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 REPLY BRIEF ON THE MERITS

On Review from the District Court

of Appeal, First District

State of Florida

POWELL & SWANICK
Stanley Bruce Powell
107 North Partin Drive
Niceville, Florida 32578
(850) 678-2118
Florida Bar No. 125650
Attorney for the Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT

Point I

A defendant in a §766.207, Fla. Stat. (2000) arbitration cannot contest causation of a decedent's damages because an admission of "liability" admits causation also.

In its answer brief, Respondent continues to argue that this is a successive injury case rather than one where medical malpractice, combined with a natural cause, resulted in an indivisible injury, namely death.

This is not a successive injury case. There was no competent substantial evidence to support apportionment of damages on any "reasonable or logical basis" as required by this Court's holding in Gross v. Lyons, 763 So.2d 276 (Fla. 2000), because the damage caused by the bleed as compared with that caused by the concurring negligence of the Respondent, was not "distinct." See Gross at 279. It is clearly a case, as explained by Gross at 279, "….when "two or more causes combine to produce such a single [harm], incapable of division on any logical or reasonable basis, and each is a 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."

Respondent attempts, at pages 10 – 1l of its answer brief, to analogize the instant case to a successive injury case involving distinct injuries by asking this Court to assume, in its analysis, certain hypothetical factual situations not present here. It says: 1) if the intracranial bleed had occurred "several days" prior to its negligence; 2) if hypothetically a person with demonstrable quadrapelegia died hours later in an emergency room because of negligence; 3) had Mr. Barlow been "in a vegetative state" requiring attendant care "for years" prior to its negligence.

These analogies are not relevant because this case is one where the Hospital's negligence was going on at the same time as the bleed and was exacerbating it, even according to Respondent's expert witnesses.

Dr. Chin admitted the giving of intravenous Heparin (an anticoagulent) for more than 11 hours while the intracranial bleed was occurring, aggravated and exacerbated the bleed, and it should have been stopped, (A. 26) (A. 25 – 29) and was making "things worse." (A. 27). As Respondent points out at Page 2 – 3 of its answer brief, Dr. Chin's opinion regarding left-sided paralysis was conditioned upon "given the size of the clot." Yet he admitted the only picture he had of the clot's "size" was taken over 11 hours after its beginning during which time it went undiagnosed and untreated, and was being exacerbated by the Heparin. (A. 28-30). Chin also

said that any disability from the bleed alone, absent the negligence, was impossible to quantify, and it was the Respondent's negligence that caused this to be so. (A. 25, 28 – 30).

Dr. Mahaffey likewise admitted that the Heparin was exacerbating the bleed and causing it not to clot. (A. 29, 32). He said, like Chin, the only picture of it (CT Scan) was 12 hours old, because of the negligent failure to diagnose it. (A. 32). He said he thought there would have been "some paralysis (from the initial bleed), but I can't quantify it" and this was because there was no scan done "at that time" and the data was therefore unavailable. (A. 33). Both doctors conceded that any disability Mr. Barlow might have had, absent the negligence, was impossible to quantify. (A. 30, 25, 32-33).

Therefore, the arbitration panel's critical finding that Mr. Barlow was robbed of all earning capacity "prior to" the Respondent's negligence, is not supported by competent substantial evidence. There was no competent evidence upon which the causes of his death could be apportioned on a logical and reasonable basis, as required by Gross, *supra*. The evidence shows the bleed and the negligence combined and concurred in time, to cause an indivisible injury, his death, See Schwab v. Tolley, 345 So.2d 747 (Fla. 4th DCA 1977). Simultaneous cause is not required. Temporally

preceeding conditions can cojoin with a defendant's subsequent negligence as a concurring cause. Zigman v. Cline, 664 So.2d 968 (Fla. 4th DCA 1995). Where the defendant's negligence acts in combination with plaintiff's physical conditions to produce the resulting (death), concurrent cause exists. Marinelli v. Grace, 608 So.2d 833, 834 (Fla. 4th DCA 1992) Rev. Denied 620 So.2d 761 (Fla. 1993).

Also, as stated in Petitioner's initial brief on the merits, Respondent admitted causation of Mr. Barlow's death when it admitted "liability," and it was therefore liable for damages for loss of earning capacity and all other damages which would not have been sustained "but for" his death. A defendant who admits liability under this statute cannot then deny liability for damages on the basis of causation. The Legislature is presumed to know the law when it writes a statute and since 1896, this Court has held that mere negligence, which is not a legal cause of the injury complained of, is not a ground for liability. See 38 Fla. Jur. 2d §56 at page 74, citing Florida Central & P.R. Co. v. Williams, 20 So. 558 (Fla. 1896) at 563. Therefore, when the legislature used the term "liability," this term encompasses causation, not just mere negligence.

Respondent barely mentions the controlling cases of St. Mary's Hospital v. Phillipe 769 So.2d 961 (Fla. 2000) and University of Miami v.

Echarte, 618 So.2d 189 (Fla. 1993), in its answer brief, making only one passing reference to each. It is clear, however, that the First District Court of Appeal was in error when it held that a widow's damages under §766.207, Fla. Stat. (2000) are controlled by, and limited by, the Wrongful Death Act. The additional element of damages of 80% of the decedent's loss of earning capacity, is part of the claimant's quid pro quo or commensurate benefit for having general damages capped at $250,000.

When a defendant admits liability under this statute, the defendant is in the same position as having either a summary judgment entered against him on liability or a verdict directed against him on liability. Causation should not have been an issue. A fight on causation is a fight on liability. If this is not so, why would this Court have said at p. 194 of Echarte:

> "The claimant also saves the costs of attorney and *expert witness fees* which would be required to prove *liability*." (emphasis supplied)

This Court also said, on that same page, that a claimant under the statute receives a "prompt recovery without the risk and uncertainty of litigation or having to prove fault in a civil trial."

Petitioner was deprived of these benefits in this case.

Point II

The widow was entitled to recover the "financial loss" of Social Security benefits which would not have occurred "but for" the death.

Economic damages under §766.207, Fla. Stat. (2000), are limited only by the sine qua non rule. The only specific elements of economic damages mentioned in the statute, §766.207(7)(a), are "past and future medical expenses and 80 percent of wage loss and earning capacity …."

All other financial losses are recoverable if they "would not have occurred but for the injury." (i.e. death). §766.202(3), Fla. Stat. (2000). Financial loss is to be determined on a case by case basis, dependent on the facts.

The loss of money from Social Security in this case 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.

The First District Court of Appeal erred when it cited the Wrongful Death Act and used wrongful death concepts such as "net accumulations" and consumption by a decedent to uphold the denial of any award for these net financial losses contrary to, and in express conflict with, controlling precedent of this Court.

Nothing in §766.207, Fla. Stat. (2000) allows or requires the reduction of damages by amounts necessary to "maintain" a decedent or by his "personal expenses" like the Wrongful Death Act does.

And the arbitrators are not empowered to pick and choose the elements of damage in a proceeding under §766.207, Fla. Stat. (2000). They must award damages for 80 percent of loss of future earning capacity and all other financial losses which would not have occurred "but for" a death, for liability has been admitted. The arbitrators cannot eliminate the claimant's "quid pro quo" that the statute provides for in return for the capping of non-economic damages at $250,000.

CONCLUSION

This Court should reverse the decision below and remand the case with directions that the arbitrators must make an award based on the financial evidence for 80 percent of Mr. Barlow's future loss of earning capacity and for the net loss of Social Security benefits. Thereafter, the amount of attorneys' fees, interest and costs should be recomputed as well.

The Court should make it crystal clear that a defendant who has admitted liability under §766.207, Fla. Stat. (2000) and limited a claimant's general damages, may not claim thereafter that its conduct did not cause the damages of the claimant. In order for damages to be apportioned between a natural cause and medical negligence, there must not only be a reasonable and logical basis for doing so, but also, there must be a clear and "distinct" delineation between the injuries caused by each, otherwise, the indivisible injury rule applies and the medical defendant under §766.207, Fla. Stat. (2000) is liable for the entire damages.

Finally, the Court should hold that loss of Social Security benefits is a "financial loss" under §766.207(7)(a) and 766.202(3), Fla. Stat. (2000).

CERTIFICATE OF SERVICE

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

Pamela Frazier, Esquire
24 West Chase Street
Pensacola, FL 32501

William K. Thames, II
24 West Chase Street
Pensacola, FL 32501

POWELL, POWELL & POWELL
422 North Main Street
Post Office Box 277
Crestview, Florida 32536
(850) 682-2757

and

Stanley Bruce Powell
Fla. Bar No. 125650
David R. Swanick, III
Fla. Bar No. 0069728
POWELL & SWANICK
107 North Partin Drive
Post Office Box 400
Niceville, Florida 32578-0400
(850) 678-2118
Attorneys for Petitioner

By: _____
Stanley Bruce Powell

CERTIFICATION OF COMPLIANCE AS TO FONT

REQUIREMENTS

I HEREBY CERTIFY that the Petitioner's reply brief was computer generated using Times New Roman 14 pt., in accordance with the rules.

POWELL, POWELL & POWELL
422 North Main Street
Post Office Box 277
Crestview, Florida 32536
(850) 682-2757

and

Stanley Bruce Powell
Fla. Bar No. 125650
David R. Swanick, III
Fla. Bar No. 0069728
POWELL & SWANICK
107 North Partin Drive
Post Office Box 400
Niceville, Florida 32578-0400
(850) 678-2118
Attorneys for Petitioners

By: _____
Stanley Bruce Powell