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 REPLY BRIEF ON THE MERITS

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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.

If this court were to accept defendant's argument and the rule articulated by the Fifth District's 2-1 opinion, it would rubber stamp a rule for which there is no statutory support, and one that flies in the face of all notions of fairness and common sense. The Fifth District has held that when one defendant offers to arbitrate--irrespective of how many negligent defendants contributed to the victim's injuries or the total amount of non-economic damages suffered by the plaintiff victim--the plaintiff's recovery is capped at a maximum amount of $250,000 in non-economic damages across the board against all defendants, including those who have not chosen to arbitrate. This rule deprives Mrs. Chester of constitutional redress for her injury by providing statutory benefits to defendants and nothing to the plaintiff in return. See, Kluger v. White, 281 So. 2d 1, 3 (Fla. 1973).

Additionally, the ruling of the court encourages collusive behavior among defendants. If all it takes is a mere offer to arbitrate by one of multiple defendants to cap the plaintiff's damages at $250,000[1], then great incentive exists for one of the multiple defendants to make such an offer as a way to limit the exposure of all defendants. While Mrs. Chester does not suggest any collusion occurred in this particular case, this court must consider how upholding the Fifth District's ruling will encourage defendants to work together to undermine the rights of redress of future victims of medical malpractice, namely those victims in cases where a defendant or defendants admit they were liable. The defendant here notes this argument made by Mrs. Chester in her Initial Brief, but simply dismisses it by stating "likewise, any 'collusive behavior' of co-defendants, whereby they agree to arbitrate and then 'share in the reward' after litigation is not an issue" (Answer Brief, p. 28). Defendant offers no reasons or rationale to counter the incentive for collusiveness put in place by the District Court's opinion. Unless this court wishes to embrace the draconian rule espoused by the defendant and announced by the Fifth District, which would undermine this court's findings in University of Miami v. Escharte, 618 So. 2d 189 (Fla. 1993) as well as the statutory purpose of medical malpractice arbitration, it must

[1]Under the Fifth District's ruling, if a plaintiff rejected a single defendant's offer to arbitrate, his or her damages would then be limited to a total of $350,000 in non-economic damages under the statute, even though plaintiff would then go to trial against multiple non-arbitrating defendants.

reverse the Fifth District's decision which caps the plaintiff's non-economic damages at $250,000 (or $350,000) irrespective of the number of defendants or the egregiousness of the negligence simply because one of multiple defendants offers to arbitrate.

Despite defendant's argument to the contrary, this court has already ruled that medical malpractice arbitration is a species of tort law unto itself. In St. Mary's Hospital, Inc. v. Phillipe, 769 So. 2d 961, 972-973 (Fla. 2000), this court made it very clear that the medical malpractice arbitration statute is a carefully circumscribed law, insulated from other statutes. It concluded that the arbitration provisions of the Medical Malpractice Act expressly specify the elements of available damages, irrespective of whether the medical malpractice action involves a wrongful death which would call upon the language of another statute. Id. at 973. This court reasoned that if the Legislature had intended for provisions of other statutes and acts to apply in the medical malpractice arbitration setting, it could have and would have provided for the application of those provisions in the Medical Malpractice Act. ("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 in the Medical Malpractice Act. It has not done so.") Id.

The plain language of this self-contained medical malpractice arbitration law does not provide for any setoffs for prior settlements. While section 766.207(7)(a) and (c) specifically provide for a setoff of collateral source payments, the statute makes no such specific reference to setoffs for prior settlements. Defendant attempts to convince this court that the provisions of sections 46.015, 768.041, and 768.31 somehow generally apply to the medical malpractice arbitration statute. However, he ignores the incongruity of the Legislature's decision to include specific language regarding setoffs for collateral sources in the medical malpractice arbitration statute, if, according to his argument, the general collateral source statute found in section 768.76 applies to medical malpractice arbitration anyway. It is a well established rule of statutory construction that a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. See, McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994). This court has already found medical malpractice arbitration to be a unique statute by its holding in St. Mary's Hospital, Inc. v. Phillipe. In light of that precedent, and a plain reading of the statute which does speak directly to computing setoffs for collateral sources, the Legislature apparently did not believe setoffs for prior settlements should apply to medical malpractice arbitration as evidenced by its decision not to include such a

provision. The Fifth District erred in finding to the contrary. Consequently, this court should reverse, and reinstate the arbitrators' award.

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.

If this court should find that defendant was entitled to set off a portion of his financial responsibility to Mrs. Chester with monies from the prior settlement she entered into with the hospital, it should not do so under the rule articulated by the Fifth District which mandates a complete dollar-for-dollar setoff from damages already artificially reduced by the cap on non-economic damages. In light of the limitation on non-economic damages imposed by the arbitration statute, any procedure for setting off prior settlements must include a full computation of the plaintiff's actual non-economic damages before the setoff is made. This procedure, similar to the mathematical rule used to compute fractions, allows the arbitrators to arrive at a type of "common denominator" before making the reduction. That way, a settlement made outside of arbitration without regard for the statutory cap on non-economic damages may be accurately compared and subtracted from the actual non-economic

damage award before succumbing to the artificial reduction down to the statutory cap (if it is above $250,000). Conversely, under the Fifth District's ruling, the artificial reduction of damages occurs first. Then, from the artificial statutory number, the arbitrators apply setoffs for settlement. Conceivably, under this ruling, an admittedly negligent defendant could end up owing the plaintiff nothing depending on the amount of the settlement.

The sovereign immunity setting whereby juries award full damages before the court makes the statutory reduction perfectly illustrates the use of this type of computation procedure advocated by Mrs. Chester if this court finds a setoff exists at all.[2]

If the plaintiff's damages here are automatically limited to the $250,000 and then further reduced by the setoff amount, the defendant has then benefitted from not one, but two reductions from her actual damages. As previously explained in Mrs. Chester's Initial Brief, if this court allows the setoff to come from the artificially reduced statutory capped amount of $250,000, as the Fifth District has, then the amount of the prior settlement takes on a "super value" because that settlement was

[2]The defendant notes in his brief that juries render verdicts without regard for the artificial limitation on damages found in sovereign immunity cases. He tries to distinguish this situation based on the idea that the jury does not know that a cap will exist. Certainly, this distinction is irrelevant to the amount of non-economic damages that the plaintiff has actually suffered, and to the idea that the full extent of damages is determined by the jury before the court enters final judgment in the amount of the statutory cap.

made irrespective of any statutory cap. Thus, while plaintiff's non-economic damages may be far in excess of $250,000, and while under normal circumstances the prior setoff would be computed against the total award, the Fifth District has now articulated a rule whereby plaintiff's agreement to medical malpractice arbitration not only caps her non-economic damages at $250,000, but also ensures that if she is to accept a settlement with any of the other defendants that she will obtain a minimal, if any, recovery against the arbitrating defendant because the entire arbitration award will then be eaten away by the prior settlements.

When considering that surviving spouses are often awarded non-economic damages in excess of a million dollars, it seems most incongruous and completely unfair that Mrs. Chester would be awarded less than the $250,000 capped amount for those damages in light of a nominal prior settlement. While defendant urges this court that the procedure argued for by the plaintiffs would somehow undermine the predictability of non-economic damage amounts, the fact that all defendants combined would not be responsible for more than capped $250,000 amount anyway belies any such argument. Actually, the method of calculating the setoff suggested by the plaintiff is entirely consistent with the statutory objective. Under this method, defendant's exposure is capped at $250,000 without unfairly limiting plaintiff's damages in a manner unintended by the Legislature.

If this court finds that the statute allows a setoff for a prior settlement, it must reverse the order of reductions urged by the defendant: i.e., the arbitrators should first ascertain the full extent of the damages, reduce that amount by the amount of the prior settlement (or some portion thereof), and then should make the reduction to the statutory cap. Performing this procedure in reverse as mandated by the Fifth District reduces plaintiff's already severely capped non-economic damage award far below what the Legislature has allowed under the statute, and allows the defendant an unfair "double dip."

If this court rejects the procedure advocated by Mrs. Chester, at the very least it must remand for a computation of the setoff amount in light of its opinion in Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So. 2d 249 (Fla. 1995). Section 766.207(7) countenances setoffs for economic damages only. Thus, in keeping with the statutory intent, only the portion of the settlement allocated to economic damages may be properly setoff. Using the procedure articulated by this court in Wells, a reduction for some portion of the prior settlement with the hospital would have been proper.

Defendant argues that Mrs. Chester and the hospital somehow arrived at a settlement indicating it was for "economic damages" only, and then uses that language to argue for a complete setoff under Wells. This questionable argument fails for

several reasons. First, when this court reads paragraph six of the settlement agreement attached as an appendix to defendant's brief, it will see that the reference to "economic settlement" was merely an attempt by the parties to demonstrate an acknowledgment that the hospital was not admitting liability even though it decided to settle the claim. The statement reads:

> This settlement is regarded by the parties to be purely an economic settlement, and is a compromise of a disputed claim, and the parties specifically agree that this agreement is not an admission of fault or guilt or wrongdoing on the part of any person or organization released herein, by whom liability is expressly denied. (Respondent's Answer Brief, A 1).

Obviously, the terms "economic settlement" mean a "business decision" made by the defendant hospital to settle the case. Further, even if the parties to the settlement did intend to specifically allocate the settlement between economic and non-economic damages--a procedure specifically disallowed by this court's opinion in Wells--it would be completely incongruous for the plaintiffs to make the settlement for economic damages only when parties are already considered jointly liable for those damages and only severally liable for non-economic damages. Thus, if the plaintiff and defendant hospital attempted to control the allocation of its settlement as suggested, it certainly would have made much more sense for the plaintiff to have argued that the settlement was for non-economic damages, thereby allowing a full

recovery of the capped non-economic damages from the arbitrating defendant (before the Fifth District's opinion that is).

If the arbitrators erred in finding that no setoff for the prior settlement existed under the medical malpractice arbitration statute, then this court should remand the case to the panel to determine the extent of the plaintiff's non-economic damages.[3] Even if this court does not believe that a full computation of the plaintiff's damages is necessary prior to deducting the full amount of the prior settlement, it should still remand with instructions to the arbitrators to compute the setoff amount in light of this court's opinion in Wells. Either way, this court should reverse the Fifth District's finding that the defendant is entitled to a complete and full setoff of any prior settlements from the arbitration award computed using the artificially capped statutory amount of non-economic damages.

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.

[3]The Fifth District wrote that the arbitration panel's failure to compute the extent of Mrs. Chester's non-economic damages is fatal to her position. Id. at p. 2. However, it was only because of the panel's legal ruling that no setoff could exist that it did not make such a computation, despite Mrs. Chester's urgings during the hearing. Thus, this act of the arbitrators certainly is not fatal to Mrs. Chester's position before this court.

While choosing not to address the merits of the argument, defendant has merely argued to this court that the issue of the estate's claim was not preserved below. Footnote three on page eleven of Mrs. Chester's Initial Brief below belies that assertion and demonstrates the inaccuracy of that argument. As that footnote stated:

> Claimant also argued and still maintains that the $250,000 statutory limit applied both to Mrs. Chester's personal claim as a survivor as well as the estate's claim. (T20-22). As indicated by defendant, this matter is currently pending before the Florida Supreme Court. See, St. Mary's v. Phillipe, 699 So. 2d 1017 (Fla. 1997), rev. granted, 718 So. 2d 170 (Fla. 1998).

Thus, this court is asked to consider the merits of plaintiff's argument as set forth under Point III of her Initial Brief.

IV. WHILE THIS COURT MAY PROPERLY ADDRESS THE ARBITRATION PANEL'S AWARD TO MRS. CHESTER FOR HER LOST SUPPORT, THE FIFTH DISTRICT WAS ENTIRELY CORRECT IN AFFIRMING THE ARBITRATOR'S DECISION ON THAT ISSUE.

In the appeal before the district court, defendant maintained that Mrs. Chester had no right to her husband's pension simply because the designated beneficiary of those benefits was the deceased Mr. Chester's first wife. The Fifth District rejected this argument, apparently agreeing that the arbitrator's award was not for pension benefits per se, but rather for Mrs. Chester's lost income and support due to her husband's untimely death.

Section 766.207(7)(a) provides as follows:

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

Defendant ignores that Mrs. Chester was entitled to the lost income generated by the Pan Am pension according to the plain language of this statute. Simply put, the "death benefits" from that pension were never an issue. Instead, the panel properly found that the pension had a present money value of lost **income** for Mrs. Chester per year.

Notwithstanding the fact that the arbitrator's award was for lost income and not for the actual value of the pension benefits, Mr. Chester never could have changed his beneficiary to list Mrs. Chester as the beneficiary of his Pan Am benefits anyway. During the arbitration, Mrs. Chester specifically testified that the election was irrevocable and that his first wife was entitled to those death benefits (T 78).[4] Defendant rather obtusely ignores that the benefits of the pension were income to the Chesters while Mr. Chester was alive. It was only upon his untimely death that those benefits took on another character which benefitted the first wife. This obviously has nothing to do with the fact that had Mr. Chester not suffered this untimely death that

[4]Arbitration hearing transcript dated December 3, 1998.

he and his wife would have enjoyed those benefits as income which Mrs. Chester has now lost. The Fifth District's opinion does not address this issue at all, nor did any of the motions for rehearing. This court should affirm the Fifth District on this issue.

CONCLUSION

This Court should answer the certified question in the negative, holding that an injured victim's total 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. The setoff for the prior settlement, if allowed, should be computed either against the full amount of those damages, or in keeping with the formula articulated by this court in Wells. On remand, this court should also order the arbitrators to consider non-economic damages for the estate.

Finally, this court should affirm (as the Fifth District did) the arbitrator's award of pension benefits to Mrs. Chester for the lost income and support she suffered due to her husband's untimely death.

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

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