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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

LEYDIANA SANTIAGO and ARMANDO OCASIO, individually and as the parents and natural guardians of Z.O.S.,

Appellants,

v.

MARISA BAKER, M.D., and WOMEN'S CARE FLORIDA, LLC, d/b/a Lifetime Obstetrics and Gynecology,

Appellees.

Case No. 2D13-4088

Opinion filed April 11, 2014.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Hillsborough County; Bernard C. Silver, Judge.

George A. Vaka and Nancy A. Lauten of Vaka Law Group, Tampa, for Appellants.

Jason M. Azzarone, James D. Wetzel, and Louis J. La Cava of La Cava & Jacobson, P.A., Tampa, for Appellees.

LaROSE, Judge.

Leydiana Santiago and Armando Ocasio, the parents and natural guardians of the child, Z.O.S., sued Dr. Marisa Baker and Women's Care Florida, LLC,

d/b/a Lifetime Obstetrics and Gynecology (collectively, Lifetime), for medical malpractice. Tragically, Z.O.S. suffers from severe birth defects allegedly caused by a drug that Ms. Santiago resumed taking to treat a chronic disease. According to the complaint, upon becoming a new patient at Lifetime, Ms. Santiago informed the medical staff that she and her husband were planning to have a second child. Later, an over-the-counter pregnancy test taken by Ms. Santiago yielded a positive result. On two visits several days later, however, Lifetime advised her that the pregnancy was nonviable; Lifetime recommended a dilation and curettage, which Ms. Santiago declined. Thereafter, Ms. Santiago resumed taking the drug, allegedly believing that spontaneous passage of the fetus would occur. She also alleged that she was unaware of the possible adverse effects the drug might have on a fetus. As noted above, Z.O.S. was born.

When she became a Lifetime patient, Ms. Santiago signed an arbitration agreement which scope covers the claims asserted in the complaint. She executed the agreement prior to Z.O.S.'s birth, indeed, prior to the child's conception.[1] After the complaint was filed, Lifetime successfully moved to compel arbitration. Ms. Santiago and Mr. Ocasio challenge the trial court's nonfinal order. We have jurisdiction, see Fla. R. App. P. 9.130(a)(3)(C)(iv), and affirm.

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[1]Ms. Santiago and Mr. Ocasio do not raise the issue of the extent to which a parent or legal guardian can bind a minor—in this case an unconceived child at the time of the agreement—to arbitration. See Global Travel Mktg., Inc. v. Shea, 908 So. 2d 392, 405 (Fla. 2005) (holding that an arbitration agreement incorporated into a commercial travel contract is enforceable against the minor or minor's estate in a tort action arising from the contract). We also note that they raise no constitutional challenge to the arbitration agreement. Nor does Mr. Ocasio challenge on appeal the extent to which he may be bound by the arbitration agreement.

Ms. Santiago and Mr. Ocasio argue that the arbitration agreement violates the State's public policy reflected in the medical malpractice statutes (the Act). See chapter 766, Fla. Stat. (2011). More specifically, they claim that the Act requires the resolution of malpractice claims exclusively through statutory voluntary binding arbitration or by trial. Lifetime contends that the Act sweeps less broadly. We agree.

Ms. Santiago and Mr. Ocasio never requested voluntary statutory arbitration, thus they never invoked the protections of section 766.207, which provides, in part, as follows:

> (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. . . .
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> . . . .
>
> (7)(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.

Ms. Santiago willingly signed the arbitration agreement. Our record reflects no coercion or duress. We find nothing in the record suggesting that the agreement is procedurally or substantively unconscionable. The agreement clearly specifies that the parties waive the right to a jury trial and consent to arbitrate all claims

arising out of or related to medical care and treatment. Unlike the provisions of section 766.207, the agreement provides that the parties shall share the arbitration expenses equally.

Ms. Santiago and Mr. Ocasio insist that Franks v. Bowers, 116 So. 3d 1240 (Fla. 2013), compels reversal. They read Bowers broadly to hold that if neither party seeks arbitration under section 766.207, the malpractice claim cannot be arbitrated at all. They contend that the arbitration agreement lessens their rights under the Act and is inconsistent with the Act's purpose and public policy.

Bowers disapproved an arbitration provision that failed to follow the Act's requirements. The supreme court held that any agreement that seeks to enjoy the benefits of the arbitration provision under the statutory scheme must necessarily adopt all of its provisions. Id. at 1248. Here, the parties never invoked the statutory arbitration scheme.

Critically, Bowers did not hold that all private arbitration agreements are void as against public policy. Indeed, the supreme court noted that the Act

> 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 Act.]

Id. at 1249-50. Indeed, nothing in Bowers "impede[s] the general enforceability of agreements to arbitrate." Id. at 1251.

Moreover, nothing in the Act specifically prohibits parties from arbitrating their claims by private agreement outside the statutory scheme.

On the record before us, we do not find the agreement void as against public policy. We must also reject Ms. Santiago's and Mr. Ocasio's argument that Bowers categorically precludes private binding arbitration agreements under the Act.

Affirmed.

NORTHCUTT, J., Concurs.
ALTENBERND, J. Concurs with opinion.

ALTENBERND, Judge, Concurring.

On July 4, 1776, in deciding to declare independence from a king who was regarded as a despot, Thomas Jefferson and John Adams provided a list of grievances that justified the revolutionary decision. One of those grievances stated: "For depriving us in many cases, of the benefits of Trial by Jury." The Declaration of Independence para. 20 (U.S. 1776).

After a long and painful war for independence, we placed the Seventh Amendment into our federal constitution to assure that in suits at common law with a value exceeding twenty dollars, "the right of trial by jury shall be preserved." U.S. Const. Amend. VII. Florida went a step farther declaring: "The right of trial by jury shall be secure to all and remain inviolate." Art. I, § 22, Fla. Const.

Typically, a person can waive a constitutional right only by a knowing and intelligent decision. See, e.g., Johnson v. Zerbst, 304 U.S. 458, 464 (1938). But somehow in deference to the supposed economic efficiency of arbitration, our society seems to be more and more willing to allow the use of form contracts, not subject to

negotiation, that force patients, the elderly, the marginally literate, and ordinary consumers of everyday products to waive their constitutional right to trial by jury in common law cases—before the common law cause of action even exists—in order to receive basic goods and services. As this case demonstrates, this occurs even when the people have never personally entered into agreements of any sort.

Leydiana Santiago went to see Dr. Marisa Baker in January 2011. She signed an arbitration agreement, apparently on her first visit. Her husband did not sign the agreement. Z.O.S. had not even been conceived, much less born, when Ms. Santiago signed this agreement.

The agreement states:

> It is the intention of the parties that this Agreement bind all parties whose claims may arise out of or relate to treatment or services provided by the provider of medical services, including the patient, the patient's estate, any spouse or heirs of the patient, any biological or adoptive parent of the patient and any children of the patient, whether born or unborn, at the time of the occurrence giving rise to the claim. In the case of any pregnant mother, the term "patient" herein shall mean both the mother and the mother's expected child or children.

This agreement may reflect Dr. Baker's "intention" to require her patients to forego their constitutional rights in order to receive medical service. It may be binding on Leydiana Santiago. It may even bind someone whose common law claim is derivative of Ms. Santiago's claim. But Armando Ocasio has a claim as parent and natural guardian of Z.O.S. Mr. Ocasio did not sign this agreement and he received no consideration for this agreement. By voting to enforce this agreement, I cannot help feeling that I am violating his constitutional right to a trial by jury.

Juries are not a relic of our history. In both civil and criminal cases, juries serve as a check upon the concentration of power in judges and other members of the political and economic elite. As Floridians, we have constitutionally protected as "inviolate" the right to trial by jury not because it is efficient or tidy, but because the participation of ordinary citizens is essential to a healthy balance of power within a democracy.

Somehow, Z.O.S. waived an inviolate right to trial by jury before conception and before this infant had a common law cause of action to be litigated. I am convinced that the holding in Global Travel Marketing, Inc. v. Shea, 908 So. 2d 392, 405 (Fla. 2005), supports this outcome in this case. As the court's opinion correctly notes, the issues preserved by trial counsel in the trial court also have limited the ability of Z.O.S's counsel to pursue this issue on appeal.

But I obey what appears to be the rule of law without any enthusiasm and with a fear that I have disappointed Thomas Jefferson and John Adams.