

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 Ct. Case No.: 1D01-1073

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

Respondent.

PETITIONER'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 Petitioner will be referred to as Petitioner or Mrs. Barlow.

Petitioner's deceased husband will be referred to as Mr. Barlow.

The Respondent will be referred to as Respondent, North Okaloosa Medical Center or NOMC.

The record on appeal will be referred to as (R.____). The transcript of the Administrative hearing under §766.207, Fla. Stat. (2000) will be referred to as (T.____). The Petitioner's appendix will be referred to as (A.____).

The deposition of Dr. Chin will be referred to as (Defendant's Exhibit 5 -- Chin depo p. ____). The opinion of the District Court of Appeal, First District is at (A. 37-41), and now reported at 809 So.2d 71 (Fla. 1st DCA2002).

STATEMENT OF THE CASE AND FACTS

This is an appeal from a binding arbitration award conducted pursuant to §766.207, Fla. Stat. (2000), and an affirmance with opinion by the First District Court of Appeal. This Court granted certiorari on October 30, 2002.

Petitioner contends the arbitrators and the District Court misapplied and misconceived the controlling law by failing to award any damages for loss of earning capacity of Petitioner's decedent, and by failing to award

damages for the net financial loss of social security benefits which would not have occurred "but for" the wrongful death of Mr. Barlow.

This was a medical malpractice case resulting from the death of Samuel Barlow, the husband of Petitioner. The Respondent is a hospital, North Okaloosa Medical Center, (hereinafter NOMC).

The basis of the claim for wrongful death was that NOMC's ICU nurses negligently failed to detect the symptoms of an intracranial bleed that Mr. Barlow suffered in NOMC's ICU as a result of being given the drug Retavase for an apparent mild heart attack, and that this negligence "caused or substantially contributed to" his death. (R. 028; see Exhibit 1 to this composite – Dr. Schweiger's verified medical opinion).

During pre-suit screening, pursuant to §766.207, Fla. Stat. (2000) the Respondent NOMC offered, in writing, to admit liability and submit the amount of the damages to binding arbitration. (R. 028; Exhibit 2, A. 8). Claimant accepted that offer.

During the period prior to the actual arbitration hearing, NOMC listed two doctors as expert witnesses indicating it was going to try to present testimony that Mr. Barlow would have died or been disabled in some degree regardless of its nurses' negligence.

Mrs. Barlow contended that a defendant who admits liability under the statute and thereby "caps" a claimant's damages, cannot then avoid paying damages by contesting causation as this would create a "heads we win – tails you lose" situation not allowed by the arbitration statute. She filed a motion seeking to prohibit NOMC from contending it did not cause her damages and a motion to withdraw her acceptance of NOMC's offer if it was going to be allowed to deny liability for her damages. (R. 028, 151)

The first administrative law judge (Judge Rigot) entered an order on the motions, after a hearing, ruling that the hospital could not contest causation, but could offer testimony relevant to the "amount" of the damages. She also ruled there was no procedure under the statute for Petitioner to revoke an acceptance of an offer to admit liability and arbitrate damages. (R. 161-164). (A. 19-21).

A few days before the arbitration hearing, there was a change of administrative law judges. (R. 170). Judge Kendrick replaced Judge Rigot.

At the hearing, over Mrs. Barlow's objections (T. 19-20, 36, 256, 259-262), NOMC was allowed by Judge Kendrick to call the two experts and elicit opinions from them about what would have happened to Mr. Barlow as a consequence of the intracranial bleed regardless of the Respondent's admitted liability for his death, and all resulting damages under the statute.

The administrative judge also allowed one expert to use authoritative texts to bolster his opinion over Petitioner's objection. (T. 267, 273-274)

The undisputed facts showed that because Mr. Barlow was given Retavase and admitted to ICU for observation, the nurses were supposed to be conducting frequent neurological checks and looking for signs of a bleed in the brain which sometimes occurs as a consequence of taking Retavase.

The ICU nurses notes show that at 7:10 Mr. Barlow complained of a very bad headache. (Defendant's Exhibit 5 -- Chin depo p. 17 (T. 23-24). This probably signaled the beginning of his intracranial bleed. (Defendant's Exhibit 5 -- Chin depo. p. 17-18). He vomited and urinated on himself at 8:10 and was described as having "gone to sleep" at 8:20 in the nurses notes. (A. 23-24). He was not checked neurologically until 11 hours later when it was finally discovered he was not asleep, but instead, was in a coma. (Defendant's Exhibit 5 -- Chin depo. p. 18, A. 23-24). During this entire 11 hours and 50 minutes, they continued to give him intravenous Heparin, an anticoagulant, which aggravated the bleed, according to Respondent's doctors. (Defendant's Exhibit 5 -- Chin depo p. 18, 26, T. 279, A. 26, 27, 29, 32) . He did not receive a CT scan until 11 hours and 50 minutes after the "bad headache" began. (Defendant's Exhibit 5 -- Chin depo p. 18). This was

the only "picture" of the bleed. (Defendant's Exhibit 5 -- Chin depo p. 17, A. 28, 32).

The hospital called a Dr. Mahaffey, a cardiologist, who opined that Mr. Barlow would have had " some significant morbidity" from the bleed alone had he survived (T. 269). He could not give a percentage. (T. 271). He based this opinion on studies. Petitioner objected to the use of studies on direct examination to shore up an opinion, but was overruled. (T. 267, 272, 273-276).

Dr. Mahaffey admitted on cross-examination that had the bleed been discovered, the Heparin would have been "instantly stopped" because it can exacerbate the bleed (T. 279), and he admitted he could not "quantitate" the disability he thought Barlow would have had from the bleed alone, because there was no scan done when the bleed began. (T. 286; A. 33).

On redirect, he agreed with NOMC's counsel's leading question that Mr. Barlow "would have suffered some moderate impairment ... " (T 288 - 289), (emphasis supplied.), but had no idea how much rehabilitation would have helped or improved the situation. (T. 291-292).

The final word was on re-cross by Mrs. Barlow's counsel:

Q – And likewise, you're unable to quantify how bad his disability, in this specific case, would have been had that hemorrhage been properly diagnosed

and properly treated according to accepted medical protocol, because you don't have any data on it, do you?

A – Not in his specific case.

MR. POWELL: All right. His specific case is what we're dealing with here. Thank you sir. (T. 295, A. 35).

The other defense expert, who again testified over objections about these causation issues, was a Dr. Chin. He also could not quantify what Mr. Barlow's disability would have been but for the negligence, saying it was "impossible" to quantify. (Defendant's Exhibit 5 -- Chin depo p. 39-40, A. 30). He agreed the giving of the Heparin for 11 hours and 50 minutes was "aggravating" the bleed, and said it would be "speculation" to try to determine what the bleed was like 11 hours and 50 minutes before the CT scan (picture) was finally done. (Defendant's Exhibit 5 -- Chin depo p. 26-27, A. 28-29).

The arbitrators awarded zero damages for loss of earning capacity stating in footnote 2 of the award (R. 246, A. 5):

"the evidence demonstrated that because of the debilitating consequences of the cranial bleed the decedent suffered prior to the act or omission on which the subject claim is based, it was unlikely he would have been able to return to gainful employment."

The order failed to state what "the evidence" was, but there was no evidence at all the decedent would have died had there been no negligence.

The arbitration award also failed to provide any damages for the "financial loss" of social security benefits, stating in footnote 4:

"4/ No award was made for lost social security benefits to the estate since the claimants failed to establish that there would be any net accumulations after consumption. Stated differently, Claimants failed to demonstrate that social security benefits did not fairly represent the monies that would have been required to maintain the decedent. Notably, §766.207(7)(a), Fla. Stat. (2000), calls for an award of "net economic damages," and there is no apparent reason to conclude that established principles used to calculate net economic damages should not apply to this case." (R. 247, A. 6).

The undisputed evidence showed that prior to death, the Barlows were receiving \$16,495.20 yearly in social security and after death \$11,292.00 was received. (T. 58 – 59). (Claimant's exhibits 2, 3, 4 and 5). The net difference was \$75,000 ± over the expected life.

The District Court of Appeal, First District, affirmed with opinion (A. 37-41), holding plaintiff should have called her own experts on causation, and her damages were controlled by the Wrongful Death Act, citing it as controlling.

Mrs. Barlow appealed to this Court contending the District Court's opinion expressly and directly conflicts with St. Mary's Hospital, Inc. v. Phillipe, 769 So.2d 961 (Fla. 2000), University of Miami v. Echarte, 618 So.2d 189 (Fla. 1993), and North Miami Medical Center v. Prezeau, 793 So.2d 1142 (Fla. 3d DCA 2001).

As to Mr. Barlow's capacity to earn, there was undisputed and unchallenged testimony from Mr. Huff, a former employer of the deceased, that his earning capacity was \$14 to \$20 per hour. (T. 37-41).

Both Mrs. Barlow and NOMC called economists to give opinion testimony on loss of earning capacity and loss of services. Dr. Frederick Raffa testified for NOMC and it is his opinion the loss of services was \$77,172 (T. 205) (after being reduced to present value) and the loss of earning capacity was a range of 12,315 to 18,995. (T. 202) He had also reduced this to present value and deducted social security benefits and assumed a minimum wage of \$5.15 as his earning capacity and assumed earning capacity totally ceased at age 70 or 72. (T. 198-202).

Therefore, his minimum estimate of economic damages was \$77,172 plus \$12,315 or \$89,487. (T. 206).

Dr Raffa admitted that his estimate of 12.75 hours per week in services was predicated on the assumption that Mr. Barlow's loss of earning

capacity damages were consuming 40 hours each week and if that was not the case, the hours of services would be much higher. (T. 214-215). He also admitted his opinions were based upon his interpretation of St Mary's Hospital v. Phillippe (T. 223-224) and §766.207, Fla. Stat. (2000) (T. 221-222).

Mrs. Barlow called Ethel Forrest, a vocational rehabilitation specialist who testified “skilled worker” mean wage in Fort Walton Beach was \$9.83 per hour. (T. 236), and unskilled workers mean wage was \$7.47 per hour. (T. 238).

Dr. Robert Turner, PhD also testified for Mrs. Barlow, and his estimate of the total economic damages was \$677,534, unreduced to present value, and \$563,777, reduced to present value. Claimant’s Exhibits 2 and 3 (T. 68). His testimony was based upon assumptions supported by the actual testimony of Ms. Forrest and Mr. Huff. (T. 50-69).

Mrs. Barlow contended reduction to present value was improper (T. 17-18, 52). She contended when a claimant accepts an offer to admit liability, there is no reduction to present value – it is only when a claimant rejects such an offer that the damages are reduced to present value pursuant to §766.209(4)(b), Fla. Stat. (2000). (T. 17-18). Unlike §766.209(4)(b), Fla.

Stat. (2000), §766.207(7)(a), Fla. Stat. (2000) does not contain the phrase “reduced to present value.” (T. 31).

The Panel awarded a total economic damages award for loss of services only of \$93,600, plus a funeral bill of \$8,764 (T. 316-317), but did not include any damages whatsoever for loss of earning capacity or loss of social security money. (A. 3-4).

SUMMARY OF THE ARGUMENT

This court should reverse the decision of the District Court and direct it to remand the case to the arbitration panel to award damages for loss of earning capacity and loss of social security, because the law requires such damages be awarded and the evidence required a substantial award for both elements of damage, since liability had been conceded as a matter of law:

A.) Loss of earning capacity and causation

The panel misapplied the law in allowing the Respondent hospital, which had admitted liability under §766.207, Fla. Stat. (2000) to contest causation and claim its negligence was not a “legal cause” of Petitioner's damages. This creates a "heads we win – tails you lose" situation for defendants not allowed by §766.207, Fla. Stat. (2000). This Court held in Echarte, *supra* that one of the benefits a claimant receives is a saving of the costs of experts necessary to prove liability.

The panel also misapplied the law, for even if a defendant was allowed to deny causation under this statute, the evidence presented by the hospital on the causation issue was incompetent and “inferior” to apportion the damages caused by and resulting from the death on a logical or *reasonable* basis as required by Florida law. Florida does not follow the "Rough Apportionment Rule." Gross v. Lyons, 763 So.2d 276 (Fla. 2000).

Both NOMC experts who were allowed to give causation testimony over Petitioner's objections and contrary to a pre-hearing ruling by the first administrative judge (R. 161-164, A. 19-21) said they could not quantify or quantitate the disability that they say Petitioners' decedent would have had, had there been no malpractice. (A. 25-36, Excerpts from their testimony). Dr. Chin even said it was impossible to do so. (A. 30)

The critical finding of fact by the arbitration panel in Footnote 2 of the award (A. 5), that the cranial bleed occurred "prior to" the negligence, and which forms the basis for its failure to award any damages at all, is also not supported by competent substantial evidence, and constitutes a misapplication of the law. The undisputed evidence showed the negligence was occurring simultaneously with the ongoing bleed, and that the administration of Heparin was aggravating the bleed. (R. 279, Defendant's Exhibit 5 -- Chin depo. p. 18, 26, A. 26-27, 32). Florida law says temporally preceding conditions can cojoin with a defendant's subsequent alleged negligence as a concurring cause, and the arbitration panel never understood this. Zigman v. Cline, 664 So.2d 968 (4th DCA 1995).

The undisputed evidence showed there was a loss of earning capacity of at least \$10,712 per year (at minimum wage) for 2080 hours per year, if defendant's economist was believed. (R. 197; Defendant's economist, R.

215) The loss was, according to the plaintiff's evidence, \$14 to \$20 per hour (R. 40-41) for the same 2080 hours per year (R. 215), and that the total of all economic damages was at least \$563,777. (T. 68, Claimant's Exhibits 2 and 3).

B.) Loss of Social Security

The panel's rationale for awarding zero damages for the net financial loss of social security is stated at footnote 4 of the arbitration award. (A. 6).

Petitioner's position, simply put, before the death \$16,495.20 was being received; after the death, \$11,292 was being received. The difference is \$5,203.20 per year in "financial loss." (T. 58- 59, Claimant's exhibits 2, 3, 4, and 5)

§766.202(3), Fla. Stat. (2000), which applies to a proceeding under 766.207, simply uses the sine qua non rule to define "economic damages." It says: "Economic damages" means 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." (Emphasis supplied)

"But for" the wrongful death, the \$16,495.20 would still be coming in. These arbitration damages are governed by §766.207, Fla. Stat. (2000), not

by the Wrongful Death Act. St. Mary's Hospital v. Phillippe, 769 So.2d 961 (Fla. 2000).

The panel and the District Court misapplied the law using the Wrongful Death Act terms and concepts such as “net accumulations” to deny any award for these net economic damages contrary to §766.207(7)(a), Fla. Stat. (2000) and St. Mary's, *supra*. There is no reduction because of presumed “consumption” by a decedent.

ARGUMENT

POINT 1

The Arbitration Panel Misapplied and misconceived the Law in awarding zero damage for loss of Earning Capacity in this Death Case and allowing the defendant to contest causation of the damages.

A) STANDARD OF REVIEW

The standard of review is governed by §766.212, Fla. Stat. (2000). It says this Court may subject the arbitration award to judicial scrutiny regarding:

- 1) the amount of the award
- 2) the evidence in support of the amount of the award, and
- 3) the procedure by which the amount of the award was determined.

The statute (§ 766.212, Fla. Stat.) also references §120.68, Fla. Stat. (2000) which allows this Court to review the arbitration order for:

- 1) erroneous interpretation of the law
- 2) material errors in procedure
- 3) violation of a constitutional or statutory provision
- 4) findings of fact not supported by competent substantial evidence.

B) THE CAUSATION ISSUE

Contrary to Judge Rigot's pre-hearing ruling, Judge Kendrick allowed the defendant to contest causation at the hearing.

§766.207, Fla. Stat. (2000) does not allow or contemplate a defendant which has admitted liability (A. 8) and capped a plaintiff's damages to then turn around and deny liability by claiming it did not cause the damages. To allow such procedure would create a "heads we win – tails you lose" situation for defendants. Prezeau, *supra* holds the statute is only available to defendants who “concede liability” because otherwise, a defendant would have its cake and eat it too.

It is "hornbook" law in Florida that without causation, there is no "liability". 38 Fla Jur 2d, *Negligence* §56 says in part: "An actual causal relationship between the negligent act and the injury is an indispensable requirement of an action for negligence." Therefore, when a defendant admits liability under this statute, it is admitting not only negligence, but also causation of the injury or death. The Prezeau court says at p. 1145 the St. Mary's opinion of this Court “clearly explains” this.

Here Mr. Barlow died as a result of the undiagnosed and untreated intracranial bleed which went negligently undetected and untreated for 11 hours and 50 minutes, despite the fact the hospital's nurses were supposed to

be alert for it and despite the fact he had the classical signs of severe headache and vomiting. During this entire time Mr. Barlow was being given intravenous Heparin which aggravated the bleeding in his brain by preventing clotting, even according to the NOMC's experts, which were erroneously allowed, over plaintiff's objections, to address causation at the arbitration.

However, neither of NOMC's two expert witnesses affirmatively testified that Mr. Barlow would have "died" absent the negligence and neither testified that the admitted negligence did not cause his death. They simply speculated about the disability the brain bleed would have caused had he not died, and did not know how rehabilitation would have affected this speculative, vague disability. (T. 291-292) This testimony was therefore incompetent to allow the panel to apportion the damages resulting from the death on any *logical* or *reasonable* basis as required by Gross v. Lyons, 763 So.2d 276 (Fla. 2000) at 280, much less totally deny them.

This case, as are all medical cases involving failure to intervene and treat a condition, or aggravation of the condition, is a classic case of concurring cause, causing an indivisible injury, to-wit: Death. See Cruz v. Plasencia, 778 So.2d 458 (Fla. 3rd DCA 2001) and Zigman v. Cline, 664 So.2d 968 (Fla. 4th DCA 1995). Marinelli v. Grace, 608 So.2d 833, 834 (Fla.

4th DCA 1992, Rev. denied 620 So.2d 761 (Fla. 1993). The Panel and the District Court misapplied or overlooked this basic legal proposition.

The stated basis in this Arbitration Award for awarding zero damage for an obviously total and complete loss of future earning capacity resulting from death is found in Footnote 2 of the panel's decision:

"the evidence demonstrated that because of the debilitating consequences of the cranial bleed the decedent suffered prior to the act or omission on which the subject claim is based, it was unlikely he would have been able to return to gainful employment." (emphasis supplied) (A. 5).

This statement is legally and factually flawed and is not supported by competent substantial evidence. It not only ignores the undisputed facts, but also ignores and misapplies the applicable controlling law which does not require the concurring causes to be *simultaneous*. Marinelli, *supra* at 834 states: "the 5.1(b) causation instruction is required where the defendants' negligence acts in combination with plaintiff's physical condition to produce the resulting injury," and for an excellent review see Hart v. Stern, 824 So.2d 927 (Fla. 5th DCA 2002).

After an oral ruling awarding the damages, Mrs. Barlow filed post-hearing motions asking the panel to state, in writing, the basis for their decision. Despite this, the arbitration panel failed to state what exactly "the

evidence" was they refer to in this footnote, (R. 181 -187) (A. 9-15; see A. 12-15), but no witness indicated any separation in time between the bleeding and the negligent acts of NOMC.

Contrary to the panel's statement that the bleed occurred "*prior to*" the negligence, undisputedly, the negligence was occurring at the *same time* the bleed was going on.

Mr. Barlow complained of a very bad headache and the nurses ignored it.

He later vomited and urinated on himself and they ignored it.

He then went into a coma and they thought he "went to sleep" and did not check him for 11 hours and 50 minutes, while pumping Heparin into his veins which was "aggravating" and "exacerbating" the bleed, according to both defense experts, Dr. Chin (Defendant's Exhibit 5 -- Chin depo p. 19, 24, 26, 27, A. 29) and Dr. Mahaffey (T. 282; A. 32).

The settled law, which was either ignored or misapplied, says that "although the term 'concurring' suggests that such causes of damage must occur 'simultaneously', it has been held that temporally preceding conditions can cojoin with a defendant's subsequent alleged negligence as a concurring cause." Hart, *supra*, Cruz, *supra* and Zigman, *supra*, at 970.

Despite the fact that the law does not require simultaneous occurrence, the undisputed evidence in this case showed the negligence occurred simultaneously with the ongoing bleed – it was not after it as the panel stated. Therefore, the panel's finding is both legally and factually wrong, and is not supported by competent substantial evidence.

But again, and it cannot be overemphasized, this is a causation issue that should not have even been considered by the panel at all. See Hart, Cruz and Zigman, *supra*, because "causation" was admitted when "liability" was admitted by North Okaloosa Medical Center under §766.207, Fla. Stat. (2000). (See A. 8).

Judge Rigot, the first administrative law judge, correctly ruled causation could not be contested under a §766.207 proceeding. Then, Judge Kendrick not only allowed , over objection, this testimony about causation to be presented but also failed to understand the issue being contested was a proximate "causation" issue.

There was no dispute Mr. Barlow died as a result of the brain bleed and the negligent failure to diagnose and treat it. The question at issue in pre-suit screening was whether the defendant's nurses' negligence was a contributing cause of the death, just as in Schwab v. Tolley, 345 So.2d 747 (Fla. 4th DCA 1977), and Hart, *supra*. Petitioner's verified medical opinion

served in pre-suit said it was. The defendant then admitted liability for the death in pre-suit, and asked for binding arbitration on the amount of the damages thereby putting causation to rest. (R. 028; See Exhibit 2, defense counsel Mrs. Frazier's certified letter; A. 8)

Compare the Cruz case, *supra*. The Court in that case in reversing for failure to give a concurring cause jury charge said:

"Under either theory, the jury was presented with evidence that one of the causes of decedent's death was bacteria that leaked from the perforated colon. The only question that remained was whether Dr. Plasencia was a contributing cause of decedent's death."

In Schwab, *supra* at page 750, and Hart, *supra* at page 930 the Court explains such issues are causation issues.

The panel's ruling that Mr. Barlow probably would not have been able to return to "gainful employment" even if the negligence had not occurred is a causation decision that they should not even have been considering in determining the *amount* of the damages. But, they used this decision to totally deny the damages for 80 percent of his loss of earning capacity mandated by the statute.

The Panel's legal error and misapprehension of law is revealed by a question put to Dr. Mahaffey by Charles Cetti, NOMC's arbitrator at (T. 293, A. 34-35):

"...if the bleed had been detected whenever it should have been, do you have - - what is the likelihood, in your opinion, if you have one, that the decedent would have been able to engage in any kind of regular gainful employment outside of the home for five to eight hours per day?

THE WITNESS: I can't quantitate that with a percentage, but I think the likelihood of him doing that would have been relatively low.

MR. CETTI: Less than 50 percent?

THE WITNESS: Probably

This "50 percent" reference is clearly a "Gooding" – *proximate causation* question. See Gooding v. University Hosp. Bldg. Inc., 445 So.2d 1015 (Fla. 1984).

Then the Administrative Law Judge Kendrick followed up Cetti:

ADMINISTRATIVE LAW JUDGE:
Speaking in terms of physical or manual labor?

THE WITNESS: Yes Sir. (T. 293-294, A. 35).

The failure to award damages for loss of earning capacity mandated by the statute, because of failing to find the negligence was a contributing

legal cause of the death, was clear error. Causation had been admitted and death had occurred.

There is no provision for denying causation under §766.207, Fla. Stat. (2000) when one admits liability or for denying damages for 80 percent loss of earning capacity. The indivisible injury here was death, not disability, and neither of the hospital's experts even addressed death. There is no evidence whatsoever that the bleed alone would have killed him.

C. THE APPORTIONMENT ISSUE

Assuming for argument purposes that the panel should have even been considering "causation", the Administrative Law Judge and the panel also misapplied the law regarding apportionment and accepted incompetent and inferior evidence which formed the basis for totally denying damages for 80 percent of loss of earning capacity. Judge Kendrick erroneously thought the issue was apportionment rather than causation. (T. 260-262)

Florida does not follow the "Rough Apportionment Rule." In rejecting it, this Court said "victims of negligence would be prevented from being compensated because inferior evidence would result in arbitrary apportionment." Gross v. Lyons, 763 So.2d 276 (Fla. 2000) at 280. That is exactly what occurred here.

This Court in Gross quoted with approval from §433 A(2) of the Restatement (Second) of Torts:

"When two or more causes combine to produce such a single [harm] incapable of division on any logical or reasonable basis, and each is substantial factor in bringing about the harm, the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with the responsibility for the entire harm." (emphasis supplied)

This is the indivisible injury rule. It was ignored and misapplied in this case. The single harm here was death, and there was no logical or reasonable way to apportion it.

The testimony on causation should not even have been allowed because NOMC admitted causation, and even the NOMC doctors admitted they could not quantify, or put a percentage on what disability would have been present had the negligence not combined with the bleed to kill Mr. Barlow. It was "impossible" to do so. (Defendant's Exhibit 5 -- Chin depo p. 39-40, A. 30, 25). They could not apportion the cause of death between the negligence and the bleed on any "reasonable" or "logical" basis as the law requires, (see Gross, *supra* at 280), and did not even attempt to do so because the nurses' negligence had made it impossible. (T. 282-286;

Defendant's Exhibit 5 -- Chin depo p. 26-27, 35-36, 40; A. 25-36). Counsel for NOMC conceded this point in final argument stating at (T. 309):

"We've had uncontradicted medical testimony that Mr. Barlow would have suffered some moderate to severe neurological impairment. And of course, neither of our experts could quantify that. They can't say exactly how much it would be or how much he would recover from it if he went to therapy... (emphasis supplied)

* * *

People generally don't work their life expectancy

* * *

So again all we ask is just that you consider the testimony of the experts that's undisputed that he would have had some impairment, when you are calculating and that you use Dr. Raffa's figures as a starting point to make that discount." (T. 310-311)

The panel did the defense one better – they awarded “0” damages for loss of earning capacity.

Also, had this been an apportionment problem, which it is not, under Florida law, a tortfeasor, like these North Okaloosa Medical Center nurses, whose negligence causes the apportionment problem, does not get to benefit because an apportionment problem exists. Schwab v. Tolley, 345 So.2d 747 (Fla. 4th DCA 1977) at 751, and see Judge Zimmer's salutary concurring

opinion in Pohl v. Witcher, 477 So.2d 1015 (Fla. 1st DCA 1985) at 1020-1022 citing Florida Standard Jury Charge 6.2(b) and controlling Supreme Court precedent.

The Schwab, *supra* decision said at p. 751: "Although this rule seems harsh, it is predicated on sound principle: the prevention of a subsequent wrongdoer from escaping responsibility where his conduct contributed to the creation of the situation in which the problems of apportionment arose."

Moreover, neither of the defense doctors stated the cause of death was the bleed alone. They simply speculated about what disability may have resulted from the bleed alone, had Mr. Barlow not died, but they could not really say. Excerpts from the testimony of each is at (A. 25-36), and should be read by this Court because it clearly demonstrates the lack of a logical or reasonable basis for apportionment, or complete denial of these damages as occurred here.

**D. §766.207, FLORIDA STATUTES AND
CONTROLLING CASES REQUIRE THE
AWARD OF DAMAGES FOR 80 PERCENT OF LOST
EARNING CAPACITY IN A DEATH CASE**

§ 766.207, Fla. Stat. (2000) uses mandatory, not permissive, language in requiring the award of damages for 80 percent of loss of earning capacity. It says in (7)(a):

"Net economic damages shall be awardable, including but not limited to 80 percent of wage loss and...loss of earning capacity.... (Emphasis supplied)

In St. Mary's Hospital, Inc. v. Phillipe, 769 So.2d 961 (Fla. 2000), this Court held the damages in §766.207, Fla. Stat. (2000) arbitration are controlled and governed by the arbitration statute rather than the Wrongful Death Act. The damages element of "loss of earning capacity" is an additional element of economic damages under the arbitration statute which is not available under the Wrongful Death Act and is part of the quid pro quo the claimant receives as a trade off or "commensurate benefit" to compensate for the capping of her non-economic damages. See St. Mary's, *supra* and University of Miami v. Echarte, 618 So.2d 189 (Fla. 1993) at 193 and 190.

This Court pointed out in Echarte at page 193, the arbitration panel "determine(s) the amount of damages." (Emphasis supplied)

Petitioner submits the panel does not have the power to pick and choose the elements of damage or arbitrarily exclude elements of damage, and ignore the evidence on Mr. Barlow's earning capacity and life expectancy, as they did here.

It is submitted, in other words, the panel does not have the power to limit or disregard the elements of damage in a given case, thereby

eliminating the "commensurate benefits" of the claimant, which make the statute constitutional.

To allow them to do so in this case would be unconstitutional application of the statute to Mrs. Barlow. This issue of unconstitutional application of the statute was raised below. (R. 181-187, see paragraph 3) (A. 10-11). And, in Florida, damages for loss of earning capacity are awarded for a person's entire remaining life expectancy, making "due allowance" for the "decline" of capacity (not total elimination) caused by passage of time, not just to age 70 as Dr. Raffa suggested. Loftin v. Wilson, 67 So.2d 185, 188 (Fla. 1953)

POINT 2

The Panel Misapplied the Law in Awarding ZERO damages for loss of Social Security Benefits.

The written Arbitration Award entered in this case states the legal basis for its failure to award the financial loss of social security benefits in Footnote 4. (R. 242-249; A. 6).

"4/ No award was made for lost social security benefits to the estate since the claimants failed to establish that there would be any net accumulations after consumption. Stated differently, Claimants failed to demonstrate that social security benefits did not fairly represent the monies that would have been required to maintain

the decedent. Notably, § 766.207(7)(a), Fla. Stat., calls for an award of "net economic damages," and there is no apparent reason to conclude that established principles used to calculate net economic damages should not apply to this case." (Emphasis supplied).

This Court held in St. Mary's, *supra* that the damages in an arbitration of a wrongful death claim are controlled by §766.207, Fla. Stat. (2000), rather than the Wrongful Death Act. The District Court held just the opposite and even cited the Wrongful Death Act as controlling the widow's damages. (A. 37-41).

The Wrongful Death Act speaks of loss of "net accumulations" and "net business or salary income" and requires the deduction of the decedent's "personal expenses" from the damages awarded. §768.18(5), Fla. Stat. (2000).

The arbitration statute does not. It says, in sharp contrast to the Wrongful Death Act, that:

"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 collateral source payments." §766.207(7)(a), Fla. Stat. (2000)

§ 766.202(3), Fla. Stat. (2000) defines "economic damages" as follows:

"(3) "Economic Damages" means 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."

This is the "sine qua non" or "but for" rule which means "without which not." Therefore, the only question is, did the death cause the "financial loss?" Did the death cause the money to not be there? Prosser explains the rule simply as "the defendant's conduct is not a cause of the event if the event would have occurred without it." Prosser, *Handbook of the Law of Torts* (1964) p. 242. This loss of money from social security would not have occurred "but for" Mr. Barlow's death. Stated another way, if he was still alive, the money lost would still be coming in monthly.

Next, there is absolutely no mention in this arbitration statute of reducing damages or "financial losses" by the decedent's personal expenses or consumption like the Wrongful Death Act does. The definition in the statute of economic damages as "financial losses" controls. Nicholson v. State, 600 So.2d 1101, 1103 (Fla. 1992). Nicholson says when a definition of a word or phrase is provided in a statute, that meaning must be ascribed to the word or phrase whenever it is repeated in the statute unless a contrary intent "clearly appears."

Both the panel and the First District Court of Appeal incorrectly applied principles, concepts and definitions from the Wrongful Death Act to this §766.207, Fla. Stat. (2000) proceeding in the face of this Court's clear holding in St. Mary's, *supra*.

To reiterate, there is no provision of §766.207, Fla. Stat. (2000) that requires or allows the reduction of a financial loss by amounts necessary to "maintain" a decedent (other than the 20% reduction of his award for loss of earning capacity), nor does the Arbitration Statute use the Wrongful Death Act concept of "net accumulations" as the panel did in awarding "zero" damages. Then the First District Court of Appeal, in direct and express conflict with this Court's holding in St. Mary's, actually cited the Wrongful Death Act in erroneously holding that as widow, Mrs. Barlow was entitled to recover "net accumulations" reduced to present value. This is impermissible under St. Marys, *supra*, and constitutes a clear misapplication of law and conflict.

The undisputed evidence showed that prior to Mr. Barlow's wrongful death, a total of \$16,495.20 was being received yearly in social security benefits. After his death, she received \$11,292.00. The difference between these two figures, or the "financial loss," is \$5,203.20 per year. The total

“net financial loss” over his expected life was over \$75,000. (T. 58-59 – Claimant's Exhibits 2, 3, 4 and 5)

The damages under §766.207(7)(a), Fla. Stat. (2000) are limited only by the sine qua non rule under §766.202(3), Fla. Stat. (2000), and obviously this loss of money would not have occurred "but for" the wrongful death.

The panel and the District Court cannot arbitrarily fail to compensate "financial loss" which would not have occurred "but for" his death.

CONCLUSION

This Court should reverse this case and remand it to the District Court with directions to order the Arbitration Panel to determine the amount of decedent's loss of earning capacity, (which was not minimum wage), and award 80 percent of that amount. They should also be directed to determine the amount of the yearly financial loss occasioned by the net \$5,203.20 loss of social security, and the 15 percent costs and attorneys fees accordingly.

This Court should hold that once a defendant admits liability under §766.207, Fla. Stat. (2000), it may not contest causation at arbitration. The duty of the panel is to determine the amount of the damages based upon the evidence, and it may not eliminate elements of damage specified in mandatory language in the statute, or any of the "commensurate benefits" provided a claimant under §766.207, Fla. Stat. (2000). To allow this would result in an unconstitutional application of the statute.

The Court should also make clear that any and all "financial losses" which would not have occurred "but for" an injury or death are compensable under §766.202(3), Fla. Stat. and §766.207(7)(a), Fla. Stat. (2000), and these are not to be reduced by personal consumption of a deceased, nor by application of the Wrongful Death concept of "net accumulations."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Petitioners' foregoing brief on the merits has been furnished to the following by regular U.S. Mail this _____ day of _____, 2002:

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CERTIFICATION OF COMPLIANCE AS TO FONT
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I HEREBY CERTIFY that the Petitioner's brief on the merits was computer generated using Times New Roman 14 pt., in accordance with the rules.

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IN THE SUPREME COURT OF FLORIDA

EVELYN BARLOW, as Personal
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SAMUEL EDWARD BARLOW and
EVELYN BARLOW, individually,

Petitioner,

v.

S.C. Case No.: SC02-796
Lower Ct. Case No.: 1D01-1073

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

Respondent.

_____ /

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

On Review from the District Court

of Appeal, First District

State of Florida

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