IN THE SUPREME COURT
OF FLORIDA

MARY CHESTER, ETC.

Petitioners,

vs.

VICTOR DOIG, M.D.,

Respondent.
_____/

CASE NO. SC01-348
5th DCA CASE NO. 5D99-116

PETITIONER'S AMENDED BRIEF ON THE MERITS

JULIE H. LITTKY-RUBIN,
Lytal, Reiter, Clark, Fountain &
Williams, LLP
515 N. Flagler Dr., 10th Floor
Post Office Box 4056 (33402-4056)
West Palm Beach, FL 33401
Telephone No.: (561)655-1990
Facsimile No.: (561) 832-2932
Florida Bar No.: 983306
Attorneys for Petitioners

CERTIFICATE OF INTERESTED PERSONS

Counsel for respondents certifies that the following persons and/or entities have or may have an interest in the outcome of this case:

1. Jennifer S. Carroll, Esq., of
   Law Offices of Jennifer S. Carroll, P.A.
   (Appellate Counsel for counsel for Respondent Defendant)

2. Mary Chester
   (Petitioner/Claimant)

3. Victor Doig, M.D.
   (Respondent/Defendant)

4. Lake H. Lytal, Jr., Esq., of
   Lytal, Reiter, Clark, Fountain & Williams, LLP
   (Trial Counsel)

5. Law Offices of Jennifer S. Carroll, P.A.
   (Counsel for Respondent/Defendant)

6. Lytal, Reiter, Clark, Fountain & Williams, LLP
   (Counsel for Petitioner/Claimant)

7. Julie H. Littky-Rubin, Esq., of
   Lytal, Reiter, Clark, Fountain & Williams
   (Appellate Counsel for Petitioner)

8. James Smith, Esq., of
   Smith, Schoder, Bouck & Roddenberry, P.A.
   (Trial Counsel for Respondent/Defendant)

9. Smith, Schoder, Bouck & Roddenberry, P.A.
   (Trial Counsel for Respondent/Defendant)

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PREFACE

Petitioner, Mary Chester, as personal representative of the Estate of Charles Chester was the claimant in a voluntary binding arbitration conducted under the medical malpractice statute, and was the appellee in the district court. She will be referred to as claimant or by her proper name. Respondent, Victor Doig, M.D., was the defendant in arbitration and the appellant in the district court. He will be referred to as defendant or by his proper name.

The following abbreviations will be used:

OR - Original Record on Appeal

R - Record on Appeal as prepared by the Clerk of the Fifth District Court of Appeal

JURISDICTIONAL STATEMENT

Petitioner, Mary Chester, invokes the discretionary jurisdiction of this Court to address the following question which has been certified by the Fifth District Court of Appeal as one of great public importance:

> IS IT APPROPRIATE TO SET OFF AGAINST THE NON-ECONOMIC DAMAGES PORTION OF AN AWARD AGAINST ONE TORTFEASOR IN AN ARBITRATION OF A MEDICAL MALPRACTICE ACTION THE AMOUNT RECOVERED FROM SETTLEMENT FROM ANOTHER RESPONSIBLE FOR THE SAME INCIDENT CAUSING THE INJURY?

Doig v. Chester, 776 So. 2d 1043 (Fla. 5th DCA February 2, 2001)(R 99). This court has jurisdiction and discretion to entertain this question pursuant to Article V, section 3(b)(4) of the Florida Constitution. This court has postponed its decision on jurisdiction pursuant to an Order rendered February 21, 2001.

This question encompasses issues raised below regarding the proper application of a prior settlement with a non-arbitrating defendant, and how the arbitration panel should compute non-economic damages in light of the statutory cap; i.e., whether the panel should determine the whole of the claimant's damages, making the appropriate setoffs and then reducing the total amount down to the statutory cap, if necessary, or whether the reductions should be made from the amount of the statutory cap itself, which may effectively whittle the claimant's non-economic damage award down to nothing. Mrs. Chester seeks further review from this Court because the district court erroneously set off a prior settlement unauthorized by statute, and because the computation of that setoff was incorrect.

This Court has jurisdiction to review all issues below, even those issues unrelated to the certified question. See, State v. Perry, 687 So. 2d 831 (Fla. 1997)(Recognizing jurisdiction to review all issues, but declining to review an issue raised on cross-appeal because issue unrelated to certified question); Feller v. State, 637 So. 2d 911, 914 (Fla. 1994)(Finding that given jurisdiction on the basis of the

certified question, the court has jurisdiction over all the issues of the case). Petitioner will mainly address those issues related to the certified question, however, she also raises for review a question on a point of law which was changed by this Court in St. Mary's Hosp., Inc. v. Phillipe, 769 So. 2d 961 (Fla. 2000).

POINTS ON APPEAL

I. THE DISTRICT COURT ERRED IN AWARDING A SETOFF FOR CLAIMANT'S PRIOR SETTLEMENT WITH A NON-ARBITRATING DEFENDANT BECAUSE THE PLAIN UNAMBIGUOUS LANGUAGE OF SECTION 766.207, FLORIDA STATUTES, ON MEDICAL MALPRACTICE ARBITRATION UNEQUIVOCALLY DOES NOT PROVIDE FOR SUCH A SETOFF AND THIS COURT HAS HELD IN *ST. MARY'S HOSP., INC. V. PHILLIPE*, 769 SO. 2D 961 (FLA. 2000) THAT THE MEDICAL MALPRACTICE ARBITRATION STATUTE IS A CIRCUMSCRIBED, INDEPENDENT LAW.

II. IF THIS COURT FINDS THAT THE DEFENDANT PHYSICIAN IS ENTITLED TO A SETOFF FOR THE PRIOR SETTLEMENT WITH THE NON-ARBITRATING DEFENDANT, IT SHOULD REMAND FOR A FULL COMPUTATION OF THE CLAIMANT'S NON-ECONOMIC DAMAGES BEFORE APPLYING A REDUCTION FOR THE PRIOR SETTLEMENT AND THE $250,000 STATUTORY CAP.

III. UNDER *ST. MARY'S HOSP., INC. V. PHILLIPE*, 769 So.2d 961 (Fla. 2000), THIS COURT

SHOULD ORDER REMAND FOR DETERMINATION OF THE ESTATE'S CLAIM FOR NON-ECONOMIC DAMAGES.

STATEMENT OF THE CASE AND FACTS

Charles Chester died as a result of negligently performed heart surgery (OR 1-20). His widow, Mary Chester, filed a notice of intent to initiate medical Malpractice litigation against defendant, Dr. Doig, as well as against Halifax Medical Center (OR 1-20). Dr. Doig chose to avoid litigation and offered to arbitrate pursuant to Section 766.207, which Mrs. Chester accepted (OR 1-20). Halifax Medical Center chose not to offer arbitration and instead settled with Mrs. Chester for $150,000.

Mrs. Chester maintained that she was entitled to collect non-economic damages up to the $250,000 cap for both her claim as well as the estate's claim, instead of the "per incident" limit then in effect under the law set forth in St. Mary's Hosp., Inc. v. Phillipe, 699 So.2d 1017 (Fla. 4th DCA 1997), rev'd, 769 So. 2d 961 (Fla. 2000)(T 20)[1]. Claimant also argued that any setoff to which the Defendant was entitled had to be deducted after a full computation of the total of her non-economic damages, but before reduction to the statutory cap (T 24).

[1]Since the arbitration, this court reversed the Fourth District's holding in that case and decided instead that each "claimant" is entitled to collect up to $250,000.00 for non-economic damages under the cap, irrespective of the idea that only one "incident" occurred. See, St. Mary's Hosp., Inc. v. Phillipe, 769 So. 2d 961 (Fla. 2000).

On December 17, 1998, the arbitrators rendered an award for Mrs. Chester in the amount of $507,321 (OR 281-284). Of this amount, $210,321 was designated for economic damages; $250,000 for statutorily capped non-economic damages; and $47,000 for attorneys' fees (OR 281-284). The arbitrators found that no setoff for the settlement with Halifax Medical Center should be allowed. Instead, the panel ruled:

> No offset from the award of non-economic damages is allowed for the $150,000 received by claimants from a settlement with another defendant. The only offset specifically provided in Section 766.207, Florida Statutes, is for "collateral sources" which may reduce economic damages. Consequently, no determination was made by the arbitration panel as to whether such a set-off, if allowed, should be applied against the $250,000 non-economic award or whether it should be applied against some amount in excess of the cap on non-economic damages. (OR 282).

The defendant filed his administrative appeal on January 14, 1999 (R 285). On June 30, 2000, the Fifth District issued its initial opinion, affirming part of the arbitration award,[2] but ruling that the defendant was entitled to a setoff for the settlement with the non-arbitrating defendant from the economic losses awarded to the claimant under arbitration. In that 2-1 opinion, the Fifth District concluded that malpractice was merely a species of general tort law and subject to the provisions of Section 768.31(5).

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[2]In the initial appeal, Dr. Doig also raised an issue with respect to monies awarded based upon the decedent's retirement pension. That is not an issue that has been raised by either party on rehearing, nor is it part of the certified question or a part of this appeal.

Claimant then filed a timely motion for rehearing, which the Fifth District granted on October 27, 2000 (R 54-59). Therein, the court crystallized the issue as "whether the Halifax recovery should be offset by the Doig award and, if so, to what extent" (R 54). The court then wrote:

> [T]he statute does not provide that any non-economic damage award beyond the $250,000 permitted by the cap may be recovered from other defendants by choosing a different remedy (R 55).

It went on to conclude that a claimant is entitled "to only one complete recovery of the non-economic damages awarded," and simply affirmed the arbitration award below (R 56; 59).

From this opinion, defendant Doig filed a motion for clarification and motion for rehearing (R 60-64). Claimant then filed a reply to that motion as well as an amended reply seeking clarification, and motion for rehearing seeking certification (R 75-78; 79-80). Defendant filed a motion to strike those motions to which claimant filed a response (R 81-86; 87-89). By order of the Fifth District dated February 5, 2001, the court ruled appellant's motion to strike was moot (R 100). On second motion for rehearing dated February 2, 2001, the Fifth District issued the opinion which is now before this court on discretionary jurisdiction (R 92-99).

On February 9, 2001, claimant served her timely notice to invoke discretionary jurisdiction (R 102-103). This court then entered an order on February 21, 2001

postponing its decision on jurisdiction and ordering briefing on the merits. This brief is filed pursuant to that order.

SUMMARY OF ARGUMENT

This Court should quash the 2-1 majority opinion issued by the Fifth District. That court ignored St. Mary's Hosp., Inc. v. Phillipe, 769 So. 2d 961 (Fla. 2000) and well established rules of statutory construction advising courts that plain unambiguous statutory language may not be interpreted, and instead must be read to mean what it says. The statute on medical malpractice arbitration specifically articulates what setoffs are allowable against a claimant's arbitration judgment, and under a plain reading of the statute, there is no allowable setoff for settlements with prior defendants.

Even if this Court finds setoffs for prior settlements allowable, the Fifth District has articulated a draconian and seemingly unconstitutional rule suggesting that a victim who accepts a defendant's offer to arbitrate has automatically agreed to limit his or her recovery of non-economic damages from all tortfeasors--whether participating in the arbitration or not--to the $250,000 cap set forth in the arbitration statute. The Fifth District's rule acknowledges that medical malpractice cases may involve multiple defendants who do not all participate in arbitration. However, the holding of the lower court expresses disdain for what it terms "plaintiff's mixing and

matching remedies," and limits a victim's maximum non-economic damages to $250,000 if arbitration takes place, irrespective of all other circumstances. Because this holding infringes on this Court's prior finding that the arbitration statute is constitutional, and because it is a deprivation both of a victim's substantive due process and equal protection rights, as well as the right to redress an injury, this Court should reject that ruling.

Even if this Court were to accept that a setoff for prior settlements should exist from an award of economic damages, it should rule that the arbitrators should fully compute the non-economic damages as a precursor for applying the settlement formula previously articulated by this court in Wells v. Tallahassee Memorial Regional Medical Center, 659 So. 2d 249 (Fla. 1995). Alternatively, if this court should hold that a setoff should be applied to all damages awarded, the arbitration panel on remand should fully compute the extent of the claimant's non-economic damages before applying any setoffs for prior settlements, and before reducing the amount back down to the statutory $250,000 cap. Without such a procedure, any prior settlements take on an inordinate "super" value when deducted from the already artificially reduced damages because of the statutory cap, allowing the defendant a "double-dip" and thereby depriving claimant of a rightful award of non-economic damages under the statute.

Finally, based upon this Court's opinion in St. Mary's Hosp., Inc. v. Phillipe, 769 So. 2d 961 (Fla. 2000), and the definition of claimant found in section 766.202(l), this Court should order remand for determination of the estate's claim for non-economic damages, as the estate as well as the survivor also has a claim under this Court's holding in that case.

ARGUMENT

I. THE DISTRICT COURT ERRED IN AWARDING A SETOFF FOR CLAIMANT'S PRIOR SETTLEMENT WITH A NON-ARBITRATING DEFENDANT BECAUSE THE PLAIN UNAMBIGUOUS LANGUAGE OF SECTION 766.207, FLORIDA STATUTES, ON MEDICAL MALPRACTICE ARBITRATION UNEQUIVOCALLY DOES NOT PROVIDE FOR SUCH A SETOFF AND THIS COURT HAS HELD IN *ST. MARY'S HOSP., INC. V. PHILLIPE*, 769 SO. 2D 961 (FLA. 2000) THAT THE MEDICAL MALPRACTICE ARBITRATION STATUTE IS A CIRCUMSCRIBED, INDEPENDENT LAW.

One of the most basic rules of statutory construction prohibits courts from interpreting unambiguous statutory language. See e.g., Rollins v. Pizzarelli, 761 So. 2d 294, 297 (Fla. 2000), ("When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.") Despite the perceived logic in attempting to extrapolate

meaning from unambiguous language, this Court has long prohibited such a practice. See e.g., State v. Jett, 626 So. 2d 691 (Fla. 1993).

In State v. Jett, for example, this court reviewed a criminal defendant's claim and found that he should have been allowed to admit evidence under a statute abrogating certain portions of the psychotherapist/client privilege. This court found that the language of the applicable statute was unambiguous, which meant the court should have sustained the defendant's objection to the admission of testimony about the information the child victims of sexual abuse imparted to their psychologists. It wrote that the unambiguous language of the statute could not be subject to judicial construction, however wise it may have seemed to alter the plain language. Id. at 692. Irrespective of the dissenting opinion of the district court, which sought to engraft a well-intentioned and logical view onto the statute, this court explained, "[w]e trust that if the legislature did not intend the result mandated by the statutes' plain language, the legislature itself will amend the statute at the next opportunity." Id. at 692.

All Florida courts follow this well established rule of statutory construction, despite their feelings about the logic or intent of the legislation. According to the Third District in Hechtman v. Nations Title Insurance of New York, Inc., 767 So.2d 505 (Fla. 3rd DCA 2000):

> Although we certainly understand and share the appellants' concerns about the wisdom of a legislative enactment

> which allows title insurers to escape statutory liability for the misdeeds of its duly appointed attorney agents, **we nevertheless are constrained to give effect to the *plain and ordinary meaning* of the words utilized in Section 627.792.**

Id. at 506. (Citations omitted)(emphasis added). The Fourth District recently rejected an argument about the legislature's implicit intention to allow parties to privately extend time for foreclosing on a mortgage without complying with the precise terms of Section 95.281(4). See, Zlinkoff v. Von Aldenbruck,, 765 So. 2d 840, 842 (Fla. 4th DCA 2000). In so rejecting, the court wrote, "[i]f the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended." Id. at 842. The Klonis v. State, 766 So.2d 1186, 1189 (Fla. 1st DCA 2000), court concluded that the state had waived sovereign immunity as to claims brought under the Florida Civil Rights Act, and in support of its ruling, wrote: "We must presume that the Florida Legislature stated in Chapter 760 what it meant, and meant what it said." Id. at 1189.

Most crucial to this court's analysis of the meaning of the medical malpractice arbitration statute is its recent opinion in St. Mary's Hosp., Inc. v. Phillipe, 769 So. 2d 961 (Fla. 2000), where this court held that the medical malpractice arbitration statute stands alone and applies irrespective of the language found in the Wrongful

Death Act. This court specifically concluded that the arbitration provisions of the Medical Malpractice Act expressly specified the elements of all the damages available when the parties agreed to binding arbitration, regardless of whether the medical malpractice action involved a wrongful death. Id. at 972. This court found that the plain language of section 766.202(3) and section 766.207(7)(a) provided the source of exactly what economic damages were available to claimants. Id. The opinion made it clear that if the legislature intended for the Wrongful Death Act to control the elements of damages available in a medical malpractice arbitration, it could have specifically provided for the application of the provisions of that act within the Medical Malpractice Act. Id. Because the legislature had not done so, this court refused to read and engraft definitions and language from other statutory provisions onto this self-contained, delicately balanced act involving medical malpractice and the resolution of claims through arbitration. Id.

In the medical malpractice arbitration statute, the legislature fastidiously detailed how offsets would apply, explicitly limiting them to collateral sources against present and future **economic** losses. Section 766.207(7)(a) and (c) provide:

> (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:

> (a) Net **economic** damages shall be awardable including, but not limited to, past and future medical expenses and eighty percent (80%) 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(8) and shall be **offset by future collateral source payments.**

(Emphasis added).

Section 766.202(2) of the statute specifically defines "collateral source payments" as any payments made to the claimant, or made on his or her behalf, by or pursuant to:

> a. The United States Social Security Act; and Federal, State or Local Income Disability Act; or any other public programs for writing 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 cost of hospital, medical, dental or other health care services.
>
> d. Any contractual or voluntary wage continuation plan provided by employers or by any other systems

> intended to provide wages during a period of disability.

Nowhere in this detailed definition of setoffs does the legislature provide for setoffs for prior settlements.

This court should find, as it did in St. Mary's Hosp., Inc. v. Phillipe, that the Medical Malpractice Act was carefully drawn by the legislature to detail each and every element of damage, as well as any limitations on those damages. As specifically stated, the only setoffs contemplated by the statute are those for collateral source payments, applied against economic damages only. Because this Court is constrained by the plain unambiguous language of the law, it cannot resort to rules of statutory construction and must find that no setoff exists for settlements made with non-arbitrating defendants because they are not included in the definition of collateral sources as defined by section 766.202(2).[3]

Despite the fundamental rule of statutory interpretation requiring plain statutory language to be read without interpretation, the district court below cavalierly dismissed the arbitration panel's finding, ignoring the fact that the legislature

[3]Claimant acknowledges her counsel's argument during the arbitration proceeding, acknowledging his belief that a setoff may exist for the prior settlement. However, at that time, this court had not yet issued its opinion in St. Mary's Hosp., Inc. v. Phillipe. Thus, under the current state of the law, claimant's argument at that time was erroneous and should now be disregarded by this court.

consciously chose to prohibit offsets for settlements with non-arbitrating defendants. In rejecting those findings, the court wrote:

> Although we understand the panel's reluctance (these statutes direct the court to reduce the judgment by the amount of any settlement and makes no reference to an 'arbitration panel'), the intent of the legislature is to prevent double recovery for the same damages. [4] Reference to "the court" in the statutes §§46.015(2) and 768.041, requiring offsets does not indicate that a double recovery is appropriate if done by an arbitration panel (R 96).

While the Fifth District's opinion expressed a general rule of tort litigation, it seemed to overlook both the plain language of the statute and the unique statutory fabric from which medical malpractice arbitration was born.

In 1988, the Florida Legislature revamped the medical malpractice statute based upon the findings of a task force which recommended implementation of a medical malpractice plan designed to stabilize and reduce medical liability premiums. See University of Miami v. Echarte, 618 So. 2d 189, 191 (Fla. 1993). Echarte considered the constitutionality of two components recommended by the task force to address the medical liability insurance crisis: (1) A presuit investigation process to eliminate

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[4]Footnote two of the Fifth District's opinion below states:

> Although the Wells court pointed out that the single recovery rule was adopted when courts could not allocate liability among Defendants, that is precisely the case here. The arbitration procedure provides joint and several liability; it does not permit allocation of liability for the purpose of limiting a Defendant's obligation for Plaintiff's injuries. (Footnote in original as n. 2).

frivolous claims, and (2) a voluntary arbitration process to encourage settlement of claims. Id. at 192. In declaring the statute constitutional, this court found that despite the cap on non-economic damages, the statute as a whole provided claimants with a "commensurate benefit" for the loss of the right to fully recover those non-economic damages. Id. at 194. In an effort to reduce the costs of medical liability insurance and to encourage a plan for prompt resolution of medical negligence claims, the statute specifically afforded claimants certain unique benefits as a "quid pro quo" for their abandonment of certain rights. See generally, University of Miami v. Echarte.

In facing a constitutional challenge by injured parties forced to engage in binding arbitration, this Court did ultimately find that there were enough benefits in section 766.207 to offset the cap the legislature imposed on non-economic damages. Part of the benefits enumerated in Echarte included the net economic damages that claimants may receive, the interest and penalty payments the defendant incurs for untimely payment, the imposition of joint and several liability on defendants for all damages, and the payment to the claimant of attorneys' fees and costs. Id. at 193. While not considered by this Court in Echarte, the issue of applying setoffs was addressed by the legislature, which chose to limit them specifically reducing economic damages by past and future collateral source payments as specifically defined by the

statute. The non-economic damages were capped separately and not included in any setoff determination.

In light of the major rights stripped from plaintiffs under the medical malpractice statute, and the very delicate balance this court drew to uphold that balance constitutionally, this court cannot allow the lower court to ignore the clear language of the statute and to run roughshod on those carefully balanced rights. The Fifth District's opinion tips the balance, violating the claimant's equal protection and substantive due process rights, and unfairly restricting the constitutional right to redress for an injury.

II. IF THIS COURT FINDS THAT THE DEFENDANT PHYSICIAN IS ENTITLED TO A SETOFF FOR THE PRIOR SETTLEMENT WITH THE NON-ARBITRATING DEFENDANT, IT SHOULD REMAND FOR A FULL COMPUTATION OF THE CLAIMANT'S NON-ECONOMIC DAMAGES BEFORE APPLYING A REDUCTION FOR THE PRIOR SETTLEMENT AND THE $250,000 STATUTORY CAP.

The majority below incongruously concluded that the $250,000 cap on non-economic damages is the maximum that any claimant could receive in the event that the claimant agrees to arbitrate with any <u>one</u> of the allegedly culpable malpractice defendants under section 766.207. As the court wrote:

> By making the non-economic damage award, as well as the economic damage award, joint and several in the context of an arbitration proceeding, the statute makes it clear that this cap applies to multiple defendants involved in the "incident" if they are included in the arbitration proceeding (R 94). See, section 766.207(7)(h), Florida Statutes. The limitation is on the amount of total non-economic damages per incident--not on the individual defendant's share of non-economic damages. The arbitration procedure does not contemplate an allocation of fault between or among the various defendants for the purposes of limiting their percentage of responsibility for plaintiff's injuries. **The policy behind the arbitration statute simply will not be served if non-economic damages in excess of the $250,000 limit for any incident may be recovered from others whose negligence contributed to the incident by plaintiffs choosing mix and match remedies.** Thus, although the supreme court has in St. Mary's Hospital construed the legislative purpose of the statute to meet a cap of $250,000 per incident per claimant, it has not yet limited "per incident" to mean "per action against any one responsible for the injury." (R 94). (Bold faced emphasis added)(Underlined emphasis in original).
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> * * *
>
> By voluntarily submitting to arbitration, Plaintiff **agreed to a maximum** award for non-economic damages for the "incident" to be $250,000. (R 97). (Emphasis added).

The district court has now articulated a rule which says if arbitration goes forward with any one Defendant, a claimant has automatically capped his/her non-economic damages at $250,000. This Court must consider the devastating implications of this finding. By its ruling the District Court has, in effect, amended section 766.207(7) by

eliminating the word "participating." The court had no authority to do so and by its ruling violated Mary Chester's rights to due process, equal protection and fair redress of her injury.

When this Court declared the $250,000 cap on non-economic damages constitutional in the context of the medical malpractice arbitration statute, it did so based upon its review of the delicate balance of the statute which provided claimants with a "commensurate benefit" for the loss of the right to fully recover those non-economic damages. University of Miami v. Echarte, 618 So. 2d at 194. However, in this Court's contemplation of the constitutionality, it never considered that the $250,000 cap would be available to tortfeasors who do not even participate in arbitration, nor provide the plaintiff with any commensurate benefit as is now the case under the lower court's opinion.

The Fifth District seemed to criticize claimants for what it characterized as "choosing mix and match remedies" (R 94). The court believed that the policy behind the arbitration statute would not be served if non-economic damages in excess of the $250,000 limit could be recovered from others whose negligence contributed to the incident (R 94).

Consider a hypothetical medical malpractice/wrongful death case where a total of six different defendants acted negligently and contributed to the untimely death of

the decedent. If one of those six defendants chooses to arbitrate, the plaintiff under the Fifth District's ruling may only recover a maximum of $250,000 in non-economic damages. This result is reached regardless of whether a jury finds that plaintiff suffered $3,000,000, $4,000,000 or $10,000,000 in non-economic damages, because according to the Fifth District, one arbitrating defendant automatically triggers a limit on non-economic damages to $250,000 (R 94).

If the plaintiff should reject the one defendant's offer to arbitrate, under the Fifth District's ruling the plaintiff would presumably still be limited to $350,000 as provided for in Section 766.209(4)(a). Thus, even though a jury may find the evidence demonstrates plaintiff's non-economic losses amount to $3,000,000, if just one defendant out of six unilaterally offers to arbitrate, the remaining defendants will have no obligation beyond the $250,000 or the $350,000 as provided for in the arbitration statute, depending on whether the injured party accepts arbitration.

Mrs. Chester challenges the soundness of the lower court's ruling by a review of analogous situations. For example, assume a Plaintiff sues a municipality along with two other nonsovereign defendants. If the municipality pays its statutory cap of $100,000, this statutory benefit does not inure to the benefit of the private defendants who may now somehow claim that the $100,000 cap satisfies their portion of damages, forcing the plaintiff to collect the balance of the judgment against them

through a claims bill. Similarly, no court will allow a non-NICA participant from claiming the benefits of section 766.303 simply because a child happened to have also been injured by a NICA participant. In Gilbert v. Florida Birth-Related Neurological Injury Compensation Ass'n., 724 So.2d 688 (Fla. 2nd DCA 1999), for example, the court held that settlement with non-NICA participants did not foreclose access to NICA benefits prior to a factual determination that the infant was a NICA baby. Id. at 690. The co-existence of two types of Defendants--one statutorily protected by a specific piece of legislation under section 766.303 and the remaining one not--further demonstrates the distinction between Defendants who fall under the auspices of the statutory protection and those who do not.

As yet another example, consider the case where two people cause an automobile accident and one failed to purchase statutorily mandated PIP insurance. Merely because the co-defendant did purchase such insurance is no reason to provide the uninsured co-defendant with the same statutory threshold which must be overcome before collecting non-economic damages.

These examples vividly illustrate the incongruity of the Fifth District's opinion which allows non-arbitrating defendants to reap the benefits of the limitations on damages provided by section 766.207 without providing claimants with any of the benefits of the statute which formed the basis of this court's finding of

constitutionality in Echarte in the first place. Conceivably, co-defendants could engage in collusive behavior by agreeing that one of them would offer to arbitrate in order to minimize the Plaintiff's damages and then share in the reward by dividing the savings following the litigation. The ruling simply flies in the face of all notions of justice and fair play.

However, if this court is going to allow arbitrating defendants to benefit from setoffs of non-arbitrating defendant settlement payments, the setoff can only be applied to economic damages pursuant to section 768.79, which is what the lower court originally found (R 42-43). The settlement of $150,000 with Halifax obviously included consideration for both economic and non-economic damages.[5] Under section 766.207(7), only the portion of the settlement allocated to economic damages can be set off. The only equitable way to determine how much of the settlement should be allocated to economic damages is to utilize the procedure outlined by the court in Wells.[6]

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[5]In arriving at its formula for computation, the court in Wells v. Tallahassee Memorial Regional Medical Center, 659 So. 2d 249 (Fla. 1995) court found it impermissible for the parties themselves to assign the respective portions of the settlement for economic and non-economic damages. Id. at 254. ("To permit the settling parties to control the allocation between economic and noneconomic damages would invite collusion between plaintiffs and settling defendants.")

[6]Under this procedure, the arbitration panel would determine the prorata share of plaintiff's economic damages as compared to plaintiff's total damages. As an example, if the economic damages were 30 percent of the total damages, Dr. Doig would be entitled to a $45,000 setoff.

Because the statute has already severely curtailed a plaintiff's ability to collect her non-economic damages, it is clear that any further reduction from the non-economic damages would amount to a rights infringing, "double dip." To illustrate, consider that the economic damage award in this case represented 41% of the total damages awarded in light of computing the total economic damages with the $250,000 statutorily capped amount of non-economic damages. In applying Wells, the defendant would only be entitled to a setoff of $61,500 (41% of $150,000). However, if the court were to calculate the total damages after reducing the non-economic damages to the statutory maximum and then determining the prorata share of the setoff, then the defendant would get the benefit of two reductions of Mrs. Chester's damages; the original reduction to the cap and then the setoff. Thus, the only appropriate method for computation of the amount constituting a setoff for the prior settlement comes from an application of the Wells formula, which requires the arbitrators to compute the full extent of the non-economic damages on remand in order to ascertain the percentage of the economic damages versus the non-economic damages to establish the setoff.[7]

[7]The arbitrators stated in their order that they found it unnecessary to determine whether plaintiff's non-economic damages exceeded the $250,000 since they found no setoff was allowed under section 766.207 (OR 281-284). The Fifth District suggested the arbitrators somehow overlooked the computation when in actuality, they consciously awarded the $250,000 cap amount.

Even if this court were somehow persuaded by the Fifth District's conclusion that a straight setoff for the whole amount should come from the whole of the damage award, it is still necessary for the arbitrators to compute the total amount of non-economic damages. This procedure is similar to what occurs when a trial goes forward against a defendant protected by sovereign immunity. The jury bases its award upon a full consideration of the liability and damages evidence, and then renders a verdict in an amount irrespective of $100,000 statutory cap. The court then reduces the verdict by any appropriate setoffs. If the damages still exceed the statutory cap, the court then enters judgment in the amount of the cap. Under the lower court's decision here, the court would ignore the jury verdict in excess of the cap and subtract the settlement proceeds from the statutory cap.

The context of medical malpractice arbitration is no different. While Mrs. Chester here may have suffered non-economic damages far in excess of the $250,000 cap, she is limited by law from recovering that amount from Dr. Doig. However, if this court approves the Fifth District's opinion, allowing a full setoff for the entire settlement amount, irrespective of considerations of the proportions of that settlement for economic and non-economic damages, or the fact that the non-economic award was already subject to the statutory cap reduction, that settlement then takes on an unfair "super value" which further diminishes the claimant's recovery even beyond

the statutory cap reduction. In viewing the matter in another way, this "super value" once again equates to a "double dip" for the defendant which is not authorized by the statute nor permitted by Florida law. See e.g., Hikes v. McNamara Pontiac, Inc., 510 So. 2d 1212 (Fla. 5th DCA 1987)(Plaintiff who sued a car dealership over the fraudulent sale of a car, had financed part of the purchase price and ultimately traded in the car during the pendency of litigation. The trial court subtracted both the trade-in value and the amount financed from damages awarded the plaintiff. Because the trade-in value encompassed the finance value, this court found the deduction of both "was a form of double dipping"). See also, Curtis v. Bulldog Leasing Co., Inc., 602 So. 2d 611 (Fla. 4th DCA 1992), rev'd on other grounds, 630 So. 2d 1060 (Fla. 1993)(Fourth District remanded for a new trial when the jury's verdict reduced damages both for comparative negligence and for failure to wear a seatbelt which the court was concerned may have amounted to double dipping).

The double dip here occurs if the $250,000 is utilized to compute the setoff rather than from the full value of claimant's non-economic damage amount. For example, if the arbitrators determine that Mrs. Chester's non-economic damages were $1,000,000 before reduction to the statutory maximum, the ratio of economic damages to non-economic damages decreases from 41 percent to 17 percent and the ratio of non-economic damages increases from 59 percent to 83 percent. Under such a

hypothetical, the defendant setoff would be only $25,500 ($17,000 of $150,000) from the economic damage award; far less than the $61,500 amount described in the earlier example.

To compute the amount, this court should order the Halifax settlement to be deducted from a total finding and reduced from that damage amount in its entirety. If this court is going to allow such a setoff, it is extremely important that it remand the matter back to the arbitration panel for a determination of plaintiff's full non-economic damages. If plaintiff's non-economic damages exceed $250,000, the use of $250,000 in computing the prorata share of the economic damages artificially increases the setoff available to Dr. Doig. For example, a one million dollar award for non-economic damages should be added to the economic damages award, and the $150,000 settlement subtracted from that total for a net award of $250,000. However, under the lower court's decision, the claimant would collect only $100,000. Setoffs should be "apples against apples" instead of "apples against oranges", which is virtually an identical situation to how sovereign immunity cases are handled at trial.

Support for this method of apportionment comes from the Supreme Court of Colorado. In General Electric Co. v. Niemet, 866 P. 2d 1361 (Colo. 1994), that court faced a similar issue. Colorado law sets a cap on non-economic damages in all civil actions. The statute there states that non-economic damages may not exceed the sum

of $250,000 unless the court finds justification by clear and convincing evidence, in which case it shall not exceed $500,000. Colorado Statute, §13-21-102.5(3)(a), 6 A C. R. S. (1987). In determining how the prorata share of liability for multiple defendants should be apportioned under the cap, the court found that the cap did not apply as a cap on the total amount a plaintiff could recover from several defendants. Id. at 1368. Instead, it was a cap as to each defendant, allowing the plaintiff a much greater recovery. The court then concluded that it was error to reduce the total damages down to the statutory cap before apportioning each party's negligence under the cap, and instead should make the computation from the full amount.

Likewise, here, the only way to reconcile prior settlements and the responsibility of other defendants with the statutory cap, is to compute the full amount of damages, before reducing to the statutorily capped amount. If the arbitrators find that the amount does not exceed the statutory cap, then obviously, the claimant receives only the amount which remains. However, it only seems fair that an injured victim receive a computation based on the total of his/her non-economic damages prior to the artificial reduction. Otherwise, the setoffs take on a much greater value than the recoverable damages and in comparison, deprive claimants of much more than the constitutionally allowable capped amount.

III. UNDER *ST. MARY'S HOSP., INC. V. PHILLIPE*, 769 So.2d 961 (Fla. 2000), THIS COURT

SHOULD ORDER REMAND FOR DETERMINATION OF THE ESTATE'S CLAIM FOR NON-ECONOMIC DAMAGES.

In the arbitration proceeding below, the arbitrators were faced with the setoffs and law from St. Mary's Hosp., Inc. v. Phillipe, 699 So.2d 1017 (Fla. 4th DCA 1997), rev'd, 769 So.2d 961(Fla. 2000) which held that the $250,000 cap on non-economic damages applied per incident, rather than per claimant. This court has since overruled that holding, establishing a non-economic damage award for each claimant. According to the definition set forth in section 766.202(l), a "claimant" is anyone with a cause of action for medical negligence. St. Mary's Hosp., Inc. v. Phillipe affirmed an award for future economic damages for the estate (decedent's loss of earnings). In light of that opinion, as well as the statutory definition of "claimant," it would seem the estate would also have a non-economic as well as economic damage claim and this court should remand for consideration of such a claim.

CONCLUSION

This Court should answer the certified question in the negative, holding that an injured victim's non-economic damages cannot be capped at $250,000 simply because one out of multiple defendants chooses to arbitrate. This Court should further quash the Fifth District's opinion, finding that the plain language of the statute does

not provide for a setoff of prior settlements, because the only allowable setoffs are collateral sources as unambiguously defined by section 766.202(2).

In the alternative, this Court should order that the case be remanded to allow the arbitrators to engage in a full computation of Mrs. Chester's non-economic damages and to allow them to compute the correct proportion of economic to non-economic damages under the Wells formula. This will facilitate a determination of the proper amount to be set off from the economic damages only.

As a final alternative and last resort, if this court allows a setoff from all damages, this court should remand for a full computation of the non-economic damages followed by the reduction for the settlement amount, before the statutory cap reduction.

Finally, on remand this court should order the arbitrators to consider non-economic damages for the estate.

JULIE H. LITTKY-RUBIN,
Lytal, Reiter, Clark, Fountain &
Williams, LLP
P.O. Box 4056
West Palm Beach, FL 33402-4056
Telephone No.: (561)655-1990
Facsimile No.: (561)832-2932
Attorney for Petitioners

By: JULIE H. LITTKY-RUBIN
Florida Bar No. 983306

CERTIFICATE OF COMPLIANCE

Petitioner's Brief on the Merits has been typed using the 14 point Times New Roman font.

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By: JULIE H. LITTKY-RUBIN
Florida Bar No. 983306

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing has been furnished by U.S. Mail this 30th day of March, 2001 to:

JENNIFER CARROLL, ESQ.
Law Offices of Jennifer S. Carroll, P.A.
United National Bank Tower
Suite 420
1645 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401

JAMES W. SMITH, ESQ.
Smith, Schoder, Bouck & Roddenberry, P.A.
605 S. Ridgewood Ave.
Daytona Beach, FL 32114

JULIE H. LITTKY-RUBIN
Lytal, Reiter, Clark, Fountain & Williams, LLP
Post Office Box 4056
West Palm Beach, FL 33402-4056
Telephone No.: (561) 655-1990
Facsimile No.: (561)832-2932
Attorneys for Petitioner

_____

By: JULIE H. LITTKY-RUBIN
Florida Bar No.: 983306

APPENDIX