IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-796

EVELYN BARLOW, as Personal Representative of the Estate of SAMUEL EDWARD BARLOW and EVELYN BARLOW, individually,

Petitioner,

v.

NORTH OKALOOSA MEDICAL CENTER, INC., A Florida Corporation,

Respondent.

On Review from the First District Court of Appeal
Case No. 1D01-1073

BRIEF OF AMICUS CURIAE FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT, NORTH OKALOOSA MEDICAL CENTER, INC. (filed with leave of Court)

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INTRODUCTION

Florida Defense Lawyers' Association ("FDLA") is a statewide organization of over 1,000 defense attorneys. FDLA is actively involved in providing this Court and the district courts of appeal with amicus briefs in appellate cases with potential statewide impact. The issue presented in this case concerns the proper interpretation of the provisions governing voluntary binding arbitration of medical malpractice actions, section 766.207, Florida Statutes (1999). This Court's resolution of the issue will have an impact on medical malpractice defendants throughout the state, and the continued viability of voluntary binding arbitration as a mechanism for achieving the prompt resolution of medical malpractice cases. FDLA's appearance as amicus curiae will serve as a conduit through which the defense bar will have an opportunity to be heard on this issue of statewide importance.

In this brief, the symbol "A" will be used to designate the Appendix to Respondent's Brief on the Merits. All emphasis is supplied by counsel unless otherwise indicated.

POINTS INVOLVED ON REVIEW

POINT I

WHETHER THE ARBITRATION PANEL'S AWARD OF ZERO DAMAGES FOR THE CLAIM OF LOSS OF EARNING CAPACITY WAS CONSISTENT WITH FLORIDA LAW ON DAMAGES AS WELL AS THE MEDICAL MALPRACTICE ACT?

POINT II

WHETHER THE ARBITRATION PANEL'S AWARD OF ZERO DAMAGES FOR LOSS OF SOCIAL SECURITY BENEFITS WAS PROPER WHERE THE EVIDENCE FAILED TO ESTABLISH THAT THE CLAIMANT SUFFERED A NET ECONOMIC LOSS

SUMMARY OF ARGUMENT

The interpretation of the Medical Malpractice Act reflected in the award of the arbitration panel, and in the district court opinion, is consistent with the continued viability of voluntary binding arbitration as a means of achieving the goal of the prompt resolution of cases. The interpretation urged by the petitioner, on the other hand, is antithetical to these goals because it suggests that the claimant who elects to have damages determined by an arbitration panel is not subject to the general law governing the recoverability of compensatory damages in Florida. Such an interpretation of the Medical Malpractice Act threatens to undermine the *predictability of outcome*, which is central to the ability of the voluntary binding arbitration mechanism to function as

intended by the Legislature.

In assessing the amount of the claimant's net economic damages -- i.e., "financial losses which would not have occurred *but for the injury giving rise to the cause of action*," section 766.202(3), Florida Statutes (1999), the arbitration panel properly considered evidence on the issue of whether the decedent would have been able to return to the work force absent the medical negligence for which the defendant hospital had acknowledged liability. Resolution of this factual dispute was within the province of the arbitration panel as the trier of fact. The fact that the defendant "admitted liability" by submitting the claim to voluntary binding arbitration did not preclude the hospital from presenting evidence relevant to the issue of whether, in fact, its medical negligence had caused the claimant to sustain the financial loss claimed.

Similarly, the arbitration panel properly concluded that no damages were awardable for loss of Social Security benefits where it was apparent that, had the decedent lived, he would have been expected to consume the amount claimed in personal expenses. Under such circumstances, the claimant has not suffered a net financial loss which is compensable in arbitration. In this regard, the Wrongful Death Act is not inconsistent with either the Medical Malpractice Act or the general law governing compensatory damages.

ARGUMENT

POINT I

THE ARBITRATION PANEL'S AWARD OF ZERO DAMAGES FOR THE CLAIM OF LOSS OF EARNING CAPACITY WAS CONSISTENT WITH FLORIDA LAW ON DAMAGES AS WELL AS THE MEDICAL MALPRACTICE ACT

A. Introduction

In 1988, the Legislature enacted a comprehensive package of medical malpractice reform measures designed to alleviate a financial crisis in the medical liability insurance industry. Ch. 88-1, *Laws of Florida;* § 766.201, Fla. Stat. (1999). One of the primary features of the Medical Malpractice Act was a mechanism for voluntary binding arbitration of damages which had as its primary goal the prompt resolution of medical negligence claims. §§ 766.201(2), 766.207, Fla. Stat. (1999). Voluntary binding arbitration offers medical malpractice claimants the benefit of a speedy resolution without the expense and effort required to prove liability, and offers defendants a one-time opportunity to invoke statutory limitations on damages, primarily non-economic damages. *See generally University of Miami v. Echarte,* 618 So. 2d 189 (Fla. 1993), *cert. denied*, 510 U.S. 915 (1993).

In practice, the arbitration mechanism gets cases settled. The Division of Administrative Hearings reports that a total of one hundred thirty eight medical

arbitration cases have been filed in the fourteen years following the enactment of the Medical Malpractice Act.[1] Of those, nineteen have resulted in awards and nine remain pending, while *one hundred ten* were resolved without a hearing; i.e., settled. These numbers alone provide compelling evidence that voluntary binding arbitration is effective as a means of achieving the Legislature's stated goal of early settlement of medical malpractice cases. Such statistics, however, cannot capture the number of cases in which an offer to arbitrate has resulted in a settlement before the parties actually initiated arbitration proceedings, or those in which a credible threat to offer to arbitrate has resulted in a settlement before the conclusion of the presuit screening period.

Voluntary binding arbitration has been effective as a means of promoting the early resolution of medical malpractice cases primarily because it removes two of the major obstacles to prompt settlement: the arbitrariness inherent in a jury's award of non-economic damages, and the uncertainty of liability defenses. The chances of settlement increase dramatically once these elements of uncertainty have been removed, and the range of possible recovery is more clearly delimited.

Central to the ability of the voluntary binding arbitration mechanism to function as intended by the Legislature, however, is the element of *predictability of outcome.*

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[1] *See* www.doah.state.fl.us

Any interpretation of the Medical Malpractice Act which generates more uncertainty regarding the economic damages which may be recovered in arbitration threatens to undermine the continued viability of voluntary binding arbitration as a means of settling cases, as well as the overall ability of the presuit screening process to achieve the legislative goals behind medical malpractice tort reform.

It is respectfully submitted that the interpretation of the Medical Malpractice Act reflected in the award of the arbitration panel, and in the district court opinion, is consistent with the continued viability of voluntary binding arbitration as a means of achieving the goal of the prompt resolution of cases. The interpretation urged by the petitioner, on the other hand, is antithetical to these goals because it suggests that the claimant who elects to have damages determined by an arbitration panel is not subject to the general law governing the recoverability of compensatory damages in Florida. Such an interpretation of the Medical Malpractice Act would erode the *predictability of outcome*, which is central to the ability of the voluntary binding arbitration mechanism to function as intended by the Legislature.

B. The Medical Malpractice Act

The Medical Malpractice Act[2] is made up of a statement of legislative findings

[2] § 766.201-212, Fla. Stat. (1999).

and intent;[3] a definitional section, defining the terms used in the Act;[4] a section providing for presuit investigation of claims;[5] and a section establishing voluntary binding arbitration.[6] In expressing the intent behind the voluntary binding arbitration provisions, the Legislature stated:

> (2) *It is the intent of the Legislature to provide a plan for prompt resolution of medical negligence claims.* Such plan shall consist of two separate components, presuit investigation and arbitration. Presuit investigation shall be mandatory and shall apply to all medical negligence claims and defenses. Arbitration shall be voluntary and shall be available except as specified.
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> * * *
>
> (b) Arbitration shall provide:
>
> 1. *Substantial incentives for both claimants and defendants to submit their cases to binding arbitration, thus reducing attorney's fees, litigation costs, and delay.*
>
> 2. A conditional limitation on noneconomic damages where the defendant concedes willingness to pay economic damages and reasonable attorney's fees.
>
> 3. Limitations on the noneconomic damages components of large awards to provide *increased predictability*

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[3] § 766.201, Fla. Stat. (1999).

[4] § 766.202, Fla. Stat. (1999).

[5] §§ 766.203-206, Fla. Stat. (1999).

[6] §§ 766.207-212, Fla. Stat. (1999).

> *of outcome of the claims resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims.*

§ 766.201(2), Fla. Stat. (1999).

Section 766.207, Florida Statutes (1999), sets forth the procedures for voluntary binding arbitration and outlines certain limitations on damages which may be recovered:

> (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 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments.*
>
> (b) Noneconomic damages shall be limited to a maximum of $250,000 per incident. . .
>
> (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.

Section 766.209(4), Florida Statutes (1999), outlines the effects of a claimant's refusal to accept a defendant's offer to enter voluntary binding arbitration in similar terms:

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

> (a) *The damages awardable at trial shall be limited to net economic damages,* plus noneconomic damages not to exceed $350,000 per incident. . .
>
> (b) *Net economic damages reduced to present value shall be awardable, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments*.
>
> (c) Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to s. 766.202(8), and shall be offset by future collateral source payments.

Relevant to the issue before this Court, the Legislature defined "economic damages" as used in sections 766.201-212 as: "financial losses which would not have occurred *but for the injury giving rise to the cause of action*, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity." § 766.202(3), Fla. Stat. (1999).

It is important to highlight the similarity between the economic damages which may be awarded in voluntary binding arbitration proceedings under section 766.207, and those which may be awarded at *trial* when a claimant has rejected a defendant's offer to arbitrate. *See* § 766.209(4), Fla. Stat. (1999). The Legislature used essentially identical language to describe the manner in which economic damages are to be awarded at trial when a claimant *rejects* a defendant's offer to enter voluntary binding arbitration, as it did to describe the manner in which economic damages may be

awarded at arbitration. Since the Legislature surely did not intend to *reward* a claimant for rejecting a defendant's offer to arbitrate, any interpretation of the economic damages recoverable at arbitration should be consistent with the economic damages which may be recovered at trial.

C. The element of loss of earning capacity

By including "loss of earning capacity" in the definition of "economic damages," the Legislature did not displace existing Florida law on the recovery of such damages[7], nor did it mandate that such damages are to be awarded *as a matter of law*, even where the arbitrators are not persuaded by the evidence that the medical injury -- for which the defendant has acknowledged liability -- caused the claimant to suffer such a financial loss.

In assessing the claimant's economic damages, the arbitration panel was charged with determining the amount of "financial losses *which would not have occurred but for the injury giving rise to the cause of action. . .*" § 766.202(3), Fla. Stat. (1999). In making this determination, it was absolutely appropriate for the arbitration panel to consider evidence relevant to the factual question of whether the decedent would have been able to return to the work force absent the medical negligence for which the

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[7] *See generally W.R. Grace & Co. -- Conn. .v Pyke*, 661 So. 2d 1301 (Fla. 3d DCA 1995).

defendant hospital had acknowledged liability. The petitioner's convoluted argument to the contrary -- which suggests that apportionment of damages is *never* appropriate in voluntary binding arbitration *as a matter of law* -- is misleading, and would result in a windfall to claimants who elect to have their damages determined by an arbitration panel.

A defendant in a medical malpractice action who has made an offer to submit the issue of damages to voluntary binding arbitration is no more precluded from arguing that its negligence did not cause an element of damages claimed than a defendant in an automobile accident case who has suffered a default would be precluded from arguing that the rear-end collision did not cause the brain damage claimed by the plaintiff. *Cf. Harless v. Kuhn*, 403 So. 2d 423, 425 (Fla. 1981), *citing Watson v. Seat & Crawford*, 8 Fla. 446 (1859) ("When a default is entered for failure to plead, a party has the right to contest damages caused by his wrong but no other issue.")

Moreover, the principles of apportionment belong to the law of *damages. See, e.g.*, Fla. Std. Jury Instr. 6.2g(1), (2) (Civ.). In Florida, the trier of fact is entitled to apportion damages, and hold the defendant liable for only the damages that he or she caused, when it is able to do so. Fla. Std. Jury Instr. (Civ.) 6.2g (2). It is only when the trier of fact is unable to apportion damages that the defendant is held to be liable

for the entire "indivisible injury." *See Gross v. Lyon*, 763 So. 2d 276 (Fla. 2000). The cases relied upon by the petitioner do not compel a finding that the arbitrators were unable to apportion damages caused by the medical negligence *as a matter of law.*[8]

Finally, there is no support whatsoever for the petitioner's contention that section 766.207 *mandates* an award of loss of earning capacity in every case, irrespective of the proof. Indeed, the contention is absurd. The claimant had the opportunity to present evidence in support of a claim for loss of earning capacity.[9] The proof submitted to the arbitrators simply failed to persuade the arbitrators that the claimant had suffered such a financial loss under the facts of this case. The defendant's "admission of liability" for causing the decedent's death clearly did not preclude the arbitrators from making the factual determination that had the decedent

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[8] Indeed, the petitioner's argument in this case reflects the mirror image of the argument rejected by the Fourth District Court of Appeal in *Schwab v. Tolley*, 345 So. 2d 747, 751 (Fla. 4th DCA 1977). Restated, the court's observation in that case serves as a complete answer to the petitioner's argument on the sufficiency of the evidence: "The [claimant's] argument on appeal would be tenable only if the evidence *construed most favorably for the* [*defendant*], established a [positive]: that [the decedent] could . . . have [returned to gainful employment following the cranial bleed] irrespective of the [medical negligence]." [*emphasis in original*] As in *Schwab,* the factual dispute was properly submitted to the arbitration panel.

[9] It should be noted that the arbitrators did award the claimant $240,000 in non-economic damages, and $102,365.50 in economic damages, representing funeral expenses and the replacement value of loss of the decedent's services. [A.13]

received appropriate medical treatment, he would have been left with a disability which prevented his return to gainful employment as a result of the cranial bleed he suffered. Such a determination is consistent with the Medical Malpractice Act's definition of "economic damages" as "financial losses *which would not have occurred but for the injury giving rise to the cause of action. . .*" § 766.202(3), Fla. Stat. (1999).

POINT II

THE ARBITRATION PANEL'S AWARD OF ZERO DAMAGES FOR LOSS OF SOCIAL SECURITY BENEFITS WAS PROPER WHERE THE EVIDENCE FAILED TO ESTABLISH THAT THE CLAIMANT SUFFERED A NET ECONOMIC LOSS

The petitioner's contention that she was entitled to recover the loss of social security benefits, which the arbitrators concluded would have been consumed by the decedent had he lived, is contrary to the most fundamental premise of Florida law on damages: "It is the function of an award of damages to place the injured party in an actual, as distinguished from a theoretical position, financially equal to that which he would have occupied has his injuries not occurred." *Renuart Lumber Yards, Inc. v. Levine*, 49 So. 2d 97, 98 (Fla. 1950).

In determining whether the claimant had suffered a "financial loss[] which would not have occurred *but for the injury giving rise to the cause of action*," it was absolutely appropriate for the arbitration panel to consider the extent to which the decedent's own living expenses would have consumed amounts he received in Social Security benefits, and to offset the amount of the decedent's personal consumption against the gross amount of benefits received. It defies logic to deny that had the decedent lived, he would have been expected to consume the $5,000 per year the claimant now seeks as a "financial loss" in day-to-day needs. If the decedent would

have been expected to consume the benefits which his spouse now claims, then common sense dictates that the surviving spouse has suffered no net "financial loss" awardable as economic damages pursuant to section 766.207.

The fact that this common sense principle is codified in the Wrongful Death Act[10] does not mean that it is not equally applicable in determining a claimant's "net economic damages" for purposes of voluntary binding arbitration pursuant to section 766.207. This Court's holding in *St. Mary's Hospital, Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000), does not compel arbitrators to apply the opposite of common sense in evaluating "net economic damages" simply because the Wrongful Death Act is not applicable in voluntary binding arbitration. In this instance, the Wrongful Death Act is not inconsistent with the Medical Malpractice Act, which provides for the recovery of "*net* economic damages."

The contention that *all* financial losses are awardable in arbitration, and are not subject to offset for the amount which would be expected to be consumed by the decedent, suggests that a claimant who agrees to submit his or her damages claim to voluntary binding arbitration is entitled to recover a *premium* for having selected arbitration as a forum. Interpreting the statutes governing voluntary binding arbitration in a manner which provides a windfall to claimants produces an absurd and

[10] § 768.18(5), Fla. Stat. (1999).

incongruous result, which cannot be sanctioned. *See Weber v. Dobbins*, 616 So. 2d 956, 958-959 (Fla. 1993) (statutory language should not be interpreted literally where to do so would lead to an absurd result); *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (same); *Wakulla County v. Davis*, 395 So. 2d 540, 543 (Fla. 1981) (courts must avoid interpretation of statute which produces unreasonable consequences). The Legislature unequivocally intended to impose *limitations* on the recovery of damages when the arbitration provisions are invoked. There is no indication whatsoever that it intended to *expand* the scope of compensable economic damages. Had the Legislature intended such a radical departure from well-settled law, it certainly would and should have said so in unequivocal terms. *Carlile v. Game & Fresh Water Fish Commission*, 354 So. 2d 362, 364 (Fla. 1977).

In the final analysis, adopting conditional limitations on the recovery of non-economic damages where a defendant is willing to admit liability and pay economic damages will have been a futile gesture on the part of the Legislature if the scope of recovery of economic damages is to be expanded beyond all previously-recognized legal boundaries. A construction of the applicable statutes which permits the recovery of economic damages which are not compensable under applicable Florida law, and which do not reflect the claimant's net financial losses, will effectively undermine the legislative goals behind the Medical Malpractice Act because it will introduce an

element of confusion and uncertainty into an alternative dispute resolution mechanism which depends upon predictability of outcome for its success.

CONCLUSION

Based upon the foregoing arguments and authorities, Amicus Curiae, Florida Defense Lawyers Association, respectfully requests this Court to approve the decision of the First District Court of Appeal.

Respectfully submitted,

Gail Leverett Parenti
for the FLORIDA DEFENSE LAWYERS' ASSOCIATION

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to **Stanley Bruce Powell, Esquire**, Attorneys for Petitioner, Powell & Swanick, 107 North Partin Drive, Post Office Box 400, Niceville, FL 32578-0400, **Pamela Frazier, Esquire**, 24 West Chase Street, Pensacola, FL 32501 and **William K. Thames, II, Esquire,** 24 West Chase Street, Pensacola, FL 32501 by mail on January 27, 2003.

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared using Times New Roman 14-point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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