SUPREME COURT OF FLORIDA

CASE NO. SC01-348
L.T. CASE NO. 5D99-116

MARY CHESTER, Individually and
as personal representative of the
estate of CHARLES CHESTER,

Petitioner,

vs.

VICTOR DOIG, M.D.,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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REBUTTAL TO PETITIONER'S JURISDICTIONAL STATEMENT

Pursuant to Florida Rule of Appellate Procedure 9.120(d), when jurisdiction is invoked by a certified question under rule 9.030(a)(2)(A)(v), as has been done here, briefs on jurisdiction are unnecessary. However, petitioner Chester has included a jurisdictional statement within her initial brief, and respondent Dr. Doig believes that Mrs. Chester's statement, which implicates the viability of her Issue III, is erroneous.

Contrary to Mrs. Chester's assertion, this Court does not have blanket jurisdiction to review an issue *never before raised on appeal*. [*See* Initial Brief pp.2-3] Nowhere does Mrs. Chester's case of State v. Perry, 687 So. 2d 831 (Fla. 1997) recognize that this Court has "jurisdiction to review all issues," and her case of Feller v. State, 637 So. 2d 911 (Fla. 1994), is not a complete statement of jurisdictional law.

In Savoie v. State, 422 So. 2d 308 (Fla. 1982), this Court articulated a complete statement as to the necessary parameters to its jurisdiction:

> We have jurisdiction, and once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues *appropriately raised in the appellate process* . . . . This authority to consider issues other than those upon which jurisdiction is based is discretionary with this court and *should be exercised only when these other issues have been properly briefed and argued* and are dispositive of the case.

Id. at 312; *see also* Savona v. Prudential Ins. Co. of America, 648 So. 2d 705, 707 (Fla. 1995) (while Supreme Court has "authority to consider issues other than those

upon which jurisdiction is based," such discretionary authority "should be exercised only when these other issues have been properly briefed and argued.").

Thus, this Court cannot, as urged by Mrs. Chester, consider her Issue III raised now for the first time -- an issue never before briefed, argued, or considered within the appellate process. However, this Court may properly consider the issue of the decedent's disputed retirement pension, which was raised, briefed, and argued as Issue II in the district court appeal. Dr. Doig has placed this issue under Issue IV of this Answer Brief.

STATEMENT OF THE CASE AND FACTS

Dr. Doig essentially agrees with the statement of the case and facts as rendered by Mrs. Chester, and will elaborate only as necessary within the argument sections of this brief.

SUMMARY OF ARGUMENT

First, the Fifth District Court of Appeal correctly awarded defendant, Dr. Doig, a set off for claimant's previous settlement agreement with the co-defendant hospital, as Florida law recognizes the applicability of such set offs, pursuant to the "set off" statutes, in medical malpractice cases. While these set off statutes are distinct from "collateral source" statutes, both types of statutes are utilized simultaneously when computing damage awards. The settlement agreement at issue is not enumerated within the arbitration collateral source statute because Florida has never enumerated settlement agreements within its various collateral source statutes. However, this agreement is expressly allowed as a set off under the set off statutes, sections 46.015, 768.041, and 768.31, Florida Statutes, and under applicable case law.

Second, a set off for the entire amount of the settlement agreement is appropriate here, and there should be no resort to hyperinflating the noneconomic damage award in an effort to avoid the arbitration statutory cap and application of the set off. Pursuant to the statutory scheme chosen by the Legislature, Mrs. Chester's noneconomic damages were capped at $250,000. There is no statutory basis for the scheme she now proposes, whereby damages are first inflated, then reduced by any set offs so as to still preserve the maximum allowed cap -- in essence negating any legitimate set off. Such a scheme would be contrary to the legislative intent of

providing predictability and early resolution for medical malpractice claims. Additionally, a Wells apportionment is inapplicable here, where Dr. Doig was jointly and severally liable, and there was no allocation of fault. Further, it is undisputed that Mrs. Chester's settlement agreement with a co-defendant was for economic damages only. The policy concerns expressed in Wells regarding apportionment are non-existent in this case.

Third, Mrs. Chester failed to preserve her third issue, and so cannot raise what has never been raised, briefed, or argued on appeal. While this Court has jurisdiction to consider all issues appropriately raised, it does not have blanket jurisdiction to consider unpreserved issues.

Fourth, Dr. Doig properly preserved an issue which can now be considered by this Court: whether pension benefits at issue were erroneously awarded to Mrs. Chester. This issue was appropriately raised, briefed, and argued below. The pension benefits, which are being received by the decedent's first wife as beneficiary, were awarded to Mrs. Chester, the decedent's second wife. This award was erroneous, as neither Mrs. Chester nor the estate ever had a claim to these benefits because the beneficiary election of the first wife never changed and the benefits vested upon the decedent's retirement, which occurred prior to his death.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY AWARDED A SET OFF FOR CLAIMANT'S PRIOR SETTLEMENT AGREEMENT WITH CO-DEFENDANT; FLORIDA'S MEDICAL MALPRACTICE ARBITRATION STATUTES DETAILING "COLLATERAL SOURCES" ARE SEPARATE AND DISTINCT FROM FLORIDA'S "SET OFF STATUTES," WHICH ALLOW A SET OFF FOR SETTLEMENT AGREEMENTS AND HAVE LONG BEEN HELD TO APPLY IN MEDICAL MALPRACTICE CASES.

Florida's set off statutes require that Mrs. Chester's prior settlement agreement with the co-defendant hospital be set off against this medical malpractice arbitration. Florida makes a distinction between "collateral source" statutes and "set off" statutes, with each equally applicable when computing damage awards. Thus, while the settlement agreement in this case may not be a collateral source under the arbitration collateral source statute, it is an allowable set off under the set off statutes, and the district court correctly awarded such set off.

"Set Off" Statutes vs. "Collateral Source" Statutes

Florida provides defendants with three specific set off statutes that allow defendants, in order to prevent double recoveries to plaintiffs, to appropriately set off settlement agreements entered into between plaintiffs and joint tortfeasors. These "set off" statutes are separate and distinct from "collateral source" statutes. Both types of statutes are appropriately applied in medical malpractice cases, including medical malpractice arbitration.

Florida's first set off statute, section 46.015, "Release of Parties," contained within the general "Civil Practice and Procedure" statutes, states that:

> (2) At trial, if any person shows the court that the plaintiff, or his or her legal representative, has delivered a written release or covenant not to sue to any person in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment.

Pursuant to section 45.021, Florida Statutes, set off under section 46.015 applies to **"all**" actions, unless specifically excluded. § 45.021, Fla. Stat. ("Chapters 45-51 . . . apply to all actions, whether heretofore at law or chancery, unless specifically provided otherwise in such chapters or parts thereof.").

The second set off statute, section 768.041, contained within Florida's general negligence provisions, reiterates section 45.015:

> (2) At trial, if any defendant shows the court that the plaintiff, or any person lawfully on his behalf, has delivered a release or covenant not to sue to any person, firm, or corporation in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment and enter judgment accordingly.

Florida's third set off statute, section 768.31, "contribution among tortfeasors," states:

> (5) Release or covenant not to sue.--When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater.

Title 45 of the Florida Statutes, entitled "Torts," encompasses all of the Medical Malpractice Act, including the statutes on arbitration, and two of the set off statutes, sections 768.041 and 768.31.

The three set off statutes are separate from provisions detailing the differing concept of "collateral sources," which are entitled to "off set." In the general negligence provisions, "collateral sources" are defined -- *apart from the set off statutes* -- as payments such as government benefits, insurances, and wage continuation plans. § 768.76(2), Fla. Stat.[1] This definition is nearly identical to the

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[1]Section 768.76(2) states:

> (2) For purposes of this section:
>
> > (a) "Collateral sources" means any payments made to the claimant, or made on the claimant's behalf, by or pursuant to:
> >
> > > 1. The United States Social Security Act, except Title XVIII and Title XIX; any federal, state, or local income disability act; or any other public programs providing medical expenses, disability payments, or other similar benefits, except those prohibited by federal law and those expressly excluded by law as collateral sources.
> >
> > > 2. Any health, sickness, or income disability insurance; automobile accident insurance that provides health benefits or

medical malpractice provision specifically defining "collateral sources," which also defines collateral sources as such payments as government benefits, insurances, and wage continuation plans. § 766.202(2), Fla. Stat.[2] The collateral sources definitions

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> income disability coverage; and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by her or him or provided by others.
>
> 3. 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.
>
> 4. Any contractual or voluntary wage continuation plan provided by employers or by any other system intended to provide wages during a period of disability.

[2]Section 766.202(2) states:

(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 pubic 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 provided, 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 any other system intended to provide wages during a

of section 766.202 apply not only to the medical malpractice arbitration sections, but also to sections 766.201 through 766.212, which include the entire medical malpractice presuit period. *See* § 766.202, Fla. Stat.

Set Off Statutes and Collateral Source Statutes Operate Simultaneously

As seen within case law, and as will be discussed *infra*, Florida law permits both set off statutes *and* collateral source statutes to operate independently from -- and simultaneously with -- one another, including in medical malpractice cases. *See, e.g.*, Olson v. N. Cole Construction, Inc., 681 So. 2d 799 (Fla. 2d DCA 1996) (personal injury action applying both collateral sources and settlement proceeds); Cohen v. Richter, 667 So. 2d 899, 900-901 (Fla. 4th DCA 1996) (medical malpractice case noting the application of both collateral sources and settlement agreements when calculating damages).

Mrs. Chester argues that the district court inappropriately engaged in statutory construction when the meaning of the statute is "plain and obvious": that since the definition of "collateral sources" does not include "setoffs for prior settlements," then no set off exists. [*See* Initial Brief pp.9-15] While Dr. Doig agrees with Mrs. Chester's premise that statutes are to be given their plain and obvious meaning, he believes that she misses the obvious meaning of the medical malpractice collateral

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period of disability.

source statute by attempting to construe it in total isolation from other statutes -- within its own "vacuum" -- and with total disregard for other relevant statutory sections. Section 766.202(2) is merely a collateral source statute defining "collateral sources" in medical malpractice cases; section 766.207(7) states how these *same* "collateral sources" will be "offset" within the context of arbitration.

Just as she did in the original appeal, Mrs. Chester again misses the point that the "set off statutes" and the "collateral source statutes" are not identical and should not be confused. [Initial Brief p.13-14] The set off of a settlement agreement is always appropriate where there are joint tortfeasors and the same claims at issue -- *including medical malpractice cases*. *See, e.g.*, Wells v. Tallahassee Mem. Reg. Med. Ctr, Inc., 659 So. 2d 249, 254 n.3 (Fla. 1995) (medical malpractice case applying both settlement agreements and collateral sources); Cohen v. Richter, 667 So. 2d 899, 900-901 (Fla. 4th DCA 1996) (medical malpractice case quoting Wells as to the application of both collateral sources and settlement agreements when calculating damages).

Mrs. Chester argues that settlement agreement set offs cannot be applied because "[n]owhere in this detailed [collateral source] definition of setoffs does the legislature provide for setoffs of prior settlements." [Initial Brief p.14] She also argues that "the legislature consciously chose to prohibit offsets for settlements," and

that "setoffs [were] addressed by the legislature, which chose to limit them." [Initial Brief pp.15, 17] Mrs. Chester ignores the fact that Florida's collateral source statutes *have never defined settlement agreements as "collateral sources."* This is regardless of whether the collateral source statute at issue implicates medical malpractice, arbitration, torts, contracts, or automobile accidents. *See* §§ 766.202, 766.207 (medical malpractice); § 768.76 (tort, contract); § 768.50 (now repealed; virtually identical to § 766.202, model for § 768.76); § 627.7372 (now repealed; personal injuries in automobile accidents; virtually identical to § 766.202).

The logical extension of Mrs. Chester's argument, since all of Florida's collateral source statutes are essentially similar, is that ***all*** collateral source statutes necessarily exclude set off for settlement agreements, and thus collateral source statutes necessarily prohibit the application of settlement set offs. However, case law does not support such an argument. If the collateral source statutes were so narrowly constricted as advocated by Mrs. Chester, then settlement set off statutes and collateral source statutes could never be simultaneously utilized. Yet, courts routinely allow both settlement agreements and collateral sources to be applied in conjunction with each other. *See, e.g.*, Wells v. Tallahassee Mem. Reg. Med. Ctr., Inc., 659 So. 2d 249, 254 & n.3 (Fla. 1995) (medical malpractice action utilizing application of both settlement proceeds and collateral source benefits); Olson v. N. Cole Construction,

Inc., 681 So. 2d 799 (Fla. 2d DCA 1996) (personal injury action applying set off for both collateral source payments and settlement proceeds to the damages award); Wiggins v. Braman Cadillac, Inc., 669 So. 2d 332 (Fla. 3d DCA 1996) (negligence action calculating damages with respect to set off for both settlement agreements and collateral source benefits received).[3]

Finally, Mrs. Chester ignores the fact that section 766.202(2), which she argues does not provide for the set off of settlement agreements, applies to sections 766.201 through 766.212, and thus reaches *beyond* the scope of only arbitration. *See* § 766.202, Fla. Stat. Thus, her preclusion of settlement agreements as set offs would necessarily be extended to medical malpractice situations beyond arbitration; as has been shown, this would be contrary to established Florida law.

St. Mary's is Inapplicable to This Case

In attempting to construe the medical malpractice collateral source statute as specifically excluding settlement agreements, Mrs. Chester relies heavily upon this

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[3]Florida also considers collateral source payments and settlement agreements in tandem within its "Offer of Judgment" statute, section 768.79(6)(b), Florida Statutes:

> For purposes of the determination required by paragraph (a), the term "judgment obtained" means the amount of the net judgment entered, *plus* any postoffer *collateral source payments* received or due . . . *plus* any postoffer *settlement amounts* by which the verdict was reduced.

court's opinion in St. Mary's Hospital, Inc. v. Phillipe, 769 So. 2d 961 (Fla. 2000). However, Dr. Doig believes that St. Mary's is inapplicable to this particular situation.

Mrs. Chester argues that according to St. Mary's, the "medical malpractice arbitration statute stands alone" and is "self-contained." [Initial Brief pp.12, 13] This is incorrect, in that one of the narrow questions before the St. Mary's Court was simply whether the medical malpractice statute or the wrongful death statute controlled as to the damages available. 769 So. 2d at 963, 973. Nowhere did the St. Mary's Court isolate the medical malpractice arbitration statute in such a way as suggested by Mrs. Chester.

In fact, when interpreting the application of the medical malpractice arbitration monetary cap on noneconomic damages as applying to each claimant, the St. Mary's Court looked to similar caps in *other* statutory sections, such as within the context of wrongful death actions and statutory limitations on sovereign immunity. St. Mary's, 769 So. 2d at 970-971. Likewise, here this Court should necessarily consider how the set off statutes and the collateral source statutes have consistently worked in tandem in various situations. It would be contrary to established case law to accept Mrs. Chester's argument that the medical malpractice collateral source statute should be isolated as the only collateral source statute to prohibit application of the set off statutes.

Mrs. Chester is correct that the St. Mary's Court concluded that the medical malpractice arbitration statute expressly specifies "the elements of all the damages available when the parties agree to binding arbitration . . . ." St. Mary's, 769 So. 2d at 973. However, her argument that this specification of a claimant's *damages* controls as to any *set off* for the defendant, and her argument that this statute specifies "any *limitations* on those damages," is misplaced. [Initial Brief p.12, 15] A careful reading of the St. Mary's language reveals that the statute implicates the "*damages* . . . available to *claimants*." Id. Nowhere does the statute or St Mary's indicate that a defendant's settlement agreement set off is implicated. Necessarily, a defendant's settlement set off is wholly distinct from the damages available to a claimant, and from this collateral source statute.

Finally, Mrs. Chester's footnote 3 states that her counsel acknowledged during arbitration proceedings that a set off existed for this settlement agreement, but that his acknowledgment is now legally erroneous under St. Mary's and should be disregarded. She does not explain why this is so. [Initial Brief p.15 n.3] Contrary to Mrs. Chester's argument, St. Mary's has no impact on counsel's acknowledgment that a set off exists. St. Mary's does not address or implicate set offs of settlement agreements -- or even collateral sources for that matter -- and in no way affects counsel's acknowledgment.

Medical Malpractice Arbitration

In her discourse as to the "unique statutory fabric from which medical malpractice arbitration was born" [Initial Brief p.16], Mrs. Chester maintains that claimants are "stripped" of "major rights." [Initial Brief p.18] However, she ignores the vast benefits awarded to an arbitrating claimant.

Arbitration in medical malpractice is voluntary -- it is an available option to a litigant. If Mrs. Chester ever felt "stripped of major rights," she was never precluded from proceeding to trial. As pointed out by the Fifth District, neither Mrs. Chester nor the co-defendant hospital requested arbitration, so Mrs. Chester could have proceeded to trial against the co-defendant with absolutely no limitation on her noneconomic damages. Instead, she chose to settle her entire claim against the co-defendant for only $150,000. *See* Doig v. Chester, 776 So. 2d 1043, 1045 (Fla. 5th DCA 2001). In addition, if she felt stripped of her rights in arbitration as to Dr. Doig, she could have elected to proceed to trial, where she could receive up to $100,000 more on her noneconomic damages claim.

As pointed out by this Court, arbitrating claimants receive a variety of benefits to compensate for any caps: quick determinations of liability; cost savings as to attorney's fees and expert witnesses; relaxed evidentiary standards; joint and several

liability of multiple arbitrating defendants; prompt payment of damages, with interest penalties for failure to comply; and limited appellate review. St. Mary's, 769 So. 2d at 970. Conversely, the primary benefit to arbitrating defendants is the statutory cap for noneconomic damages -- but defendants must concede liability in order to obtain it. Id.

Further, medical malpractice arbitration defendants are subject to the exact same limitations imposed upon defendants in the non-arbitration setting with respect to contribution -- defendants are precluded from seeking contribution from a settling co-defendant. The medical malpractice arbitration statutes appear to allow contribution from non-arbitrating tortfeasors. Section 766.208(6), Florida Statutes, which is applicable to "multiple defendants," states:

> (6) Any defendant paying damages assessed pursuant to this section or s. 766.207 [voluntary binding arbitration] . . . shall have an action for contribution against any non-arbitrating person whose negligence contributed to the injury.

However, while the medical malpractice arbitration statute does state a right to contribution from other "non-arbitrating" joint tortfeasors, the principles of contribution as set forth in the relevant contribution statute and case law will not allow contribution against a *settling* joint tortfeasor unless there is a lack of good faith on the part of the joint tortfeasor in reaching its settlement. Under the cases, the only way to receive contribution *once a joint tortfeasor has settled* is to bring an action

alleging the settlement was not done in good faith. *See* St. Paul Fire & Marine Ins. Co. v. Shure, 647 So. 2d 877 (Fla. 4th DCA 1994); Boca Raton Transportation, Inc. v. Zaldivar, 648 So. 2d 812 (Fla. 4th DCA 1995).

Under the controlling contribution statute, section 768.31 -- contribution among tortfeasors [Uniform Contribution Among Tortfeasors Act], contribution is allowed only under very limited circumstances.

Section 768.31 provides in pertinent part:

> (2) Right to contribution.--
>
> > (d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement or in respect to any amount paid in a settlement which is in excess of what was reasonable.
>
> . . . .
>
> (5) Release or covenant not to sue.--When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> > (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

> (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

Under these sections, when a tortfeasor has settled in good faith, such settlement discharges that tortfeasor from all liability for contribution to any other tortfeasor.

If an arbitrating defendant is bound by the same "no contribution" rule which governs non-arbitrating defendants, then certainly an arbitrating defendant should be treated no differently from the non-arbitrating defendant with respect to set off.

Conclusion

Because of Florida's distinction between collateral source statutes and set off statutes, and the inapplicability of St. Mary's to this issue, the district court correctly allowed a settlement agreement set off within the medical malpractice arbitration context.

II. THIS COURT SHOULD FIND THAT A SET OFF FOR THE ENTIRE AMOUNT OF THE SETTLEMENT AGREEMENT AGAINST THE ARBITRATION AWARD IS APPROPRIATE; REMANDING FOR AN ARBITRARY DETERMINATION OF HYPERINFLATED DAMAGES WOULD BE CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTES AND TO LEGISLATIVE INTENT.

Through a series of hyperinflated damage hypotheticals, and resort to an inapplicable Colorado case, Mrs. Chester attempts to convince this Court to allow an artificial inflation of her noneconomic damages in order to evade both Florida's mandatory statutory cap and a lawful set off for monies she has already received. This

Court should find, as the Fifth District reasoned, that Mrs. Chester must accept the statutory cap to which she agreed, along with a statutorily allowed set off of her prior settlement agreement.

The Fifth District Opinion

In its opinion, the Fifth District pointed out that the legislative policy here is to encourage arbitration of the entire medical claim, not just a portion of it. Doig v. Chester, 776 So. 2d 1043, 1044 (Fla. 5th DCA 2001). The legislature specifically chose the term "per incident " when capping economic damages: "Noneconomic damages shall be limited to a maximum of $250,000 per incident." Id. at 1044; § 766.207(7)(b), Fla. Stat. The Fifth District pointed out that the legislature chose to make economic and noneconomic damages "joint and several in the context of an arbitration proceeding." Doig, 776 So. 2d at 1044; § 766.207(7)(h). Additionally, "[t]he arbitration procedure does not contemplate an allocation of fault between the various defendants for the purpose of limiting their percentage of responsibility for plaintiff's injuries." Doig, 776 So. 2d at 1044. As noted by the district court, this Court's recent decision in St. Mary's is inapplicable, as that case construed the "per claimant" -- but not the "per incident" -- limitation. Doig, 776 So. 2d at 1044.

The Fifth District acknowledged the difficulty in applying the statutes when, as here, a claimant has sought different remedies against joint tortfeasors. Doig, 776

So 2d at 1045. However, Mrs. Chester made the decision to accept the benefits of arbitration, with its $250,000 "*per incident*" limit, rather than proceed to a jury trial with either no limitations or a higher, $350,000 noneconomic cap. Id. She also chose to settle with the nonarbitrating co-defendant hospital for $150,000, rather than proceed to trial with no limitation on damages, as there neither side had requested arbitration. Id.

The Fifth District pointed out that Mrs. Chester's argument that her noneconomic damage award should be hyperinflated in order to then negate the effect of a set off "may have been a reasonable statutory scheme, [but] *it was not the one chosen by the legislature*." Doig, 776 So. 2d at 1045. Notably, the court stated, "we believe fatal to her position is the fact that there had not been a determination by anyone that her non-economic damages exceed $250,000." Id.

Recognizing the apportionment case of Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So. 2d 249 (Fla. 1995), the Fifth District distinguished Wells on several grounds: Wells involved a jury trial, not arbitration; it involved apportionment of fault, with each defendant solely responsible for its own noneconomic damages, while here there is joint and several liability; it involved a determination of percentages of fault, while here there is no determination of such percentages. Doig, 776 So. 2d at 1045-1046.

Finally, the Fifth District reasoned that Mrs. Chester suffered noneconomic damages only once, and so is entitled to only one complete recovery:

> Thus, in this case, we believe that all of the settlement proceeds of $150,000 should be offset against plaintiff's arbitration award without concern for how much of the settlement award was for non-economic or economic damages. That is because there is no allocation of fault and Dr. Doig is responsible jointly and severally for all non-economic damages found by the arbitration panel. We believe that the rule in *Wells* limiting offsets to only economic damages simply cannot rationally be applied unless there has been a determination by a court as to the total amount of noneconomic damages suffered and an appropriate allocation of fault between the various parties and any non-parties found to be partially responsible for the loss.

Id. at 1047.

Mrs. Chester's Argument Advocating a Hyperinflated Award Cannot be Supported by Statute, and is Contrary to Legislative Intent

As she did at arbitration and on appeal, Mrs. Chester again argues that unless her noneconomic damages are first hyperinflated, then reduced by the set off to arrive at a figure no lower than the maximum statutory cap, Dr. Doig will receive a "double dip." [Initial Brief pp.24-29] This argument cannot be supported by any interpretation of the statutes, and is entirely contrary to any legislative intent.

Although Mrs. Chester devotes a good portion of her Issue I to the argument that statutes must be given their plain and ordinary meaning, she does not hesitate to now ignore this same principle in her Issue II and -- in the words of the Fifth District Court -- render a statutory scheme for noneconomic damages that clearly "was not the

one chosen by the legislature." Doig, 776 So. 2d at 1045. Mrs. Chester can put forth no statutory wording which would support her view that noneconomic damages should be hyperinflated by the arbitrators. The statutes clearly state that arbitration will provide "[l]imitations 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," and that "[n]oneconomic damages shall be limited to a maximum of $250,000 per incident . . . ." §§ 766.201(2)(b)(3), 766.207(7)(b).

Mrs. Chester argues that the statute has "already severely curtailed" her noneconomic damages, and so proposes hypotheticals involving speculations of $1 million in noneconomic damages. [Initial Brief p.24, 27] However, it is readily apparent that Mrs. Chester did not view her noneconomic damages as being so greatly in excess of the $250,000 cap, otherwise she would not have settled with the co-defendant hospital for merely $150,000. Her settlement agreement included not just the hospital, but also "its staff physicians, and its non-physician staff, agents, servants and employees." [A.1, p.1]

Moreover, the settlement stated, "This settlement is regarded by the parties as to be purely an economic settlement . . . ." While the parties addressed economic damages, *no mention* is made of noneconomic damages. Moreover, this $150,000

covers Mrs. Chester's damages **plus** "specifically includes but is not limited to claims for costs and attorney's fees." [A.1, p.1] It is clear that Mrs. Chester did not believe that her noneconomic damages were in the $1 million range, as she now hypothesizes.

Mrs. Chester seeks to inflate her noneconomic damages so as to avoid the cap and the legitimate set off, which she argues would be double dipping. In support of this she likens the arbitration award to a jury verdict in a sovereign immunity case. [Initial Brief p.25] However, when such a jury renders its verdict, it is not advised of statutory caps, and renders the verdict without regard for such limitations. South Broward Topeekeegeeyugnee Park Dist. v. Martin, 564 So. 2d 1265, 1267 (Fla. 4th DCA 1990) (statutory cap on damages does not affect rendition of a judgment in excess of that cap). Additionally, the plaintiff in a sovereign immunity case does not have arbitration options available as does the medical malpractice claimant. In contrast, the medical malpractice arbitrators, as opposed to the jury, are fully cognizant of the $250,000 cap; they are also cognizant that the parties have agreed to proceed with just such a limitation. If the claimant cannot agree to such a limitation, she is free to forego arbitration and proceed to a jury trial with less restrictions on damages.

Mrs. Chester maintains that allowing her hyperinflation of damages would prevent "unfair super values" and "double dipping." However, she ignores that caps

and set offs are not double dipping by defendants. In fact, set offs -- distinguishable from statutory caps -- are intended to prevent *plaintiffs* from double dipping. Centex-Rooney Constr. Co., Inc. v. Martin County, 706 So. 2d 20, 29 (Fla. 4th DCA 1997) (set off of prior settlement agreements was required to prevent double recovery). Mrs. Chester has already received $150,000 toward any damages she suffered for this one medical malpractice incident.

In contrast to a set off, the $250,000 statutory cap in medical malpractice arbitration was specifically put into place by the legislature in order "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." § 766.201(2)(b)(3). As held by this Court in University of Miami v. Echarte, 618 So. 2d 189, 196-197 (Fla 1993), "the Legislature has shown that an 'overpowering public necessity' exists" for restricting a medical malpractice claimant's noneconomic damages. Following Mrs. Chester's theory would result in losing predictability and impeding early resolution of claims.

Mrs. Chester argues that to allow a set off and a cap would not be "authorized by the statute or permitted by Florida law." However, as discussed *supra*, set offs and caps are each applied *pursuant* to applicable statutes. §§ 46.015, 766.207, 768.041, 768.31, Fla. Stat. Mrs. Chester's cited cases do not support her position. Hikes v.

McNamara Pontiac, Inc., 510 So. 2d 1212 (Fla. 5th DCA 1987), has no application here. It involved a car purchase, and concerns over whether double dipping was involved where a judge deducted both the trade-in value of the car and amount that was financed. No analogy can be made to statutory caps and statutory set offs. Mrs. Chester's case of Curtis v. Bulldog Leasing Co., 602 So. 2d 611 (Fla. 4th DCA 1992) is cited as "reversed on other grounds." This is incorrect. Mrs. Chester's parenthetical states that the case was remanded by the district court for a new trial because the jury verdict reduced damages for comparative negligence and failure to wear a seatbelt, and the court had concerns of double dipping with the use of both. However, contrary to Mrs. Chester's parenthetical, on further appeal this Court quashed the district court decision and remanded for reinstatement of the original judgment, as no new trial was necessary -- the defendant could submit the seatbelt defense to the jury. Bulldog Leasing Co. v. Curtis, 630 So. 2d 1060, 1065 (Fla. 1994).

Mrs. Chester puts forth a Colorado case as a model for this Court to follow in applying the cap and the set off here. General Electric Co. v. Niemet, 866 P.2d 1361 (Colo. 1994). [Initial Brief p.28] However, that case is entirely inapplicable. In fact, when the petitioners in that case similarly urged the Colorado Supreme Court to follow California law, the Colorado court stated that it would not do so because:

> [T]he laws of California and Colorado are too dissimilar on this subject to permit our adoption of the reasoning of any of the California cases. For

> example, the California statute that imposes a cap on noneconomic damages is a narrowly drawn law that limits such damages only in actions against a specific class of health care providers. In contrast, Colorado's statutory cap applies to all tortfeasors. Further, the Colorado legislature provided that a plaintiff, after presenting clear and convincing evidence, can receive an award that exceeds the $250,000 cap. The California legislature made no such provision. Finally, the statutory language employed by the legislatures of California and Colorado is too dissimilar to apply the interpretation of one state's statute to a similar, but not identical, statute of another state.

Id. at 1367.

Niemet is as wholly dissimilar to this case as Colorado law is to Florida law. Unlike Florida, Colorado imposes a cap on all tortfeasors, in all civil actions. Again unlike Florida, this cap may be substantially raised upon clear and convincing evidence. Niemet, 866 P.2d at 1362. Colorado has a pro rata liability statute whereby "no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant"; this statute "eliminates joint and several liability of defendants." Id. at 1363, 1364. Contrary, Florida mandates joint and several liability in medical malpractice arbitration. § 766.207(7)(h), Fla. Stat. Niemet addressed the question of whether, in a pro rata liability context, a cap should be applied before or after apportionment of liability. 866 P.2d at 1362. That is obviously far from any questions presented here, and Niemet can offer no insight into the resolution of this situation.

Mrs. Chester's hypothetical of a fictional $1 million in noneconomic damages being utilized to reduce the set off from $150,000 to a mere $25,500 illustrates how numbers can be manipulated and any predictability destroyed. [Initial Brief p.27] The Legislature has mandated predictability in medical malpractice situations in its efforts to control dramatically increasing liability insurance premiums. It has also mandated the imposition of "reasonable limitations on damages." § 766.201(1)(d), Fla. Stat. Its goal is to combat dramatic increases in medical malpractice liability insurance premiums, which have resulted in "increased medical care costs for most patients and functional unavailability of malpractice insurance for some physicians." § 766.201(1)(a), Fla. Stat. Mrs. Chester's scheme of artificially inflating noneconomic damage awards would effectively undercut the clear legislative purpose of the medical malpractice statutes.

Mrs. Chester's Noneconomic Damages

Mrs. Chester disagrees with the Fifth District's conclusion that she received all of the noneconomic damages to which she was entitled. [Initial Brief pp.18-23] In so doing, she utilizes a series of inapplicable hypotheticals. However, the scenarios presented are not before this Court, and this Court does not give advisory opinions. Likewise, any "collusive behavior" of co-defendants, whereby they agree to arbitrate and then "share in the reward" after litigation is not an issue. [Initial Brief p.23]

The Fifth District Appropriately Distinguished this Case From Wells

Mrs. Chester argues that the set off should be applied to economic damages, utilizing a Wells allocation between economic and noneconomic damages, but only after first hyperinflating the noneconomic damages amount. [Initial Brief pp.23-25]

Mrs. Chester states that the settlement "*obviously* included consideration of *both* economic and non-economic damages." [Initial Brief p.23 (emphasis supplied)] This said, it must be taken that Mrs. Chester deemed her noneconomic damages to be of no consequence, as the settlement agreement included no allowance for such damages. As discussed *supra*, the settlement agreement expressly stated, "This settlement is regarded by the parties as to be purely an economic settlement . . . ." [A.1, p.2]

To support her argument for a limited set off, Mrs. Chester argues that only economic damages may be set off under section 766.207(7). As discussed at length *supra*, this particular statutory section expressly addresses "offset by any collateral source payments." "Collateral sources" have never included set offs of settlement agreements when defined within Florida statutes; settlement agreement set offs are addressed through Florida's set off statutes, not its collateral source statutes.

The Fifth District correctly recognized that a Wells-type apportionment was inapplicable here. Wells involved a jury verdict, and an allocation of fault under the

comparative fault provisions of section 768.81(3). Wells v. Tallahassee Memorial Reg. Med. Ctr., Inc., 659 So. 2d 249, 252 (Fla. 1995). This case involves arbitration under a statute mandating joint and several liability for all damages. No percentages of fault have been determined, and Dr. Doig is "100% responsible for the maximum possible arbitration award of non-economic damages." Doig, 776 So. 2d at 1046.

Further, in the present case, unlike in Wells, the plaintiff and co-defendant specifically stated in their settlement agreement that their settlement was solely for economic damages. There was no doubt in this case that the settlement with co-defendant was for economic damages only. In Wells, under the circumstances of that particular case, the Court would not allow the parties to control the allocation between economic and noneconomic damages in their settlement agreement because the Court was concerned about plaintiffs seeking to maximize *noneconomic* damages in order to avoid any future set offs. This in turn would invite collusion between plaintiffs and settling co-defendants. In this case, such a concern is nonexistent, inasmuch as *Mrs. Chester* specifically agreed to settle with a co-defendant for *economic damages* only.

Finally, *apportioning* the damages under Wells and actually *applying* the setoff are two different procedures. As the Doig court found, *apportionment* based upon percentages of fault under Wells is inapplicable. Thus, the entire $150,000 should be

applied as a set off against the damages award. Even if this Court applies this set off to only the economic portion of the award, as advocated by Mrs. Chester, the full settlement set off will be utilized: economic damages total $210,321 as originally awarded, and $179,596 when the retirement benefits at issue are excluded.

Conclusion

Without resorting to hyperinflation of damages, which is a concept totally without legal support, this court should find that a set off of the entire settlement agreement is appropriate where there is joint and several liability, making Wells apportionment inapplicable.

III. REMANDING TO THE ARBITRATORS FOR A DETERMINATION OF THE ESTATE'S CLAIM FOR NONECONOMIC DAMAGES WOULD BE WHOLLY INAPPROPRIATE WHERE SUCH AN ISSUE WAS NEVER PRESERVED BELOW.

Mrs. Chester failed to preserve this issue below, and cannot now raise it at this late date. During arbitration, Mrs. Chester's counsel argued that one issue was whether Mrs. Chester and the decedent's estate each had separate claims for noneconomic damages. He stated that he had a similar case which he had just argued before the Florida Supreme Court the previous month, and that his position was unchanged that each did indeed have a separate claim. [O.R.T., pp.20-23, Arbitration Hearing, Dec. 3, 1998]

However, although this same issue was pending in the Supreme Court in the case of St. Mary's, Mrs. Chester never raised it within the appeal of the arbitration award, and so failed to preserve the issue. Dr. Doig never raised such an issue, and Mrs. Chester did not cross-appeal. Thus, it was never raised, briefed, or argued on appeal.

This Court has jurisdiction to consider all issues which have been appropriately raised within the appellate process. It may exercise this discretionary review "only when these other issues have been properly briefed and argued," which is not the situation here. Savona v. Prudential Ins. Co. of America, 648 So. 2d 705, 707 (Fla. 1995); Savoie v. State, 422 So. 2d 308, 312 (Fla. 1982). Thus, this Court is without the broad jurisdiction urged upon it by Mrs. Chester, and this unpreserved issue cannot be remanded for a determination of such damages.

IV. THIS COURT MAY APPROPRIATELY ADDRESS THE ISSUE OF WHETHER THE ARBITRATORS ERRONEOUSLY AWARDED THE RETIREMENT BENEFITS, AS THIS ISSUE WAS PROPERLY RAISED, BRIEFED AND ARGUED IN THE APPELLATE COURT.

Although this Court cannot address an unpreserved issue, it can address one which has been properly raised, briefed, and argued. Savona v. Prudential Ins. Co. of America, 648 So. 2d 705, 707 (Fla. 1995); Savoie v. State, 422 So. 2d 308, 312 (Fla. 1982).

On appeal, Dr. Doig's Issue II argued that the amount of the arbitration award was erroneous in that the value of the decedent's retirement pension, which named the decedent's first wife as the designated beneficiary, was awarded to Mrs. Chester, the decedent's second wife. The decedent, who died in January 1997, did not divorce his first wife until 1995. His retirement benefits from Pan American World Airways designated his first wife as beneficiary, and Mrs. Chester testified that this designation was irrevocable. Regardless that the first wife was currently receiving the pension benefits, and that the pension company advised Mrs. Chester that there were no benefits for her, the arbitrators awarded her $30,725 for these benefits. [O.R.T., pp.11-12, 27-29, 77-78, Arbitration Hearing, Dec. 3, 1998; O.R. 281-284]

In arguing this issue on appeal, Dr. Doig utilized the case of Waller v. Pope, 715 So. 2d 958 (Fla. 2d DCA 1998). In that case the widow, who was the second wife and the estate's personal representative, petitioned for a determination of her deceased husband's pension beneficiary. After his first marriage in 1961, the husband had designated the first wife as beneficiary in 1965. The designation remained unchanged, despite a divorce in 1980. The husband married the second wife in 1982, and named her beneficiary of his life insurance and personal representative of his estate. However, the trial and appellate courts held that the benefits passed *to the first wife*, not to the estate. Id. at 960.

For this ruling, Waller relied upon Cooper v. Muccitelli, 661 So. 2d 52 (Fla. 2d DCA 1995). In Cooper, the decedent's sister argued that life insurance benefits should have been awarded to her rather than to her brother's former wife. The decedent married in 1984 and purchased life insurance in 1987, naming his wife as primary beneficiary and his sister as secondary. After the couple divorced in 1992, the decedent died in 1993 without changing beneficiaries; both women claimed the proceeds. The court's analysis:

> Where the right to change the beneficiary rests solely with the insured, the beneficiary acquires no vested right or interest during the life of the insured, but only an expectancy. . . . The *right to change the beneficiary* of a life insurance policy *depends on the contract* between the insurer and the insured as expressed in the insurance policy. . . . Here, the policy required a written request in order to change a beneficiary. It is undisputed that this did not occur. It is also clear that [former wife] had no vested rights to the policy because [decedent] could change the beneficiary at any time.

Id. at 53.

The court discussed how the former wife, with no vested rights, could not have waived any rights in the couple's separation agreement general release. "The general rule is that the rights of the beneficiary in an ordinary life insurance policy, including the right to receive the proceeds thereof upon maturity of the policy, are in no way affected by the fact that the parties are divorced subsequent to the issuance of the

policy, especially if no attempt is made to change the beneficiary after the divorce." Id. at 54.

Similarly, in Austin v. Austin, 350 So. 2d 102 (Fla. 1st DCA 1977), the court affirmed a final judgment directing that retirement benefits be paid to the designated beneficiaries -- the former wife and two children -- rather than the widow. The decedent was covered by the state retirement system. Although remarried for 10 years, "at no time prior to his death did he execute another designation of beneficiary form nor did he cancel or terminate the designation form [previously] executed." Id. at 104.

The law is well established that a retiree's benefits vest at the time of retirement. In Arnow v. Williams, 343 So. 2d 1309 (Fla 1st DCA 1977), a retired state employee had elected a statutory option whereby he gave up ordinary retirement benefits for the "actuarial equivalent" -- a reduced amount to him for life, then one-half of this amount to his spouse for her life if she survived him. After receiving benefits, he divorced and remarried, then sought certification that should his new wife survive him, she would receive the option he had selected. When this was denied he appealed, but the appellate court ruled:

> the retirement benefits vest at the time of retirement and at the time the retiree receives his first retirement check. . . . The reduced benefit became fixed at that time and the actuarial equivalent of what the retiree would otherwise have received during his life was determined and fixed

> from a combination of this life expectancy at his then age and his then spouse's life expectancy at her then age.

Id. at 1310.

The court ruled that the benefits could not be recalculated. All rights had vested at the time of retirement, so the rights of the named beneficiary had also vested. Id. at 1311. The court reasoned that based upon the statute, "[a]t that time if the retiree elects an option under which his spouse will benefit if he predeceases her, that person who is his spouse at the time of the election and upon whose age the actuarial equivalent is determined acquires vested rights in the option which the retiree elected." Id.

In this situation, at his retirement Mr. Chester elected a 50% Joint and Survivor Option for his first wife. No evidence was ever presented by Mrs. Chester that this election was ever changed by the decedent. Further, if this designation was irrevocable, as claimed by Mrs. Chester, there is a reason why Mr. Chester chose that such designation be irrevocable. Just as in Arnow, an election can become irrevocable, and benefits can vest once the retiree receives the first retirement check under such an irrevocable election.

On appeal, Mrs. Chester argued that section 766.207(a)[4] allowed these benefits as "lost income." First, although "wage loss" is allowed under section 766.207, pension benefits cannot be "wages." *See* Coleman v. City of Hialeah, 525 So. 2d 435, 437 (Fla. 3d DCA 1988) ("Benefits given by an employer to an employee as part of a social security type scheme -- such as pension benefits . . . are not considered 'wages' in the commonly accepted use of that term.").

The benefits are not "lost income" either, as the statute does not reference this type of "lost income" as a recoverable damage, and neither the estate nor Mrs. Chester were entitled to the pension benefits, so it was not their income to lose. The benefits vested to the decedent's first wife at the time of the decedent's retirement -- which occurred prior to his death. Accordingly, this benefit could not have passed to the estate upon the decedent's death. *See* Waller, 715 So. 2d at 960.

Further, any income from these pension benefits was never lost, as the benefits are still being paid by the pension company to the first wife, the plan's beneficiary. This was an intentional election made earlier by the decedent, who was aware that Mrs. Chester could never receive his retirement benefits upon his death.

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[4]Section 766.207(a) states:

> 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.

Mrs. Chester never had any claim or right to the decedent's retirement pension, and these benefits are still being paid out to the rightful beneficiary. Moreover, the benefits were personal to the decedent; Mrs. Chester was never a recipient of these within the decedent's lifetime. As this award of the benefits to Mrs. Chester nullified the intent of the decedent and the express language of his retirement contract, the award was an improper element of damages and should be reversed.

CONCLUSION

For the foregoing reasons, the Fifth District's decision should be AFFIRMED.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font standards, i.e, Times New Roman 14-point font, as set forth in Florida Rule of Appellate Procedure 9.210.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this _____ day of May, 2001, to the following:

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