the most significant incentive for defendants to concede liability and subject the issue of damages to arbitration is the $250,000 cap on noneconomic damages. This limitation provides liability insurers with the ability to improve the predictability of the outcome of claims for the purpose of loss planning in risk assessment for premium purposes.

St. Mary' Hosp., Inc. v. Phillipe, 769 So. 2d 261, 970 (Fla. 2000) (quoting *Echarte,* 618 So. 2d at 194); *see*

also N. Miami Med. Ctr. v. Prezeau, 793 So. 2d 1142, 1144-45 (Fla. 3d DCA 2001) ("It is apparent from the clear and unambiguous language of the statute that the benefit of the statutory cap on noneconomic damages is solely reserved for a defendant who is conceding liability and participating in arbitration. This benefit is part of the statutory scheme to encourage the arbitration of medical negligence claims.")

Under the statute, Franks would be entitled to receive a maximum of $1 million if the case proceeded to court without either party seeking arbitration, or if Dr. Bowers and NFS refused to proceed with arbitration under conditions of section 766.207. *See* § 766.209, Fla. Stat. (2008) (providing that the caps under § 766.118, Fla. Stat. (2008), apply when voluntary arbitration is refused.); § 766.118(2)(a)-(b), Fla. Stat. (2008) ("With respect to a cause of action for . . . wrongful death arising from medical negligence of practitioners, . . . noneconomic damages shall not exceed $500,000 per claimant. . . . [I]f the negligence resulted in a . . . death, the total noneconomic damages recoverable from all practitioners . . . under this paragraph shall not exceed $1 million."). Under the Financial Agreement, Franks could only receive a maximum of $250,000. Further, the agreement dispenses with the inherent concession of liability provided by section 766.207. *See* § 766.207(2), Fla. Stat. (2008) ("[T]he parties may elect to have damages determined by an arbitration panel."). This Court has previously stated that the concession of liability is one of the incentives provided by the chapter. *See St. Mary's Hospital,* 769 So. 2d at 970.

The incentive provided to claimants to encourage arbitration is a necessary provision of the MMA. We therefore find that the Financial Agreement's avoidance of the incentive contravenes the intent of the statute and, accordingly, the public policy of this state. Because the Legislature explicitly found that the MMA was necessary to lower the costs of medical care in this State, we find that any contract that seeks to enjoy the benefits of the arbitration provisions under the statutory scheme must necessarily adopt all of its provisions.

We now turn to whether the objectionable provision is severable. NFS argues that the arbitration provision of the financial agreement is valid and that the limitation of damages provision is a separate and severable provision. We disagree. A plain reading of the agreement and its provisions provides that the Limitation of Damages provision is not severable from the Arbitration provision, without which the trial court's order compelling arbitration is void. Because we are reviewing the propriety of the order compelling arbitration, we do not address whether the arbitration provision is severable from the Financial Agreement.

We have previously set forth the following standard for determining whether a contractual provision is severable from the whole:

> As to when an illegal portion of a bilateral contract may or may not be eliminated leaving the remainder of the contract in force

> and effect, the authorities hold generally that a contract should be treated as entire when, by a consideration of its terms, nature, and purpose, each and all of its parts appear to be interdependent and common to one another and to the consideration. *Stokes v. Baars,* 18 Fla. 656; 12 Am.Jur., Contracts, sec. 316. Stated differently, a contract is indivisible where the entire fulfillment of the contract is contemplated by the parties as the basis of the arrangement. *Hyde & Gleises v. Booraem & Co.,* 16 Pet. 169, 10 L.Ed. 925. On the other hand, a bilateral contract is severable where the illegal portion of the contract does not go to its essence, and where, with the illegal portion eliminated, there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other. Williston on Contracts, rev. ed., Vol. 6, sec. 1782.
>
> Whether a contract is entire or divisible depends upon the intention of the parties. *Ireland v. Craggs,* 5 Cir., 56 F.2d 785. And this is a matter which may be determined "by a fair construction of the terms and provisions of the contract itself, and by the subject matter to which it has reference." 12 Am.Jur., Contracts, sec. 315.

Local No. 234 v. Henley & Beckwith, Inc., 66 So. 2d 818, 821-22 (Fla. 1953). "To the extent this claim is based on written materials before this Court, the issue is a pure question of law, subject to de novo

review." *Shotts v. OP Winter Haven, Inc.,* 86 So. 3d 456, 475 (Fla. 2011) (citing *Aills v. Boemi,* 29 So. 3d 1105, 1108 (Fla. 2010)).

The Financial Agreement is a four-page document containing twelve separate headings. Joseph's signature appears on pages two, three, and four of the agreement. The Arbitration provision begins on page two and continues on page three. The Limitation of Damages clause appears as a subheading under the Arbitration provision on page two. Because of this format, it does not appear that either party intended for the Limitation of Damages provision to be separated from the Arbitration provision. A further indication of this intent is that the signature acknowledging the agreement appears on page three under "Arbitration, continued." Additionally, the plain language of the Limitation of Damages provision supports this conclusion: "This limit applies regardless of the number of claimants or defendants in the arbitration proceeding," Based on the foregoing, we find that the Limitation of Damages clause is not severable from the Arbitration provision of the Financial Agreement.

Lastly, we address whether the Federal Arbitration Act (FAA) precludes our finding expressed herein. Dr. Bowers argues that if the MMA is interpreted to restrict the enforcement of the arbitration clause in the Financial Agreement, then the FAA preempts state law. Because we find that the MMA does not preclude all arbitration – and, in fact encourages arbitration under the specified guidelines – and that our decision here is fact-specific pertaining only to the particular

agreement before us and does not prohibit all arbitration agreements under the MMA, we likewise find that the FAA does not preempt state law or preclude our decision here.[1] The FAA reflects a strong federal policy favoring enforcement of agreements to arbitrate and provides, in part, that a written agreement to arbitrate disputes arising from a contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2006). However, this policy does not preclude a state from enforcing its laws regarding arbitration procedures.

In *Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468 (1989), the United States Supreme Court held that a statute is not preempted by the FAA where the parties have agreed that their agreement will be governed by state law. *Volt,* 489 U.S. at 470. After a dispute arose between the parties, Stanford University filed an action against Volt in California Superior Court and Volt moved to compel arbitration. The Superior Court denied Volt's motion to compel arbitration and stayed the proceeding pending the outcome of tangential litigation. Volt appealed to the California Court of Appeal, which

---

[1] The Florida Arbitration Code (FAC), chapter 682, Florida Statutes, also provides for the enforcement of arbitration agreements. Chapter 682 applies only to the extent that it is not in conflict with federal law . *See Powertel, Inc. v. Bexley,* 743 So. 2d 570, 573 (Fla. 1st DCA 1999); *Shearson/Lehman Brothers, Inc. v. Ordonez,* 497 So. 2d 703 (Fla. 4th DCA 1986).

affirmed, reasoning "that the purpose of the FAA was not to mandate the arbitration of all claims, but merely the enforcement of privately negotiated arbitration agreements." *Volt,* 489 U.S. at 472 (internal quotation marks omitted). The United States Supreme Court affirmed, stating:

> The [FAA] was designed to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate, and place such agreements upon the same footing as other contracts. Section 2 of the Act therefore declares that a written agreement to arbitrate in any contract involving interstate commerce or a maritime transaction shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract, and § 4 allows a party to such an arbitration agreement to petition any United States district court for an order directing that such arbitration proceed in the manner provided for in such agreement.
>
> But § 4 of the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that arbitration proceed in the manner provided for in the parties' agreement.

Volt, 489 U.S. at 474-75 (citations, internal quotation marks, brackets, emphasis, and ellipses omitted).

> [T]he FAA does not require parties to arbitrate when they have not agreed to do so, nor

> does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.

Volt, 489 U.S. at 478 (citation omitted).

> But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.

Volt, 489 U.S. at 479.

In short, "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt,* 489 U.S. at 476. Based on this reasoning, the FAA does not preempt this Court's determination that the arbitration provision must follow the rules outlined in chapter 766 because our conclusion does not impede the general enforceability of agreements to arbitrate.

CONCLUSION

Based on our decision above, we decline to address whether the Financial Agreement was unconscionable. For the foregoing reasons, we find that the Financial Agreement is void as to public policy and quash the First District's decision affirming the trial court's order compelling arbitration. We remand with instructions to hold further proceedings consistent with our decision.

It is so ordered.

PARIENTE, LEWIS, QUINCE and LABARGA, JJ., CONCUR.

PARIENTE, J., specially concurs with an opinion.

CANADY, J., dissents with an opinion, in which POLSTON, C.J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PARIENTE, J., specially concurring.

I agree with the majority that the Financial Agreement that the patient was required to sign takes away the patient's significant statutory rights

without providing the commensurate benefit of requiring the defendant to admit liability, as specifically envisioned by the Medical Malpractice Statute. For this reason, the Financial Agreement violates the public policy of Florida, as embodied in the Medical Malpractice Statute.

Specifically, this Financial Agreement forces the patient to forego his or her right to pursue a claim in a court of law and limits the amount of recoverable damages – without requiring the defendant to admit liability or to give up any other rights in return. Conversely, the Financial Agreement under review relieves the defendant of the burden and expense of proceeding to a jury trial and still limits the amount of damages that must be paid – without providing *any* benefit to the patient in return. In other words, this Financial Agreement undermines the legislative balance of incentives in the comprehensive medical malpractice statutory scheme, and for that reason is void as against the public policy underpinning the Medical Malpractice Statute.

As set forth chapter 766, *if* a defendant agrees to admit liability, a patient is required to give up the right to sue is a court of law and must arbitrate his or her claims, and the patient is also subject to limitations on recoverable damages. *See* § 766.207, Fla. Stat. (2008). In turn, the Legislature envisioned that with a defendant's admission of liability, a patient's risk of recovering nothing would be eliminated. The legislative scheme also envisioned that the admission

of liability would reduce the expenses of litigation and expedite the process of resolving the dispute.

In contravention to the carefully crafted statutory scheme set forth in chapter 766, the Financial Agreement under review requires the patient to arbitrate his or her claims in exchange for absolutely nothing in return – no elimination of the risk of not recovering any damages through the defendant's admission of liability, no guarantee of a reduction in the expenses inherent in proving a medical malpractice claim, and no assurance that the dispute will be resolved quickly – while still subjecting the patient to the cap on damages. This result is contrary to the public policy of Florida, as expressed in the Medical Malpractice Statute.

The Legislature expressly stated that its intent in enacting the Medical Malpractice Statute was to "*provide a plan for prompt resolution* of medical negligence claims." § 766.201(2), Fla. Stat. (emphasis added). The Legislature provided that "[a]rbitration shall be voluntary and shall be available except as specified." *Id.* As set forth in the legislative findings allowing for arbitration, the Legislature found that arbitration would provide incentives and benefits to *both* parties:

> (b) 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 noneconomic damages where the defendant concedes willingness to pay economic damages and reasonable attorney's fees.
>
> 3. Limitations on the noneconomic damages components of large awards to provide increased predictability of outcome of the claims resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims.

Id. Thus, the Legislature envisioned a plan in which there would be the following give-and-take in order to provide for the prompt resolution of claims and to reduce costs: (1) "[s]ubstantial incentives for *both claimants and defendants*" to submit to arbitration, which would reduce attorney's fees, litigation costs, and delay; (2) a conditional limitation on noneconomic damages and reasonable attorney's fees; and (3) limitations on the noneconomic damages "to provide *increased predictability*" and "*facilitate early resolution* of medical negligence claims." § 766.201(2)(b), Fla. Stat. (emphasis added).

Chapter 766 withstood constitutional scrutiny with respect to a patient's right of access to the courts for the following reason: "[T]he statutes at issue provide a *commensurate benefit to the plaintiff in exchange for the monetary cap.*" *Univ. of Miami v. Echarte,* 618 So. 2d 189, 190 (Fla. 1993) (emphasis added). "Commensurate benefit" to the injured party is the linchpin of the constitutional analysis where the statutory scheme restricts the right of access to

courts. *See Smith v. Dep't of Ins.,* 507 So. 2d 1080, 1087-88 (Fla. 1987); *see also Kluger v. White,* 281 So. 2d 1, 3-4 (Fla. 1973). The "commensurate benefit" of the monetary cap on noneconomic damages if both parties agree to arbitration under the statute was explained as follows in *Echarte*:

> The initial question in the instant case is whether the arbitration statutes, which include the non-economic damage caps found in sections 766.207 and 766.209, provide claimants with a "commensurate benefit" for the loss of the right to fully recover noneconomic damages. Section 766.207 and 766.209 only limit a claimant's right to recover noneconomic damages after a defendant agrees to submit the claimant's action to arbitration. *The defendant's offer to have damages determined by an arbitration panel provides the claimant with the opportunity to receive prompt recovery without the risk and uncertainty of litigation or having to prove fault in a civil trial.* A defendant or the defendant's insurer is required to conduct an investigation to determine the defendant's liability within ninety days of receiving the claimant's notice to initiate a malpractice claim. § 766.106(3)(a). Before the defendant may deny the claimant's reasonable grounds for finding medical negligence, the defendant must provide a verified written medical expert opinion corroborating a lack of reasonable grounds to show a negligent injury. §766.203(3)(b). The claimant benefits from the requirement that a defendant quickly

> determine 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 a 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 payments 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."

Echarte, 689 So. 2d at 194. In other words, the Legislature envisioned that arbitration under the statute would give injured parties the *right* to prompt resolution of their disputes because the defendant would have to *admit liability.* This in turn would save the injured party costs in the form of increased attorney's fees and the expenditure of expert witness fees that would otherwise be required in order to prove liability.

It is therefore clear from a full review of the Medical Malpractice Statute that the legislative quid pro quo for patients in exchange for both a substantial limitation on noneconomic damages to a maximum of $250,000 per incident and the right to a jury

trial was that a defendant would be required to admit liability. This clearly expressed public policy in the statute, however, has been expressly contravened by the Financial Agreement in this case, which eviscerates statutory rights *without* providing the injured patient *with any of the added benefits of incentives* provided for by the Legislature. Further, by requiring arbitration without in turn requiring the counterbalance of the defendant admitting liability, the Financial Agreement undermines the public policy set forth in the statute of reducing attorney's fees, litigation costs, and delay.

The Financial Agreement in this case destroys the essence of the legislative scheme providing for arbitration and limiting damages along with an admission of liability, as well as the Legislature's stated goal of providing a uniform and efficient procedure for the "*prompt resolution* of medical negligence claims." § 766.201(2), Fla. Stat. (emphasis added). Because this Financial Agreement eviscerates the major benefits provided by the Legislature of requiring an admission of liability from the defendant, while still limiting the patient's noneconomic damages, this Financial Agreement is contrary to public policy and is in express contravention of the arbitration provisions of the Medical Malpractice Statute. For all those reasons, I concur in the majority.

CANADY, J., dissenting

Because I conclude that the decision on review, *Franks v. Bowers,* 62 So. 3d 16 (Fla. 1st DCA 2011), does not expressly and directly conflict with *University of Miami v. Echarte,* 618 So. 2d 189 (Fla. 1993), I would dismiss this case for lack of jurisdiction under article V, section 3(b)(3), of the Florida Constitution. On the merits, I conclude that there is no statutory basis for determining that the provisions of the Financial Agreement limiting non-economic damages violate public policy. On the contrary, it is the judicial invalidation for the Financial Agreement that is at odds with the public policy established by the Legislature.

I. Jurisdiction

In *Franks,* the First District Court of Appeal considered whether a Financial Agreement between a patient and his doctor that provided for mandatory arbitration was contrary to public policy. After explaining that the voluntary arbitration provisions of chapter 766, Florida Statutes, "were enacted in response to a dramatic increase in the cost of medical malpractice insurance," the First District concluded that the mandatory arbitration portion of the Financial Agreement did "not countermand the public policy reflected in Chapter 766, as applied to the claims presented in this case." *Franks,* 62 So. 3d at 18. The First District reasoned that the Financial Agreement could be enforced because it did "not eliminate

statutory rights which are essential in effectuating legislative intent" but instead "afford[ed] meaningful relief" that was "consistent with the legislative purpose and the public policy which led to the enactment of the medical negligence provisions in Chapter 766." *Franks,* 62 So. 3d at 18.

Echarte involved a distinct legal issue. In *Echarte,* this Court rejected several challenges to sections 766.207 and 766.209, Florida Statutes (Supp. 1988) – which provided for voluntary arbitration and a noneconomic damages cap in medical malpractice claims – but "limit[ed] [its] discussion to the validity of the statutes under the right of access to the courts." 618 So. 2d at 191. In its opinion, this Court considered only whether the voluntary arbitration and noneconomic damages provisions of section 766.207 and 766.209 satisfied the access-to-courts test set out in *Kluger v. White,* 281 So. 2d 1 (Fla. 1973), and concluded that the statutes provided a commensurate benefit for the loss of the right to fully recover noneconomic damages and, alternatively, that the Legislature's tort reform was justified by an "overpowering public necessity," for which "no alternative method of meeting such public necessity [was] shown." *Echarte,* 618 So. 2d at 195 (quoting *Kluger,* 281 So. 2d at 4).

The legal issue addressed in *Echarte* was whether the Legislature could constitutionally alter or abolish preexisting right of redress for a particular injury – not whether an individual could contract out of the statutory procedures enacted in chapter 766. This Court reviewed the constitutionality of a legislative

solution to a public problem. This Court was not asked, however, to consider the public policy implications of individual patients and doctors privately negotiating stricter arbitration agreements on a case-by-case basis.

A discussion of how the majority believes that *Franks* and *Echarte* conflict and its resolution of that "conflict" – is noticeably absent from the majority opinion. Because *Franks* and *Echarte* address different legal issues, this Court does not have jurisdiction, and the case should be discharged. Accordingly, I dissent.

II. Merits

On the merits, I disagree with the majority's conclusion "that the Financial Agreement blatantly contravenes the intent provided by the Florida Legislature" in the Medical Malpractice Act (MMA). Majority op. at 12. The Financial Agreement undeniably furthers the general purpose articulated by the Legislature in the text of the statute. It is the majority's decision that "blatantly contravenes" the legislative purpose not only of the MMA but also of the Florida Arbitration Code, §§ 682.01-.22, Fla. Stat. (2012).

The statute at issue here is expressly designed to limit the expense associated with the medical malpractice litigation. In the statutory declaration of

legislative findings and intent, the Legislature made the following salient findings:

> (a) Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased medical care cost for most patients and functional unavailability of malpractice insurance for some physicians.
>
> (b) *The primary cause of increased medical malpractice liability insurance premiums has been the substantial increase in loss payments to claimants caused by tremendous increases in the amounts of paid claims.*
>
> (c) The average cost of medical negligence claim has escalated in the past decade to the point where *it has become imperative to control such cost in the interests of the public need for quality medical services.*
>
> (d) The high cost of medical negligence claims in the state can be substantially alleviated by requiring early determination of the merit of claims, *by providing for early arbitration of claims,* thereby *reducing delay and 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.*

§ 766.201(1)(a)-(d), Fla. Stat. (2012) (emphasis added).

By the enactment of the statute, the Legislature sought to address the mischief of the perceived excessive "loss payments to claimants cause by tremendous

increases in the amounts of paid claims." § 766.201(1)(b), Fla. Stat. (2012). To help remedy this mischief, the Legislature enacted measures to provide post-dispute incentives for arbitration and to prevent the filing of frivolous claims and defenses. Among the post-dispute incentives for arbitration was the provision for the conditional limitation on noneconomic damages whenever the defendant concedes liability. Nothing in the statute, however, prohibits voluntary pre-dispute agreements-outside the statutory framework – to arbitrate disputes or to impose limits of damages.[2]

The majority reasons that "the concession of liability is one of the incentives provided by" the statute and that the "avoidance of the incentive contravenes the intent of the statute." Majority op. at 14. The majority thus concludes that the predispute Financial Agreement contravenes the statute because the Financial Agreement does not contain a concession of liability. This is incongruous. A post-dispute concession of liability may be a very reasonable "incentive," but a pre-dispute concession of liability would be absurd. It is wholly unjustified to extrapolate from the post-dispute context addressed by the statute to impose restrictions in the dissimilar context of voluntary pre-dispute agreements.

---

[2] For that matter – although the point is not at issue here and may be of no practical importance – nothing in the statute prohibits parties from entering voluntary post-dispute agreements to arbitrate or limit damages.

Nothing in the statute can be read to support the conclusion that the purpose of the statute is thwarted by voluntary pre-dispute agreements – such as the voluntary agreement invalidated by the majority here – designed to limit the cost of litigation and the amount of paid claims. Instead, such voluntary agreements are designed to cure the same mischief that the statute seeks to address. The Financial Agreement here unquestionably serves to advance the public policy embodied in the statute. The specific public policy of the MMA thus is antithetical to the majority's decision. And the majority fails to cite any authority for a general public policy – either legislatively established or judicially recognized prohibiting voluntary agreements limiting liability.

There is an astonishing irony in the line of judicial reasoning that condemns as invalid a voluntary agreement designed to limit the expense of medical malpractice litigation and grounds that condemnation on the purpose of a statute expressly designed to limit the expense of medical malpractice litigation. The public policy that animates the Court's decision here is an unprecedented judicial policy that contravenes the declared objective of the Legislature set forth in section 766.201.

The majority's decision also contravenes the public policy embodied in the Florida Arbitration Code, which provides as follows:

> Two or more parties may agree in writing to submit to arbitration *any controversy*

> existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of *any controversy* thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof.

§ 682.02, Fla. Stat. (2012) (emphasis added). This broadly framed statutory right to enter both predispute and post-dispute arbitration agreements is set aside by the majority's decision on grounds that cannot withstand analysis.

In the name of public policy, the majority thus strikes two blows against the public policy unambiguously established by the Florida Legislature. This decision validates the old observation that "public policy" is "a very unruly horse." *Story v. First Nat'l Bank & Trust Co.,* 156 So. 101, 103 (Fla. 1934) (citing *Richardson v. Mellish,* [1824] 130 Eng. Rep. 294, 303, 2 Bing. 229, 252). Here, public policy has kicked over the traces.

POLSTON, C.J. concurs.

Application for Review of the Decision of the District Court of Appeal – Certified Direct Conflicts of Decisions

First District – Case No. 1D10-3078

(Duval County)

Thomas S. Edwards and Eric C. Ragatz of Edwards & Ragatz, P.A., Jacksonville, Florida,

for Petitioner

Kelly B. Mathis and Laurie M. Lee of Mathis & Murphy, P.A., Jacksonville, Florida,

for Respondents

Bryan S. Gowdy of Creed & Gowdy, P.A., Jacksonville, Florida,

for Amicus Curiae Florida Justice Association

Cynthia S. Tunniclif and Gerald Don Nelson Bryant IV of Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., Tallahassee, Florida,

for Amici Curiae Florida Justice Reform Institute, Florida Medical Association, and Florida Osteopathic Medical Association

DONNA FRANKS, as Personal Representative of the Estate of JOSEPH JAMES FRANKS, SR., Deceased, Appellant, v. GARY JOHN BOWERS, M.D., BENJAMIN M. PIPERNO, III, M.D., and NORTH FLORIDA SURGEONS, P.A., a Florida Corporation, Appellees.

CASE NO. 1D10-3078

COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

62 So.3d 16; 2011 Fla. App. LEXIS 3493; 36 Fla. L. Weekly D 572

March 16, 2011, Opinion Filed

PRIOR HISTORY:

An appeal from the circuit Court for Duval County. James H. Daniel, Judge.

COUNSEL: Thomas S. Edwards, Jr., Jennifer K. Millis, and Eric C. Ragatz, of Edwards & Ragatz, P.A., Jacksonville, for Appellant.

Kelly B. Mathis and Laurie M. Lee of Mathis & Murphy, Jacksonville, for Appellees

Bryan S. Gowdy, of Creed & Gowdy, P.A., Jacksonville, for the Florida Justice Association, amicus curiae.

Andrew S. Bolin, of Beytin, Bolin, McLaughlin & Willers, P.A., Tampa, for the Florida Defense Lawyers Association, amicus curiae.

JUDGES: CLARK, J. VAN NORTWICK and LEWIS, JJ., CONCUR.

OPINION BY: CLARK

OPINION

CLARK, J.

The appellant challenges an order by which the circuit court stayed the appellant's wrongful death and medical negligence action, and compelled arbitration pursuant to a doctor-patient agreement. In contesting that ruling, the appellant contends that the contractual agreement was misconstrued, that it is otherwise void as being contrary to public policy, and unconscionable. However, the appellant has not established any such infirmity with regard to the contractual provisions, or any error in the court's enforcement of the contractual agreement.

The appellant, as the personal representative of the estate of Joseph Franks, sued the appellees for wrongful death and medical negligence when Mr. Franks died after receiving medical care from the appellees. In obtaining such care, Mr. Franks had signed a document entitled "North Florida Surgeons Financial Agreement" which contained a provision whereby the doctor and patient agreed that all disputes, including "any negligence claim relating to the diagnosis, treatment, or care of Patient . . . shall be resolved by arbitration. . . ." The agreement called for the arbitration to be "in lieu and instead of any trial by Judge or Jury." The agreement further provided a limitation on non-economic damages, and required compliance with the pre-suit notice requirements in Chapter 766, Florida Statutes.

In response to the appellant's lawsuit, the appellees sought to compel arbitration under the terms of the Financial Agreement. The appellant replied to that motion by asserting that the Financial Agreement's invocation of the pre-suit notice provisions in Chapter 766 also invoked the arbitration provisions in that chapter, with such arbitration being voluntary rather than mandatory. The circuit court rejected that argument, ruling instead that the mandatory arbitration clause in the Financial Agreement was controlling. Although the appellant now argues that the court misconstrued the Financial Agreement in that regard, the court properly construed and applied the arbitration clause.

The appellant contends that the arbitration clause in the Financial Agreement is contrary to the public policy reflected in Chapter 766, which contains a somewhat different arbitration scheme for claims of medical negligence. Among other differences, for the voluntary arbitration in Chapter 766 to pertain, the defendants must not contest liability and the arbitration would address the amount of damages, with certain specified evidentiary standards, and a limitation on the amount of non-economic damages that could be awarded in arbitration, and another limitation if the claim proceeds to trial. *See* §§ 766.106(3)(b)(3); 766.207(2); 766.207(7); 766.118(2), Fla. Stat. The arbitration clause in the Financial Agreement contains a similar limitation on the arbitrated non-economic damages, but without any requirement that liability not be contested, and without any provision

for the claim to proceed to trial (as arbitration under the Financial Agreement is mandatory). The appellant points to these differences, along with certain other differences between the Financial Agreement and Chapter 766 arbitration, and asserts that the Financial Agreement is thereby inconsistent with the public policy which the legislature embodied in Chapter 766.

In furtherance of that policy argument, the appellant refers to *Alterra Healthcare Corp. v. Estate of Linton*, 953 So. 2d 574 (Fla. 1st DCA 2007), which invalidated an arbitration agreement with limitations on non-economic damages and with other restrictions, as being inconsistent with statutory provisions and public policy. The court in *Alterra Healthcare* referred to the Nursing Home Residents Act in Chapter 400, Florida Statutes, and the Assisted Living Facilities Act which is now in Chapter 429, Florida Statutes. *See also Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296 (Fla. 4th DCA 2005); *Romano v. Manor Care, Inc.*, 861 So. 2d 59 (Fla. 4th DCA 2003). However, those cases do not address chapter 766 arbitration, and instead involved arbitration agreements that were contrary to remedial enactments which did not authorize arbitration, and which created private rights and a statutory cause of action which had not previously existed. And as was emphasized in *Blankfeld* and *Romano,* the legislature enacted the nursing home provisions after a grand jury investigation revealed that substantial abuses of residents were occurring on a frequent basis in those facilities,

whereupon the legislature responded with statutes intending to protect the residents, guaranteeing them certain rights and providing a civil cause of action for violations of those rights. *See e.g*. §400.023 Fla. Stat.

The medical negligence provisions in Chapter 766, on the other hand, were enacted in response to a dramatic increase in the cost of medical malpractice insurance, *see* section 766.201, Florida Statutes, which the supreme court described in *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 2003), as creating an "overpowering public necessity." Chapter 766 itself imposes limitations on non-economic damages, and provides for arbitration as a means of dispute resolution. *See* §§ 766.207; 766.209; 766.118, Fla. Stat.

The differences between the arbitration process in Chapter 766 and arbitration under the Financial Agreement in the present case do not countermand the public policy reflected in Chapter 766, as applied to the claims presented in this case. Unlike the nursing home cases, the Financial Agreement does not eliminate statutory rights which are essential in effectuating legislative intent, or policy. Instead, the arbitration clause, as applied in this instance, affords meaningful relief and is consistent with the legislative purpose and the public policy which led to the enactment of the medical negligence provisions in Chapter 766.

The appellant has likewise failed to show any infirmity with regard to the arbitration provisions in

the Financial Agreement, upon the assertion that they should be deemed to be unconscionable. Such unconscionability relates to the procedural manner in which the agreement was obtained, and substantive notions of basic fairness. *See e.g., Gainesville Health Care Center, Inc. v. Weston*, 857 So. 2d 278 (Fla. 1st DCA 2003); *Powertel. Inc. v. Bexley*, 743 So. 2d 570 (Fla. 1st DCA 1999); *see also Frantz v. Shedden*, 974 So. 2d 1193 (Fla. 2d DCA 2008). To prevail on an assertion that a contractual provision is unconscionable and should not be enforced, the appellant must show that the agreement is both procedurally and substantively unconscionable. *Id.* The appellant has not made that necessary showing, and in the circumstances of this case has thus not demonstrated any unconscionability, or any error in the circuit court's enforcement of the contractual agreement.

The appealed order is AFFIRMED.

VAN NORTWICK and LEWIS, JJ., CONCUR.

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY,
FLORIDA

CASE NO.: 16-2010-CA-00474
DIV.: CV-A

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

Plaintiff,

vs.

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

Defendant, /

ORDER COMPELLING ARBITRATION AND STAYING ACTION

Defendants, GARY J. BOWERS, M.D., BENJAMIN PIPERNO, III, M.D., and NORTH FLORIDA SURGEONS, P.A., move this court to compel arbitration of the claims filed by the Plaintiff, DONNA MARIE FRANKS, as Personal Representative of the Estate of JOSEPH JAMES FRANKS, SR., and to dismiss this action. For the reasons stated below, the Court grants Defendants' motion to compel

arbitration and enters a stay of all proceedings in this action until the completion of arbitration.

1. Defendants have provided this Court with document entitled "North Florida Surgeons Financial Agreement" (hereafter "North Florida arbitration provision"). The agreement contains a separate subsection labeled "Arbitration" which provides for arbitration of any claims against the professional association or any of its physicians alleging medical malpractice. There is no dispute that the decedent, Joseph James Franks, Sr., signed the "North Florida Surgeons Financial Agreement" containing this arbitration provision and there is no dispute that the agreement covers the named Defendants in this action.

2. Plaintiff challenges this agreement on separate grounds that the agreement is unconscionable (both procedurally and substantively) and that it violates public policy as embodied in the legislative scheme found in the medical malpractice statutes located at Chapter 766, Florida Statutes. Both arguments mainly rest on differences between the non-economic damages available to claimants under Chapter 766 and the restriction on non-economic damages under Defendants' arbitration provision.

3. Plaintiff also requests an evidentiary hearing to establish procedural unconscionability.

4. The North Florida arbitration provision places a cap on non-economic damage awards at $250,000.00 and directs that non-economic damages

"shall be calculated on a percentage basis with respect to capacity to enjoy life, as provided by Florida Statutes, Section 766.207."[1] The arbitration agreement mandates this $250,000 cap in all cases regardless of whether or not a claimant is required to prove liability on the part of North Florida, its surgeons or any of its employees.

5. While the North Florida arbitration provision tracks the language of §766.207(7)(b) as to the $250,000 cap on non-economic damages, there is one important difference. According to §766.207(7), if the parties choose voluntary binding arbitration under the statute, then the only issue for consideration during the arbitration is the amount of the claimant's damages. In other words, the claimant does not have to prove liability if the claim is arbitrated pursuant to the statute. The North Florida arbitration provision requires claimants to prove liability in all cases.

6. Additionally, if a claimant foregoes voluntary binding arbitration under the statute and proceeds to litigation after presuit investigation, then the claimant

---

[1] 766.207(7)(b), Fla. Stat., directs that, in addition to the cap, non-economic damages are calculated on a percentage basis with respect to the capacity to enjoy life so that a finding that the claimant's injuries resulted in a 50% reduction of the capacity to enjoy life would result in an award of not more than $125,000 in non-economic damages. Since this is a wrongful death action, and loss of the capacity to enjoy life is not specifically listed as an element of damages for a survivor, this additional limitation on non-economic damages is most likely not relevant.

must prove liability, but is subject to the general statutory cap on non-economic damages found at §766.118(3), Fla. Stat., instead of the $250,000 cap under §766.207. The general statutory cap under §766.188(3) is $750,000.00 per claimant for claims not involving death and $1,500,000 for wrongful death claims.

7. In sum, the North Florida arbitration provision in this case requires the claimant to prove liability in all cases, but still imposes the more restrictive $250,000 cap for non-economic damages instead of the higher cap on non-economic damages found at §766.118(3). Normally under Chapter 766, a medical malpractice defendant in a wrongful death case will face a cap on non-economic damages in the amount of $1,500,000 unless that defendant is willing to concede liability. The North Florida arbitration imposes restrictions on non-economic damages in this case that are different than those enacted by the Legislature and these differences are not de minimis.

8. Despite the significant difference between the cap for arbitration under Chapter 766 and the cap for arbitration under the North Florida arbitration agreement, the Court feels constrained to compel arbitration as this is not the first case in the Fourth Judicial Circuit challenging the validity of the North Florida arbitration provision on both grounds of unconscionability and public policy.

9. In fact, most recently in the case of *Gardner v. Niosa, M.D., et. Al.,* Case No.: 16-2008-CA-130,

Judge Johnson and Judge Tygart denied the same challenges to the North Florida arbitration provision that have been raised in this case. Judge Tygart expressly found that the standard arbitration provision did not impermissibly rewrite §766.207(7), Fla. Stat., which I take to mean that he found that it did not violate public policy as expressed by this legislation. Following a period to allow for discovery into unconscionability, Judge Johnson then entered a detailed order finding that the arbitration provision in question was neither substantively unconscionable nor were the facts surrounding its execution procedurally unconscionable.

10. *Gardner* was recently affirmed on April 9, 2010 by the First District Court of Appeal in *Gardner v. Nioso, M.D., et al.,* Case No.: 1D09-4767. The panel decided to affirm, per curiam, with only a citation to *Gainesville Health Care Center, Inc. v. Weston*, 857 So.2d 278 (Fla. 1st DCA 2003). It is clear from both the briefs and review of the oral argument that both unconscionability and public policy arguments were presented to the panel.

11. While this Court in not bound by a PCA with a citation, nevertheless this Court pays a great deal of attention to them.

12. I agree with Judge Johnson's assessment that the North Florida arbitration provision is not substantively unconscionable. Substantive unconscionability "requires an assessment of whether the contract terms are so outrageously unfair as to shock the

judicial conscience." *Bland v. Healthcare and Retirement Corporation of America,* 927 So.2d 252, 256 (Fla. 2nd DCA 2006). It involves a contract that "no man in his senses and not under delusion would make on the one hand, and as to honest and fair man would accept on the other." *Id.*

13. Regardless of the differences in the cap on non-economic damages between the private agreement and Chapter 766, the North Florida arbitration provision does not rise to the level that it shocks the judicial conscience, nor does the Court think that someone would have to be under delusion to enter into such an agreement. The agreement is based upon the Florida Arbitration Code, Chapter 682, Fla. Stat., which, as Judge Johnson observed, is an appropriate means of conducting an arbitration proceeding. Although it requires proof of negligence in all cases, the standards and burdens of proof are no more than required of a medical malpractice case in a court of law.

14. As to procedural unconscionability, the Court is aware that the facts will differ from case to case and that an evidentiary hearing is normally required to determine this issue because courts are required to look at the "circumstances surrounding the transaction" to determine whether the complaining party had a "meaningful choice" at the time the contract was entered. *Gainesville Health Care Center, Inc. v. Weston,* 857 So.2d at 284. However, given the determination that the North Florida arbitration provision is not substantively unconscionable, there is

no need to inquire further into procedural unconscionability because a court must find that an arbitration agreement is ***both*** substantively and procedurally unconscionable before invalidating such a provision. *Id.*

15. While I have compelled arbitration in this case, I have done so with significant reservations concerning the public policy arguments against the validity of the North Florida arbitration provision. Despite the First District's decision in *Gardner,* there remains uncertainty surrounding the public policy challenge to North Florida's arbitration provision.

16. Judge Tygart's order in *Gardner* clearly ruled on the issue of public policy in terms of the arbitration provision's conflict with §766.207, Fla. Stat., and the issue was briefed and argued to the appellate panel. However, the citation to *Gainesville Health Care Center, Inc. v. Weston* in the appellate opinion leaves the public policy arguments pertaining to this arbitration provision in somewhat of a grey area for future cases that may involve the same or a similar arbitration provision.

17. *In Gainesville Health Care Center, Inc., v. Weston,* the trial court refused to enforce an arbitration provision in a nursing home case on grounds that the agreement was unconscionable and the First District reviewed the lower court's decision as to the propriety of that determination. *Gainesville Health Care Center, Inc., v. Weston,* 857 So.2d at 283. The *Weston* opinion mainly discusses unconscionability

and not whether the arbitration provision violated public policy.[2]

18. Two District Courts of Appeal have expressly recognized that a challenge to an arbitration provision on grounds of public policy is separate and apart from a challenge on the ground of unconscionability. *Blankfield v. Richmond Health Care, Inc.,* 902 So.2d 296, 299 (Fla. 4th DCA 2005) (en banc); and *Frantz v. Shedden,* 974 So.2d 1193, 1198 (Fla. 2nd DCA 2008).

---

[2] The claimant in *Weston* did challenge the arbitration provision on grounds that it violated federal Medicare/Medicaid law. Specifically, the claimant argued that the law prohibited a nursing home from accepting additional consideration from a Medicare/Medicaid patient except for the standard rate found at 42 C.F.R. §483.12(d)(3). *Gainesville Health Care Center, Inc., v. Weston,* 857 So.2d at 289. The court rejected this argument finding that an arbitration provision was not "consideration" under the federal statute and that the federal regulation was not intended to apply to such a situation. *Id.*

This is distinctly different from the public policy challenge in this case, and other cases involving the North Florida arbitration provision, where clearly the non-economic cap in the arbitration agreement conflicts with provisions of Chapter 766. Moreover, public policy challenges are case-specific and depend upon the subject matter of the arbitration provision as it relates to a specific statute or other embodiment of public policy. *Weston* obviously did not concern the validity of an agreement to arbitrate a nursing home case as it related to any provision in Florida's medical malpractice statute and it did not involve an agreement that limited a claimant's remedies such as a cap on damages.

19. Although the First District has not expressly held that the two grounds are separate, the court has invalidated an arbitration provision on grounds of public policy while holding that the arbitration provision was not unconscionable. *Alterra Healthcare Corporation v. Estate of Linton,* 953 So.2d 574 (Fla. 1st DCA 2007) (holding in nursing home case that $250,000 cap on non-economic damages in arbitration provision violated public policy where it conflicted with Assisted Living Facilities Act).

20. Therefore, since it appears that a challenge based on public policy is distinct from a challenge based on unconscionability, citation to *Gainesville Health Care Center, Inc., v. Weston* in the recent *Gardner* appeal does not provide clear direction.

21. Moreover, in light of the First District's decision in *Alterra Healthcare Corporation v. Estate of Linton*, supra, there are serious questions as to how this arbitration provision reconciles with §§766.118 and 766.207, Fla. Stat, from a public policy standpoint.

22. In *Estate of Linton,* the First District expressly held that a $250,000 cap on non-economic damages and the elimination of punitive damages in an arbitration provision covering a nursing home resident defeated the remedial purposes of the Nursing Home Residents Act in Ch. 400, Fla. Stat., and were unenforceable in a wrongful death claim under the act. The First District observed:

> The arbitrability of statutory claims ***rests on the assumption that the arbitration clause permits relief equivalent to that available via courts.*** An arbitration clause is thus unenforceable if its provisions deprive the plaintiff of the ability to obtain meaningful relief for alleged statutory violations.

Alterra Healthcare Corporation v. Estate of Linton, 953 So.2d at 578 (emphasis supplied). Because the arbitration provision contained a severability clause, the court affirmed the trial court's decision to sever the limitation of liability claim and allowed the remainder of the case to proceed forward to arbitration. *Id.* at 579.

23. Like the statute involved in *Estate of Linton*, §766.118 and §766.207 appear to be remedial in nature. "A remedial statute is one which confers or changes a remedy." *Blankfield v. Richmond Health Care, Inc.,* 902 So.2d at 298. "One of the primary purposes of enacting remedial legislation is to correct or remedy a problem or redress an injury." *Campus Communications, Inc. v. Earnhardt,* 821 So.2d 388, 396 (Fla. 5th DCA 2002).

24. §766.207 and §766.118 were part of a comprehensive revision to the medical malpractice statute enacted by the Legislature in 1988. §766.201 Fla. Stat., contains the legislative findings and intent for enacting the medical malpractice reform provisions contained in Chapter 766 including both of these statutes. These statutes were designed as part of a remedy to the "high cost of medical negligence claims"

and to "control such cost in the interest of the public need for quality medical services."

25. The voluntary binding arbitration provisions found in §766.207 were expressly recognized in §766.201(2) as an important component of the overall legislative scheme for addressing medical malpractice claims:

> 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, presuit investigation and arbitration.

26. Therefore, voluntary binding arbitration was integral to the enactment of legislation designed to promote prompt resolution of medical negligence claims and to address the increase in costs associated with such claims. Accordingly, §766.118 and §766.207 are likely remedial in nature.

27. §766.201(2)(b), Fla. Stat., sets out precisely how the Legislature intended to achieve its remedial goals through voluntary binding arbitration and caps on non-economic damage awards:

> (b) 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 noneconomic damages where the defendant concedes willingness to pay economic damages and reasonable attorney's fees.
>
> 3. Limitations on noneconomic damages components of large awards to provide increased predictability of outcome of the claims resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims.

28. There is merit to Plaintiff's argument that the North Florida arbitration provision is in conflict with the remedial goals of the statute to provide "substantial incentives" to both the claimant and the defendant through a "conditional limitation on noneconomic damages where the defendant concedes willingness to pay economic damages and reasonable attorney's fees."

29. The North Florida arbitration agreement appears to be one sided in its incentives as North Florida's $250,000 cap on non-economic damage awards under the private arbitration agreement is not conditioned upon anything, much less a concession of liability on its part. Furthermore, in any private arbitration covered by the North Florida arbitration provisions, Plaintiff will not receive her economic damages without proof that North Florida breached the prevailing standard of professional care. This is completely at odds with the choices made by the Legislature to meet its remedial goals.

30. Also, the private arbitration agreement contains absolutely nothing which provides claimant an avenue to recover reasonable attorney's fees like those provisions in §766.209, Fla. Stat.

31. By raising these concerns, the Court is not unmindful of the well-settled view in this state that arbitration agreements are generally favored under the law. See, generally *Seifert v. U.S. Home Corporation,* 750 So.2d 633 (Fla. 1999). Arbitration agreements do not automatically violate public policy even though such agreements are executed in the context of providing medical care or seek to arbitrate medical malpractice claims.

32. Towards that end, the Second District in *Frantz v. Shedden, supra*, expressly found that an arbitration provision requiring arbitration of a medical malpractice claim was valid and enforceable despite the claimant's objections on grounds that the agreement was unconscionable and void as against public policy. *Frantz v. Shedden,* 974 So.2d at 1198. However, it does not appear that the arbitration provision in that case involved any cap on non-economic damages that was in conflict with statutory limitations. Instead, the claimant grounded his public policy arguments solely on the basis that the arbitration agreement negated his statutory right to appeal as provided by the Florida Arbitration Code. *Id.*

33. *Frantz v. Shedden* further supports the conclusion that parties can agree privately to arbitrate a medical malpractice claim without utilizing

the voluntary binding arbitration procedure found at §766.207, Fla. Stat. The only question is whether or not they can agree to do so by avoiding the remedial provisions of the Medical Malpractice Act that pertain to voluntary binding arbitration such as the defendant's concession of responsibility for economic damages in exchange for a $250,000 cap on non-economic damages.[3]

34. Public policy favors enforcing arbitration agreements. However, it is one thing for an arbitration agreement to waive a claimant's right to trial by jury or their right to have the decision made in a court of law, and quite another for such an agreement to waive or limit the remedy or relief available to a claimant through the courts.

35. That said, based upon the earlier decision in *Gardner*, the Court orders that this case be referred to arbitration pursuant to the North Florida arbitration provision and stays further proceedings in this matter. However, the decision in *Gardner* does not

---

[3] The court in *Shedden* also recognized that, even if the arbitration agreement completely eliminated the right to appeal, the agreement would still be enforceable because of the severability clause in the agreement. *Frantz v. Shedden,* 974 So.2d at 1198. That provision would simply allow the court to eliminate those invalid provisions and enforce the remainder of the agreement. *Id*

In this case, the North Florida arbitration provisions does not have a severability clause. Therefore, either the agreement is valid and enforceable, in total, or it is not.

eliminate the reservations and concerns expressed above.

DONE AND ORDERED this **11th** day of **May, 2010**.

___*s / Judge*_____

CIRCUIT JUDGE

CHAPTER 766

FLORIDA STATUTES

MEDICAL MALPRACTICE AND RELATED MATTERS

766.201 Legislative findings and intent. –

(1) The Legislature makes the following findings:

(a) Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased medical care costs for most patients and functional unavailability of malpractice insurance for some physicians.

(b) The primary cause of increased medical malpractice liability insurance premiums has been the substantial increase in loss payments to claimants caused by tremendous increases in the amounts of paid claims.

(c) The average cost of a medical negligence claim has escalated in the past decade to the point where it has become imperative to control such cost in the interests of the public need for quality medical services.

(d) The high cost of medical negligence claims in the state can be substantially alleviated by requiring early determination of the merit of claims, by providing for early arbitration of claims, thereby reducing delay and 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.

(e) The recovery of 100 percent of economic losses constitutes overcompensation because such recovery fails to recognize that such awards are not subject to taxes on economic damages.

(2) 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, presuit investigation and arbitration. Presuit 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.

(a) Presuit investigation shall include:

1. Verifiable requirements that reasonable investigation precede both malpractice claims and defenses in order to eliminate frivolous claims and defenses.

2. Medical corroboration procedures.

(b) 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 noneconomic damages where the defendant concedes willingness

to pay economic damages and reasonable attorney's fees.

3. Limitations on the noneconomic damages components of large awards to provide increased predictability of outcome of the claims resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims.

766.202 Definitions; ss. 766.201-766.212. – As used in ss. 766.201-766.212, the term:

(1) "Claimant" means any person who has a cause of action for damages based on personal injury or wrongful death arising from medical negligence.

(2) "Collateral sources" means any payments made to the claimant, or made on his or her behalf, by or pursuant to:

(a) The United States Social Security Act; any federal, state, or local income disability act; or any other public programs providing medical expenses, disability payments, or other similar benefits, except as prohibited by federal law.

(b) Any health, sickness, or income disability insurance; automobile accident insurance that provides health benefits or income disability coverage; and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by him or her or provided by others.

(c) Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services.

(d) Any contractual or voluntary wage continuation plan provided by employers or by any other system intended to provide wages during a period of disability.

(3) "Economic damages" means financial losses that would not have occurred but for the injury giving rise to the cause of action, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity to the extent the claimant is entitled to recover such damages under general law, including the Wrongful Death Act.

(4) "Health care provider" means any hospital, ambulatory surgical center, or mobile surgical facility as defined and licensed under chapter 395; a birth center licensed under chapter 383; any person licensed under chapter 458, chapter 459, chapter 460, chapter 461, chapter 462, chapter 463, part I of chapter 464, chapter 466, chapter 467, part XIV of chapter 468, or chapter 486; a clinical lab licensed under chapter 483; a health maintenance organization certificated under part I of chapter 641; a blood bank; a plasma center; an industrial clinic; a renal dialysis facility; or a professional association partnership, corporation, joint venture, or other association for professional activity by health care providers.

(5) "Investigation" means that an attorney has reviewed the case against each and every potential defendant and has consulted with a medical expert and has obtained a written opinion from said expert.

(6) "Medical expert" means a person duly and regularly engaged in the practice of his or her profession who holds a health care professional degree from a university or college and who meets the requirements of an expert witness as set forth in s. 766.102.

(7) "Medical negligence" means medical malpractice, whether grounded in tort or in contract.

(8) "Noneconomic damages" means nonfinancial losses that would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses to the extent the claimant is entitled to recover such damages under general law, including the Wrongful Death Act.

(9) "Periodic payment" means provision for the structuring of future economic damages payments, in whole or in part, over a period of time, as follows:

(a) A specific finding of the dollar amount of periodic payments which will compensate for these future damages after offset for collateral sources shall be made. The total dollar amount of the periodic payments shall equal the dollar amount of all such future damages before any reduction to present value.

(b) The defendant shall be required to post a bond or security or otherwise to assure full payment of these damages awarded. A bond is not adequate unless it is written by a company authorized to do business in this state and is rated A+ by Best's. If the defendant is unable to adequately assure full payment of the damages, all damages, reduced to present value, shall be paid to the claimant in a lump sum. No bond may be canceled or be subject to cancellation unless at least 60 days' advance written notice is filed with the court and the claimant. Upon termination of periodic payments, the security, or so much as remains, shall be returned to the defendant.

(c) The provision for payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amounts of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made.

766.2021 Limitation on damages against insurers, prepaid limited health service organizations, health maintenance organizations, or prepaid health clinics. – An entity licensed or certified under chapter 624, chapter 636, or chapter 641 shall not be liable for the medical negligence of a health care provider with whom the licensed or certified entity has entered into a contract in any amount greater than the amount of damages that may be imposed by law directly upon the health care provider,

and any suits against such entity shall be subject to all provisions and requirements of evidence in this chapter and other requirements imposed by law in connection with suits against health care providers for medical negligence.

766.203 Presuit investigation of medical negligence claims and defenses by prospective parties. –

(1) APPLICATION OF PRESUIT INVESTIGATION. – Presuit investigation of medical negligence claims and defenses pursuant to this section and ss. 766.204-766.206 shall apply to all medical negligence claims and defenses. This shall include:

(a) Rights of action under s. 768.19 and defenses thereto.

(b) Rights of action involving the state or its agencies or subdivisions, or the officers, employees, or agents thereof, pursuant to s. 768.28 and defenses thereto.

(2) PRESUIT INVESTIGATION BY CLAIMANT. – Prior to issuing notification of intent to initiate medical negligence litigation pursuant to s. 766.106, the claimant shall conduct an investigation to ascertain that there are reasonable grounds to believe that:

(a) Any named defendant in the litigation was negligent in the care or treatment of the claimant; and

(b) Such negligence resulted in injury to the claimant.

Corroboration of reasonable grounds to initiate medical negligence litigation shall be provided by the claimant's submission of a verified written medical expert opinion from a medical expert as defined in s. 766.202(6), at the time the notice of intent to initiate litigation is mailed, which statement shall corroborate reasonable grounds to support the claim of medical negligence.

(3) PRESUIT INVESTIGATION BY PROSPECTIVE DEFENDANT. – Prior to issuing its response to the claimant's notice of intent to initiate litigation, during the time period for response authorized pursuant to s. 766.106, the prospective defendant or the defendant's insurer or self-insurer shall conduct an investigation as provided in s. 766.106(3) to ascertain whether there are reasonable grounds to believe that:

(a) The defendant was negligent in the care or treatment of the claimant; and

(b) Such negligence resulted in injury to the claimant.

Corroboration of lack of reasonable grounds for medical negligence litigation shall be provided with any response rejecting the claim by the defendant's submission of a verified written medical expert opinion from a medical expert as defined in s. 766.202(6), at the time the response rejecting the claim is mailed, which statement shall corroborate reasonable grounds

for lack of negligent injury sufficient to support the response denying negligent injury.

(4) PRESUIT MEDICAL EXPERT OPINION. – The medical expert opinions required by this section are subject to discovery. The opinions shall specify whether any previous opinion by the same medical expert has been disqualified and if so the name of the court and the case number in which the ruling was issued.

766.204 Availability of medical records for presuit investigation of medical negligence claims and defenses; penalty. –

(1) Copies of any medical record relevant to any litigation of a medical negligence claim or defense shall be provided to a claimant or a defendant, or to the attorney thereof, at a reasonable charge within 10 business days of a request for copies, except that an independent special hospital district with taxing authority which owns two or more hospitals shall have 20 days. It shall not be grounds to refuse copies of such medical records that they are not yet completed or that a medical bill is still owing.

(2) Failure to provide copies of such medical records, or failure to make the charge for copies a reasonable charge, shall constitute evidence of failure of that party to comply with good faith discovery requirements and shall waive the requirement of

written medical corroboration by the requesting party.

(3) A hospital shall not be held liable for any civil damages as a result of complying with this section.

766.205 Presuit discovery of medical negligence claims and defenses. –

(1) Upon the completion of presuit investigation pursuant to s. 766.203, which investigation has resulted in the mailing of a notice of intent to initiate litigation in accordance with s. 766.106, corroborated by medical expert opinion that there exist reasonable grounds for a claim of negligent injury, each party shall provide to the other party reasonable access to information within its possession or control in order to facilitate evaluation of the claim.

(2) Such access shall be provided without formal discovery, pursuant to s. 766.106, and failure to so provide shall be grounds for dismissal of any applicable claim or defense ultimately asserted.

(3) Failure of any party to comply with this section shall constitute evidence of failure of that party to comply with good faith discovery requirements and shall waive the requirement of written medical corroboration by the party seeking production.

(4) No statement, discussion, written document, report, or other work product generated solely by the presuit investigation process is discoverable or admissible in any civil action for any purpose by the opposing party. All participants, including, but not limited to, hospitals and other medical facilities, and the officers, directors, trustees, employees, and agents thereof, physicians, investigators, witnesses, and employees or associates of the defendant, are immune from civil liability arising from participation in the presuit investigation process. Such immunity from civil liability includes immunity for any acts by a medical facility in connection with providing medical records pursuant to s. 766.204(1) regardless of whether the medical facility is or is not a defendant.

766.206 Presuit investigation of medical negligence claims and defenses by court. –

(1) After the completion of presuit investigation by the parties pursuant to s. 766.203 and any discovery pursuant to s. 766.106, any party may file a motion in the circuit court requesting the court to determine whether the opposing party's claim or denial rests on a reasonable basis.

(2) If the court finds that the notice of intent to initiate litigation mailed by the claimant does not comply with the reasonable investigation requirements of ss. 766.201-766.212, including a review of the claim and a verified written medical expert opinion by an expert witness as defined in s. 766.202, or

that the authorization accompanying the notice of intent required under s. 766.1065 is not completed in good faith by the claimant, the court shall dismiss the claim, and the person who mailed such notice of intent, whether the claimant or the claimant's attorney, is personally liable for all attorney's fees and costs incurred during the investigation and evaluation of the claim, including the reasonable attorney's fees and costs of the defendant or the defendant's insurer.

(3) If the court finds that the response mailed by a defendant rejecting the claim is not in compliance with the reasonable investigation requirements of ss. 766.201-766.212, including a review of the claim and a verified written medical expert opinion by an expert witness as defined in s. 766.202, the court shall strike the defendant's pleading. The person who mailed such response, whether the defendant, the defendant's insurer, or the defendant's attorney, shall be personally liable for all attorney's fees and costs incurred during the investigation and evaluation of the claim, including the reasonable attorney's fees and costs of the claimant.

(4) If the court finds that an attorney for the claimant mailed notice of intent to initiate litigation without reasonable investigation, or filed a medical negligence claim without first mailing such notice of intent which complies with the reasonable investigation requirements, or if the court finds that an attorney for a defendant mailed a response rejecting the claim without reasonable investigation, the court shall submit its finding in the matter to The Florida

Bar for disciplinary review of the attorney. Any attorney so reported three or more times within a 5-year period shall be reported to a circuit grievance committee acting under the jurisdiction of the Supreme Court. If such committee finds probable cause to believe that an attorney has violated this section, such committee shall forward to the Supreme Court a copy of its finding.

(5)(a) If the court finds that the corroborating written medical expert opinion attached to any notice of claim or intent or to any response rejecting a claim lacked reasonable investigation or that the medical expert submitting the opinion did not meet the expert witness qualifications as set forth in s. 766.102(5), the court shall report the medical expert issuing such corroborating opinion to the Division of Medical Quality Assurance or its designee. If such medical expert is not a resident of the state, the division shall forward such report to the disciplining authority of that medical expert.

(b) The court shall refuse to consider the testimony or opinion attached to any notice of intent or to any response rejecting a claim of an expert who has been disqualified three times pursuant to this section.

766.207 Voluntary binding arbitration of medical negligence claims. –

(1) Voluntary binding arbitration pursuant to this section and ss. 766.208-766.212 shall not apply to rights of action involving the state or its agencies or subdivisions, or the officers, employees, or agents thereof, pursuant to s. 768.28.

(2) Upon the completion of presuit investigation with preliminary reasonable grounds for a medical negligence claim intact, the parties may elect to have damages determined by an arbitration panel. Such election may be initiated by either party by serving a request for voluntary binding arbitration of damages within 90 days after service of the claimant's notice of intent to initiate litigation upon the defendant. The evidentiary standards for voluntary binding arbitration of medical negligence claims shall be as provided in ss. 120.569(2)(g) and 120.57(1)(c).

(3) Upon receipt of a party's request for such arbitration, the opposing party may accept the offer of voluntary binding arbitration within 30 days. However, in no event shall the defendant be required to respond to the request for arbitration sooner than 90 days after service of the notice of intent to initiate litigation under s. 766.106. Such acceptance within the time period provided by this subsection shall be a binding commitment to comply with the decision of the arbitration panel. The liability of any insurer shall be subject to any applicable insurance policy limits.

(4) The arbitration panel shall be composed of three arbitrators, one selected by the claimant, one selected by the defendant, and one an administrative law judge furnished by the Division of Administrative Hearings who shall serve as the chief arbitrator. In the event of multiple plaintiffs or multiple defendants, the arbitrator selected by the side with multiple parties shall be the choice of those parties. If the multiple parties cannot reach agreement as to their arbitrator, each of the multiple parties shall submit a nominee, and the director of the Division of Administrative Hearings shall appoint the arbitrator from among such nominees.

(5) The arbitrators shall be independent of all parties, witnesses, and legal counsel, and no officer, director, affiliate, subsidiary, or employee of a party, witness, or legal counsel may serve as an arbitrator in the proceeding.

(6) The rate of compensation for medical negligence claims arbitrators other than the administrative law judge shall be set by the chief judge of the appropriate circuit court by schedule providing for compensation of not less than $250 per day nor more than $750 per day or as agreed by the parties. In setting the schedule, the chief judge shall consider the prevailing rates charged for the delivery of professional services in the community.

(7) Arbitration pursuant to this section shall preclude recourse to any other remedy by the claimant against any participating defendant, and shall be

undertaken with the understanding that damages shall be awarded as provided by general law, including the Wrongful Death Act, subject to the following limitations:

(a) Net economic damages shall be awardable, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments.

(b) Noneconomic damages 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, so that a finding that the claimant's injuries resulted in a 50-percent reduction in his or her capacity to enjoy life would warrant an award of not more than $125,000 noneconomic damages.

(c) Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to s. 766.202(9) and shall be offset by future collateral source payments.

(d) Punitive damages shall not be awarded.

(e) The defendant shall be responsible for the payment of interest on all accrued damages with respect to which interest would be awarded at trial.

(f) The defendant shall pay the claimant's reasonable attorney's fees and costs, as determined by the arbitration panel, but in no event more than 15 percent of the award, reduced to present value.

(g) The defendant shall pay all the costs of the arbitration proceeding and the fees of all the arbitrators other than the administrative law judge.

(h) Each defendant who submits to arbitration under this section shall be jointly and severally liable for all damages assessed pursuant to this section.

(i) The defendant's obligation to pay the claimant's damages shall be for the purpose of arbitration under this section only. A defendant's or claimant's offer to arbitrate shall not be used in evidence or in argument during any subsequent litigation of the claim following the rejection thereof.

(j) The fact of making or accepting an offer to arbitrate shall not be admissible as evidence of liability in any collateral or subsequent proceeding on the claim.

(k) Any offer by a claimant to arbitrate must be made to each defendant against whom the claimant has made a claim. Any offer by a defendant to arbitrate must be made to each claimant who has joined in the notice of intent to initiate litigation, as provided in s. 766.106. A defendant who rejects a claimant's offer to arbitrate shall be subject to the provisions of s. 766.209(3). A claimant who rejects a defendant's offer to arbitrate shall be subject to the provisions of s. 766.209(4).

(l) The hearing shall be conducted by all of the arbitrators, but a majority may determine any

question of fact and render a final decision. The chief arbitrator shall decide all evidentiary matters.

The provisions of this subsection shall not preclude settlement at any time by mutual agreement of the parties.

(8) Any issue between the defendant and the defendant's insurer or self-insurer as to who shall control the defense of the claim and any responsibility for payment of an arbitration award, shall be determined under existing principles of law; provided that the insurer or self-insurer shall not offer to arbitrate or accept a claimant's offer to arbitrate without the written consent of the defendant.

(9) The Division of Administrative Hearings is authorized to promulgate rules to effect the orderly and efficient processing of the arbitration procedures of ss. 766.201-766.212.

(10) Rules promulgated by the Division of Administrative Hearings pursuant to this section, s. 120.54, or s. 120.65 may authorize any reasonable sanctions except contempt for violation of the rules of the division or failure to comply with a reasonable order issued by an administrative law judge, which is not under judicial review.

766.208 Arbitration to allocate responsibility among multiple defendants. –

(1) The provisions of this section shall apply when more than one defendant has participated in voluntary binding arbitration pursuant to s. 766.207.

(2) Within 20 days after the determination of damages by the arbitration panel in the first arbitration proceeding, those defendants who have agreed to voluntary binding arbitration shall submit any dispute among them regarding the apportionment of financial responsibility to a separate binding arbitration proceeding. Such proceeding shall be with a panel of three arbitrators, which panel shall consist of the administrative law judge who presided in the first arbitration proceeding, who shall serve as the chief arbitrator, and two medical practitioners appointed by the defendants, except that if a hospital licensed pursuant to chapter 395 is involved in the arbitration proceeding, one arbitrator appointed by the defendants shall be a certified hospital risk manager. In the event the defendants cannot agree on their selection of arbitrators within 20 days after the determination of damages by the arbitration panel in the first arbitration proceeding, a list of not more than five nominees shall be submitted by each defendant to the director of the Division of Administrative Hearings, who shall select the other arbitrators but shall not select more than one from the list of nominees of any defendant.

(3) The administrative law judge appointed to serve as the chief arbitrator shall convene the arbitrators for the purpose of determining allocation of responsibility among multiple defendants within 65 days after the determination of damages by the arbitration panel in the first arbitration proceeding.

(4) The arbitration panel shall allocate financial responsibility among all defendants named in the notice of intent to initiate litigation, regardless of whether the defendant has submitted to arbitration. The defendants in the arbitration proceeding shall pay their proportionate share of the economic and noneconomic damages awarded by the arbitration panel. All defendants in the arbitration proceeding shall be jointly and severally liable for any damages assessed in arbitration. The determination of the percentage of fault of any defendant not in the arbitration case shall not be binding against that defendant, nor shall it be admissible in any subsequent legal proceeding.

(5) Payment by the defendants of the damages awarded by the arbitration panel in the first arbitration proceeding shall extinguish those defendants' liability to the claimant and shall also extinguish those defendants' liability for contribution to any defendants who did not participate in arbitration.

(6) Any defendant paying damages assessed pursuant to this section or s. 766.207 shall have an

action for contribution against any nonarbitrating person whose negligence contributed to the injury.

766.209 Effects of failure to offer or accept voluntary binding arbitration. –

(1) A proceeding for voluntary binding arbitration is an alternative to jury trial and shall not supersede the right of any party to a jury trial.

(2) If neither party requests or agrees to voluntary binding arbitration, the claim shall proceed to trial or to any available legal alternative such as offer of and demand for judgment under s. 768.79 or offer of settlement under s. 45.061.

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

(a) The claim shall proceed to trial, and the claimant, upon proving medical negligence, shall be entitled to recover damages subject to the limitations in s. 766.118, prejudgment interest, and reasonable attorney's fees up to 25 percent of the award reduced to present value.

(b) The claimant's award at trial shall be reduced by any damages recovered by the claimant from arbitrating codefendants following arbitration.

(4) If the claimant rejects a defendant's offer to enter voluntary binding arbitration:

(a) The damages awardable at trial shall be limited to net economic damages, plus noneconomic damages not to exceed $350,000 per incident. The Legislature expressly finds that such conditional limit on noneconomic damages is warranted by the claimant's refusal to accept arbitration, and represents an appropriate balance between the interests of all patients who ultimately pay for medical negligence losses and the interests of those patients who are injured as a result of medical negligence.

(b) Net economic damages reduced to present value shall be awardable, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments.

(c) Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to s. 766.202(9), and shall be offset by future collateral source payments.

(5) Jury trial shall proceed in accordance with existing principles of law.

766.21 Misarbitration. –

(1) At any time during the course of voluntary binding arbitration of a medical negligence claim pursuant to s. 766.207, the administrative law judge serving as chief arbitrator on the arbitration panel, if he or she determines that agreement cannot be reached, shall be authorized to dissolve the

arbitration panel and request the director of the Division of Administrative Hearings to appoint two new arbitrators from lists of three to five names timely provided by each party to the arbitration. Not more than one arbitrator shall be appointed from the list provided by any party, unless only one list is timely filed.

(2) Upon appointment of the new arbitrators, arbitration shall proceed at the direction of the chief arbitrator in accordance with the provisions of ss. 766.201-766.212.

(3) At any time after the allocation arbitration hearing under s. 766.208 has concluded, the administrative law judge serving as chief arbitrator on the arbitration panel is authorized to dissolve the arbitration panel and declare the proceedings concluded if he or she determines that agreement cannot be reached.

766.211 Payment of arbitration award; interest. –

(1) Within 20 days after the determination of damages by the arbitration panel pursuant to s. 766.207, the defendant shall:

(a) Pay the arbitration award, including interest at the legal rate, to the claimant; or

(b) Submit any dispute among multiple defendants to arbitration pursuant to s. 766.208.

(2) Commencing 90 days after the award rendered in the arbitration procedure pursuant to s. 766.207, such award shall begin to accrue interest at the rate of 18 percent per year.

766.212 Appeal of arbitration awards and allocations of financial responsibility. –

(1) An arbitration award and an allocation of financial responsibility are final agency action for purposes of s. 120.68. Any appeal shall be taken to the district court of appeal for the district in which the arbitration took place, shall be limited to review of the record, and shall otherwise proceed in accordance with s. 120.68. The amount of an arbitration award or an order allocating financial responsibility, the evidence in support of either, and the procedure by which either is determined are subject to judicial scrutiny only in a proceeding instituted pursuant to this subsection.

(2) No appeal shall operate to stay an arbitration award; nor shall any arbitration panel, arbitration panel member, or circuit court stay an arbitration award. The district court of appeal may order a stay to prevent manifest injustice, but no court shall abrogate the provisions of s. 766.211(2).

(3) Any party to an arbitration proceeding may enforce an arbitration award or an allocation of financial responsibility by filing a petition in the circuit court for the circuit in which the arbitration took

place. A petition may not be granted unless the time for appeal has expired. If an appeal has been taken, a petition may not be granted with respect to an arbitration award or an allocation of financial responsibility that has been stayed.

(4) If the petitioner establishes the authenticity of the arbitration award or of the allocation of financial responsibility, shows that the time for appeal has expired, and demonstrates that no stay is in place, the court shall enter such orders and judgments as are required to carry out the terms of the arbitration award or allocation of financial responsibility. Such orders are enforceable by the contempt powers of the court; and execution will issue, upon the request of a party, for such judgments.