IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

v.

S.C. CASE NO.: SC02-796
LOWER CASE NO.: 1 D01-1073

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

Respondent.
_____/

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RESPONDENT'S BRIEF ON THE MERITS

On Review from the District Court of Appeal

First District

State of Florida

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Preliminary Statement

The Respondent, North Okaloosa Medical Center, is referred to as “NOMC”or “Respondent”. The Petitioner, Evelyn Barlow, is referred to as “Mrs. Barlow” or “Petitioner.” References in this Brief to the record on appeal will be made by the designation “R” followed by the volume and page numbers assigned. The transcript of the Administrative Hearing will be made by the designation “T” followed by the volume and page numbers. The Respondent's appendix will be referred to by the designation "App." followed by the page number. The deposition of Dr. Chin will be referred to as “Defendant’s Exhibit 5 --Dr. Chin depo p.” followed by the page number. The opinion of the District Court of Appeal, First District is at "App. 1." References to the Petitioners’ Brief on the Merits will be made by the designation “P.B.” followed by the page number.

Statement of Facts

For purposes of this Answer Brief, NOMC accepts the Statement of the Case and Facts as set forth in the Petitioner’s Initial Brief, P.B. 1-10, as generally accurate, with some exceptions, but incomplete.

With regard to the loss of earning capacity issue and the testimony presented

by NOMC expert witnesses on the subject, on February 8, 2001 Administrative Law Judge Linda Rigot, entered an Order stating that

> "The Defendant correctly argues that depending upon the types of damages being sought by the Claimant, the decedent's life expectancy and future earning capacity, for example, are relevant to this proceeding. The Defendant argues, therefore, that its expert witnesses would be relevant to the issue of the amount of damages to be awarded in this proceeding." (R. 162).

Judge Rigot went on to rule that the Defendant's expert witnesses could offer evidence relevant to the issue of the amount of damages to be awarded. (R. 162-163). At the Arbitration Hearing, Judge Kendrick ruled in exactly the same manner as Judge Rigot, indicating that evidence going to the condition of or the ability of the deceased Mr. Barlow to pursue gainful employment and what he could reasonably be expected to earn had he lived was relevant and admissible. (T. 261-262).

With regard to the testimony actually presented by NOMC's expert witnesses on the issue of Mr. Barlow's medical condition prior to NOMC's negligence having occurred, Dr. Lawrence Chin testified that had Mr. Barlow been properly treated, it is very likely that he would have had complete left-sided paralysis. (Defendant's Exhibit 5--Dr. Chin depo p.16).

> A. Well, I think that given the size of the clot and given the location, that it's very likely that he would have had left-sided paralysis.
>
> Q. How much?
>
> A. Well, I would say, given the size of the clot, that it--it likely would

> have been complete paralysis. Now, there may have been some degree of recovery. (Defendant's Exhibit 5--Dr. Chin depo, p. 16). (App. 2.)

Further, Dr. Kenneth Mahaffey testified for NOMC that had Mr. Barlow survived, there was a high likelihood he would have suffered some significant morbidity even if the intracranial bleed would have been discovered at the earliest possible time. (T. 269-270).

> A. I think, from the studies that we've done, that he had a high likelihood of suffering some significant morbidity following his event if he would have survived.
>
> Q. Okay. Would that opinion hold true even if it had been discovered at the earliest possible time?
>
> A. Yes (T. 269-270). (App. 3.)

Dr. Mahaffey went on to testify that, as a cardiologist, when classifying a patient's potential disability from a stroke it is classified as mild, moderate or severe. (T.270). Mild would be essentially no deficit, moderate would be significant limitations in doing the routine activities of daily living, and moderate or severe deficit would be the inability to live independently or would require placement in a nursing home. (T. 270). In the case of Mr. Barlow, had he survived, he would have had a moderate to severe disability and would have been moderately or severely impaired based upon the information available. (T. 271-272).

> Q. Can you specify what kind or what the minimal permanent impairment you believe Mr. Barlow would have suffered had the

bleed been discovered earlier?

A. Well, when--as a cardiologist, when--when we classify patient's potential disability from a stroke, we classify it as mild, moderate and severe. Mild would be essentially no deficit, moderate would be that the patient would have significant limitations in terms of doing the routine activities of daily living, and moderate or severe deficit would be the inability to live independently or require the placement in a nursing home. And I think that Mr. Barlow, if he had survived, would have had a moderate to severe disability, based on the information available (T. 271-272). (App. 4.)

Significant morbidity would be expected in Mr. Barlow's case. (T. 271). The disability or morbidity is not expressed in terms of percentage because physicians think more about a person's ability to live on a routine and do routine activities. (T. 272). The likelihood of Mr. Barlow being able to have gone back to engage in any kind of regular gainful employment outside the home for five to eight hours per day would have been relatively low, probably less than 50%. (T. 293).

With regard to the issue of the reduction in social security benefits due to Mr. Barlow's death, NOMC's expert witness, Frederick Raffa, Ph.D., testified that in 1998 Mrs. Barlow received social security retirement benefits of roughly $5,674.00 and Mr. Barlow received social security retirement benefits of $10,822.00. (T. 200). Adjusted to 1999, Mr. Barlow would have received if he had survived $10,963.00, and Mrs. Barlow would have received $5,748.00. (T. 200). Based upon social security regulations, a surviving spouse receives the higher of either her benefit or her husband's benefit. (T. 201). Mrs. Barlow ended up receiving her husband's benefit

which, in 1999, amounted to some $5,215.00 more than what she had received prior to Mr. Barlow's death. (T. 201). Mrs. Barlow is currently receiving $11,292.00 per year in social security retirement benefits. (T. 201).

SUMMARY OF ARGUMENT

The Arbitration Panel's decision to award zero damages for loss of earning capacity was supported by competent substantial evidence. The testimony of NOMC's expert witnesses, Dr. Chin and Dr. Mahaffey, both supported NOMC's position that, prior to any negligence on the part of NOMC ever having occurred, Mr. Barlow had sustained a moderate to severe impairment that would likely have precluded him from ever returning to gainful employment. Therefore, the Arbitration Panel's decision to award zero damages for loss of earning capacity was correct.

Further, the Arbitration Panel's decision not to award any damages for the alleged loss of social security benefits was correct. The Petitioner presented no evidence whatsoever that the reduction in Social Security retirement benefits would not have been offset by Mr. Barlow's consumption had he lived. As testified to by Dr. Raffa, Mrs. Barlow's social security retirement benefits actually increased after Mr. Barlow's death because she received, by law, Mr. Barlow's benefit which was more than hers.

STANDARD OF REVIEW

Pursuant to Section 766.212(1), Fla. Stat., any appeal is limited to a review of the record and shall otherwise proceed in accordance with Section 120.68, Fla. Stat.

The Court of Appeal may not substitute its judgment as to disputed findings of fact or as to the weight of the evidence. Gershanik v. Department of Professional Regulation, B.D. of Medical Examiners, 458 So.2d 302 (Fla. 3d DCA 1984). The Standard of Review is whether there is in the record competent substantial evidence to support the Arbitration Panel's findings. Gulf Coast Co-op, Inc. v. Clark, 674 So.2d 120 (Fla. 1966). The law in Florida is well settled that an appellate court should not retry the case or reweigh conflicting evidence submitted to the trier of fact, but, rather, the concern on appeal must be whether, after all conflicts in evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, whether there is substantial, competent evidence to support the verdict and judgment. Helman v. Seaboard Coastline Railroad Company, 349 So.2d 1187 (Fla. 1977); Neal v. State, 792 So.2d 613 (Fla.4th DCA 2001).

As set forth in Griffis v. Hill, 230 So.2d 143 (Fla. 1969), the test to be applied in determining adequacy of a verdict is whether a jury of reasonable men could have returned that verdict. Because trial courts are generally in a better position to assess the characteristics of testimony or other evidence admitted, appellate courts defer to a trial court to resolve factual questions. Kinlaw v. Unemployment Appeals Commission, 417 So.2d 802 (Fla. 5th DCA 1982). This is the case when assessing witness credibility or assigning weight to the evidence and this rule applies in the

context of administrative hearings. Gulf Coast Co-op, Inc., supra. If the evidence presented before the lower tribunal is undisputed, and the factual finding is merely an inference drawn from the evidence, then the standard of review is whether the record shows competent substantial evidence to support the order or judgment. SEDS, Inc. v. Hartford Fire Ins. Co., 724 So.2d 1258 (Fla. 4th DCA 1999). If the evidence is disputed, the issue is whether the finding is clearly erroneous. Holland v. Gross, 89 So.2d 255 (Fla. 1956).

ARGUMENT

I. The Arbitration Panel properly applied the applicable law when it awarded zero damages for the alleged loss of earning capacity where there was competent substantial evidence that the decedent would not have returned to gainful employment.

The Petitioner's argument that NOMC was contesting its liability for causing Mr. Barlow's death (P.B. 11, 16) is simply wrong. The issue at the arbitration hearing was the amount of the Petitioner's damages. Therefore, testimony that Mr. Barlow suffered from disabling conditions prior to any negligence on the part of NOMC occurring is both relevant and admissible on the issue of the Petitioner's damages.

Mr. Barlow's intracranial bleed was caused by a stroke, not by any action or inaction of NOMC. However, NOMC admitted liability for not detecting the bleed sooner. Dr. Chin and Dr. Mahaffey both testified that Mr. Barlow suffered from permanent neurological injuries prior to the admitted negligence of NOMC. (T. 269-270, Defendant's Exhibit 5--Dr. Chin depo p. 16). This testimony directly relates to the issue of the amount of the Petitioner's damages for loss of earning capacity. In determining the amount of economic damages awardable, it is proper to consider the Decedent's physical capacity to perform work prior to the negligent act. Loftin v. Wilson, 67 So.2d 185 (Fla. 1953); W.R. Grace & Company v. Pyke, 661 So.2d 1301

(Fla. 3d DCA 1995); Atlantic Coast Line Railroad Company v. Ganey, 125 So.2d 576 (Fla. 3d DCA 1960).

The uncontradicted testimony of Dr. Mahaffey and Dr. Chin established that Mr. Barlow's health was adversely effected by the intracranial bleed prior to the any negligence on the part of NOMC ever having occurred, and his physical capacity to perform work and to provide support and services would have suffered accordingly. (Defendant's Exhibit 5--Dr. Chin depo p. 13-16; T. 269-271). Certainly had Mr. Barlow demonstrated neurological injuries as a result of the intracranial bleed several days before NOMC's negligent act, there would be no question that his pre-existing medical conditions would be taken into consideration in determining damages. Because only hours passed between the commencement of the intracranial bleed and the detection of the bleed does not change this analysis in any way. The same logic would apply in the hypothetical situation in which an automobile accident victim suffers a spinal injury rendering him a quadriplegic, and thereafter dies in the emergency room as a result of medical negligence only hours later. In that hypothetical scenario, the accident victim would already have been disabled at the time of the medical negligence and, therefore, his quadriplegia (even though only hours old) would have to be considered in determining lost earning capacity due to the emergency room's medical negligence. Yet, in defiance of all logic, reason, and common sense,

the Petitioner would have this Court hold that the deceased quadriplegic must be awarded full damages for loss of future earning capacity even though no future earning capacity existed prior to the negligent act. (P.B. 27-28).

The substance of the Petitioner's argument in this case is that no matter what the physical condition of the plaintiff is prior to the occurrence of the negligent act, that the Court cannot consider the physical condition of the plaintiff as it relates to lost earning capacity and, instead, full damages for loss of earning capacity must be awarded. This argument is inconsistent with logic, reason, and common sense. Assume, hypothetically, that Mr. Barlow had been in a vegetative state and not worked for years prior to NOMC's negligence which caused his death. Further, assume for purposes of the hypothetical, that Mr. Barlow required around-the-clock attendant care for even his most basic needs such as eating, bathing, and hygiene. To accept the Petitioner's argument in this hypothetical would mean that the Court would have no discretion and must award full damages for loss of earning capacity even though, under the hypothetical, Mr. Barlow would have had absolutely no earning capacity whatsoever prior to NOMC's negligent act. Such an outcome would defeat the whole purpose of arbitrating the amount of damages. In fact, there would be virtually no purpose for an arbitration defendant to put on any evidence whatsoever.

The Petitioner further erroneously relies on North Miami Medical Center v. Prezeau, 793 So.2d 1142 (Fla.3rd DCA 2001). In Prezeau, the plaintiff brought a medical malpractice action against two doctors and a hospital. The plaintiff alleged that the hospital was vicariously liable for the actions of the doctors. The doctors submitted their cases to arbitration, however, the hospital did not and proceeded to a jury trial at which the hospital was found vicariously liable for the doctors' actions and damages were awarded. The hospital contended that it was entitled to the $250,000.00 statutory cap on non-economic damages under § 766.207(7)(b), Fla.Stat., because its liability stemmed solely from the vicarious liability of the doctors who were allowed to assert the cap on non-economic damages. The Third District Court of Appeal rejected this argument holding that "the benefit of the statutory cap on non-economic damages is solely reserved for a defendant who is conceding liability and participating in arbitration." Prezeau bears no resemblance whatsoever to the case at bar since NOMC did concede liability for causing Mr. Barlow's death and elected to proceed to arbitration on the issue of the amount of damages.

The Petitioner's reliance on Gross v. Lyons, 763 So.2d 276 (Fla. 2000), is also misplaced. In Gross, a motorist was involved in a July 1992 collision causing multiple injures. Id. Three months later in September 1992, the motorist was involved in a second motor vehicle accident. Id. The plaintiff sued on the first accident and the

defendant admitted liability for causing the first accident but denied any responsibility for damages, instead claiming that the motorist's medical problems resulted from pre-existing conditions or, alternatively, from the second accident. Id. at 277. The trial court instructed the jury that the motorist could recover from an aggravation of a pre-existing condition, but also instructed that the motorist could not recover for any damages caused by the second September 1992 accident. Id. The jury returned a defense verdict awarding zero damages. Id. On appeal, the 4th District Court of Appeal reversed because the jury instruction concerning the September 1992 accident might have improperly lead the jury to believe that if damages could not be apportioned, the first tortfeasor would not be responsible for any damages. Id. This Court held that the first of two successive tortfeasors is liable for the entire injury if a jury cannot apportion the damages between the two successive tortfeasors. Id at 280. This Court declined to adopt a "rough apportionment" method of dividing damages, whereby if a jury is unable to determine by a preponderance of the evidence how much of the plaintiff's damages can be attributed to the defendant's negligence, it can make a rough apportionment of such by dividing the damages equally between each separate accident. Id.

The case at bar bears no similarity to Gross which, essentially, concerns whether the "concurring causation" jury instruction (Standard Jury Instruction 5.1(b))

should be given. Not one single case cited by the Petitioner stands for their proposition that an absolute certain percentage number (i.e., 99%, 84%, 71%, etc.) of disability has to be assigned by a witness to a pre-existing condition in order for the finder of fact to determine that, but for any negligence on the part of NOMC, if Mr. Barlow had lived he would not have been able to return to gainful employment due to a pre-existing disability, and the undersigned's legal research has not revealed the existence of any such case. In the case at bar, NOMC admitted responsibility for failing to detect the symptoms of an intracranial bleed which resulted in Mr. Barlow's death. However, prior to any negligent act on the part of NOMC taking place, the intracranial bleed had already caused injuries that would have precluded Mr. Barlow's return to gainful employment. This was the testimony presented to the Arbitration Panel in the case at bar.

Similarly, the Petitioner's reliance on Schwab v. Tolley, 345 So.2d 747 (Fla. 4th DCA 1977) is also misplaced. In Schwab, the plaintiff was injured in an automobile collision. Subsequently, the plaintiff underwent surgery which resulted in the plaintiff becoming a quadriplegic. The court held that the jury was properly permitted to determine whether or not it was possible to apportion the causation of the plaintiff's ultimate quadriplegic condition between the automobile collision and the allegedly negligent surgery. Schwab bears no resemblance to the case at bar since the issue in

the case at bar is not causation, but rather damages. Specifically, did Mr. Barlow have any earning capacity to lose prior to NOMC's negligent act? The uncontradicted testimony at the arbitration hearing was that Mr. Barlow did not have any earning capacity prior to NOMC's negligent act. The Petitioner made a tactical decision not to call any expert witness to testify that Mr. Barlow did, indeed, have an earning capacity prior to NOMC's negligent act despite being on notice that NOMC intended to challenge this element of damages through expert testimony. The Petitioner now has to live with the consequences of that tactical decision, and should not now complain nor is it proper the Petitioner to attempt to retry the facts once again on appeal. The law in Florida is well settled that an appellate court should not retry the case or reweigh conflicting evidence submitted to the trier of fact, but, rather, the concern on appeal must be whether, after all conflicts in evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, whether there is substantial, competent evidence to support the verdict and judgment. Helman v. Seaboard Coastline Railroad Company, 349 So.2d 1187 (Fla. 1977); Neal v. State, 792 So.2d 613 (Fla.4th DCA 2001).

The Petitioner also cites Pohl v. Witcher, 477 So.2d 1015 (Fla.1st DCA 1985) which is another case that merely stands for the proposition that, in a medical malpractice case, whether there is a direct causal relationship between the physician's

deviation from the standard of care and the present condition of the Plaintiff is a question of fact for the jury. Pohl also has no relationship to the case at bar.

Likewise, the other cases cited by the Petitioner on the same point, i.e., Cruz v. Placentia, 778 So.2d 458 (Fla. 3d DCA 2001), Zigman v. Cline, 664 So.2d 968 (Fla. 4th DCA 1995); Marinelli v. Grace, 608 So.2d 833; and Hart v. Stern, 824 So.2d 927 (Fla.5th DCA 2002) all deal with reversible error based upon a trial court's failure to give Florida Standard Jury Instruction 5.1(b) and have nothing to do with the sufficiency of the evidence. In the case at bar, Dr. Chin and Dr. Mahaffey both provided competent substantial evidence that Mr. Barlow had sustained debilitating neurological injuries prior to any negligence on the part of NOMC ever occurring. (Defendant's Exhibit 5--Dr. Chin depo p. 13-16; T. 269-271). Therefore, there exists competent substantial evidence to support the Arbitration Panel's decision in the case at bar and those findings should be affirmed.

Also, the Petitioner mistakenly refers to Gooding v. University Hospital Building, Inc., 445 So.2d 1015 (Fla. 1984) when referring to Dr. Mahaffey's testimony for the proposition that the issue being addressed was proximate causation. It is patently obvious that Dr. Mahaffey was testifying as to Mr. Barlow's earning capacity (damages) when he testified that there was less than a 50% probability of Mr. Barlow being able to engage in regular gainful employment even if the intracranial bleed had

been detected in a timely manner (in other words, before NOMC's negligent act had occurred). (T. 293). In fact, Gooding simply stands for the proposition that a plaintiff in a medical malpractice action must show that an injury more likely than not resulted from the defendant's negligence in order to establish a jury question on proximate causation. This issue has nothing to do with the case at bar.

The Petitioner also argues that pursuant to this Court's holding in University of Miami v. Echarte, 618 So.2d 189, 193 (Fla.1993) that a plaintiff in a medical malpractice arbitration proceeding somehow must be awarded "loss of earning capacity," whether or not there was in fact any "earning capacity" prior to the admittedly negligent act because this is a "commensurate benefit" to the plaintiff to compensate for the capping of non-economic damages. However, Echarte stands for no such proposition. In fact, this Court noted in Echarte that the plaintiff could recover, as a commensurate benefit for participating in arbitration, net economic damages, and, in addition, the plaintiff in arbitration also receives prompt payment of the award including interest, payment of reasonable attorney's fees and costs up to 15% of the award, and holds each participating defendant in an arbitration proceeding jointly and severally liable for all damages assessed. Id. at 192-193. However, this Court made no such sweeping statement to the effect that loss of earning capacity

must be awarded whether or not there was any earning capacity prior to the negligent act, as the Petitioner attempts to read into that decision.

In conclusion, despite having been put on notice prior to trial that NOMC was going to call expert witnesses Dr. Mahaffey and Dr. Chin to testify that Mr. Barlow's intracranial bleed rendered him disabled prior to any negligence on the part of NOMC occurring (R. 28, P.B. 3), and despite Judge Rigot's pre-arbitration Order allowing NOMC's expert witnesses to testify (R. 161-164), the Petitioner made a tactical decision not to present any witness of her own to dispute Dr. Mahaffey's or Dr. Chin's testimony. The Petitioner should not now complain about the consequences of that tactical decision. Therefore, the Opinion of the First District Court of Appeal should be affirmed.

II. The Arbitration Panel properly applied the applicable law in awarding zero damages for the alleged loss of social security benefits where there was no evidence to suggest that the amount of the reduction in social security benefits due to the decedent's death did not fairly represent the amount of monies necessary to maintain the decedent had he lived.

The Petitioner correctly argues that this Court's opinion in St. Mary's Hospital, Inc. v. Phillipe, 769 So.2d 961 (Fla. 2000), provides that medical malpractice damages are governed by the Florida Medical Malpractice Act. In St. Mary's, this Court held that since the Florida Medical Malpractice Act governed arbitration damages, that the decedent's survivors could recover for loss of earning capacity and wage loss even

though such damages could not be recovered under the Florida Wrongful Death Act. Id. at 972. However, this Court made no ruling that established legal principles should not be used when calculating net economic damages under the Florida Medical Malpractice Act.

The Arbitration Panel properly made no award for loss of social security benefits since there was no evidence to establish that there would exist any net accumulation of social security benefits after consumption. While Mr. Barlow was alive, he and Ms. Barlow received and consumed social security benefits totaling some $16,495.25 and, after his death, she alone consumed benefits totaling $11,292.00. (T. 58-59, 201; A.B. 25). The Petitioner put forth no evidence to show that, had Mr. Barlow lived, the $5,203.25 difference would not have been consumed by him in the ordinary course of daily living for items such as food, clothing, travel, recreation, etc. The Petitioner had the burden of proof to establish her damages before the Arbitration Panel and failed to do so.

Section 766.207, Fla. Stat. provides that:

> (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% of wage loss and loss of earning

> capacity, offset by collateral source payments. (emphasis added).

The statute specifically uses the term "awardable", not "awarded", implying that the net economic damages are something that may or may not be awarded depending on the evidence. Further, the use of the term "net" implies that a plaintiff's gross economic damages should be reduced by established legal principles in order to come up with a "net" amount.

As stated by the Arbitration Panel in its March 8, 2001 Arbitration Award, there is no reason to conclude that Section 766.207, Fla. Stat., intended for established legal principles used to calculate net economic damages should be disregarded (T. 316-317). (App. 5.) Due to her husband's death, Ms. Barlow's social security benefits actually increased since she now receives her husband's benefit which was higher than hers. (T. 201). As such, Mrs. Barlow has not sustained any net economic damage. Since there is no evidence that Mrs. Barlow has sustained a "net economic loss" through the reduction in social security benefits, the Arbitration Panel's decision was correct.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court affirm the decision of the First District Court of Appeal.

Respectfully submitted:

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Stanley Bruce Powell, Esq./David R. Swanick, III, Esq., Powell & Swanick, 107 North Partin Drive, Post Office Box 400, Niceville, Florida 32578-0400 by U. S. Mail delivery, this the _____ day of _____, 2001.

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CERTIFICATION OF COMPLIANCE AS TO FONT REQUIREMENTS

I HEREBY CERTIFY that the Respondent's Brief on the Merits was computer generated using Times New Roman 14 pt., in accordance with the Rules.

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