SUPREME COURT OF FLORIDA

CASE NO. SC03-286

BAY ANESTHESIA, INC.

Petitioner,

vs.

DARLENE ALDRICH AND MICHAEL CONIGLIO AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF WILLIAM E. RODDENBERRY, JR., ON BEHALF OF THE ESTATE AND SURVIVORS,

Respondents.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT
CASE NOS. 1D01-4042 AND 1D01-4079

RESPONDENTS' ANSWER BRIEF ON THE MERITS

DONALD M. HINKLE **Fla. Bar No. 0301027** **HINKLE & FORAN** **1545 Raymond Diehl Road** **Suite 150** **Tallahassee, Florida 32308** **(850) 205-2055** **(850) 205-2056 (fax)**	**LOUIS K. ROSENBLOUM** **Fla. Bar No. 194435** **LOUIS K. ROSENBLOUM, P.A.** **4300 Bayou Boulevard, Suite 36** **Pensacola, Florida 32503** **(850) 475-1211** **(850) 475-1290 (fax)** **Attorneys for Respondents**

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Other Issues

II. Whether section 768.81(3), Florida Statutes (1997), permits a health care provider who aggravates the initial injury by malpractice to apportion fault to the tortfeasors who allegedly caused or contributed to the initial injury.

III. Whether the trial court correctly exercised its discretion by excluding the testimony of Bay Anesthesia's proffered expert witness on the subject of survivability of burn injuries when (A) Bay Anesthesia had already presented the testimony of a highly qualified burn injury expert who was prepared to testify on that subject; and (B) the proffered opinion on the issue of survivability was identical to the opinion presented by the co-defendant's burn injury expert who possessed comparable qualifications and also was cumulative to other expert opinions on cause of death.

IV. Whether the district court correctly held that Bay Anesthesia was liable for 100 percent of plaintiffs' damages where the district court determined that any fault of Bay Anesthesia's co-defendant did not contribute to decedent's death as a matter of law.

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STATEMENT OF THE CASE AND FACTS

Preliminary Statement

This answer brief on the merits is submitted by plaintiffs-respondents Darlene Aldrich and Michael Coniglio, as co-personal representatives of the estate of William E. Roddenberry, Jr., deceased ("plaintiffs"). In this brief, "R" refers to the record on appeal, "T" to the trial transcript and "IB" to the initial brief on the merits filed by defendant-petitioner Bay Anesthesia, Inc. ("Bay").

Plaintiffs-respondents generally accept Bay's statement of the case and facts with the exceptions and additions noted below.

Relationship Between Nurse Cruce and Dr. Griffin

Concerning the relationship between certified registered nurse anesthetist (CRNA) Teresa Cruce (Bay's employee) and John B. Griffin, M.D. (Jackson Hospital's employee), plaintiffs disagree with Bay's assessment that Cruce was under Dr. Griffin's supervision and control in all critical aspects of the intubation procedure. See IB at 2, 9-10. Although Dr. Griffin made the decision to intubate the patient and selected the particular method of intubation (nasal versus esophageal), Dr. Griffin specifically asked Nurse Cruce to intubate the patient and relied on her expertise to perform the procedure because he knew she was "a specialist in anesthesia and airways." (T-XVII [R-XXI] 2500). Further, although Dr. Griffin was present and observed the procedure, and assessed the patient after the procedure ended, Nurse Cruce performed the intubation herself without Dr. Griffin's direct supervision. (T-

XV [R-XXIX] 2224-42; T-XVII [R-XXXI] 2510-11). In this regard, Dr. Griffin summarized the relative responsibilities for intubating the patient as follows:

> Q. Now, I believe you testified that as the captain of the team you make the decision as to the means and method of the intubation, is that correct?
>
> A. Yes, sir.
>
> Q. All right.
>
> And then I believe you testified it is the responsibility of the CRNA to place the tube?
>
> A. Yes, sir.

(T-XVII [R-XXI] 2491-92).

<u>Anesthesia Services Agreement</u>

The legal relationship between Bay and Jackson Hospital was controlled by an Anesthesia Services Agreement dated August 1, 1994. (T-XI [R-XXV] 1711; Plaintiffs' Exh. 65) (Appendix at Tab 2). The agreement reflects Jackson Hospital's viewpoint "that the proper, orderly, and efficient delivery of quality anesthesia services to the Hospital's patients can be accomplished best by entering into a coverage arrangement with" an outside contractor. (Plaintiffs' Exh. 65 at 1). In this respect, the agreement expressly recognizes Bay's right to exercise control over its anesthetists assigned to Jackson Hospital and preserves Bay's status as an independent contractor under the following provisions:

> Notwithstanding anything herein to the contrary, the Hospital will not have or exercise control over the manner

> in which the medical duties of the Anesthetists[1] or anyone providing services under this Agreement are performed as would jeopardize the status of the Corporation [Bay] as an independent contractor.
>
> ***
>
> 4. PARTIES' RELATIONSHIP. The Corporation [Bay] at all times will act as an independent contractor and not as a partner of Hospital. The Anesthetists shall not act or hold themselves out to third parties as a partner, employee, or agent of the Hospital in the provision of patient services under this Agreement.

(Plaintiffs' Exh. 65 at 2-3, 6) (footnote added).

Bay Hospital's Appeal and Causation

On the appeal by Bay's co-defendant, Jackson Hospital, the district court held that the trial court should have granted Jackson Hospital's motion for directed verdict on two grounds. First, the district court held that the evidence was insufficient to establish that Dr. Griffin acted with "reckless disregard" as defined by section 768.13(2)(b)1., Florida Statutes (1997). See Jackson County Hosp. Corp. v. Aldrich, 835 So. 2d 318, 327 (Fla. 1st DCA 2002) (Appendix at Tab 1). Second, the district court held that the evidence on the issue of causation was insufficient to prove "more likely than not that Roddenberry would have survived but for the improper intubation." Id. at 328.

It should be emphasized that Bay, unlike Jackson Hospital, did not make a motion for directed verdict on the issue of causation or file any post-trial motions

[1] The contract defines "anesthetist" as a certified registered nurse anesthetist (CRNA). (Plaintiffs' Exh. 65 at 1-2). Teresa Cruce was one of Bay's CRNAs assigned to Jackson Hospital. (T-XV [R-XXIX] 2210; R-VIII 1439).

challenging the sufficiency of the evidence to support the jury verdict finding that Nurse Cruce's negligence was a legal cause of Roddenberry's death. (T-XI [R-XXV] 1838; T-XII [R-XXVI] 1842-48; T-XVIII [R-XXXII] 2645-48; R-X 1976-83). Likewise, Bay did not challenge the jury verdict on that ground in the district court. See Id. at 335 n.2 (Wolf, J., concurring in part and dissenting in part). Thus, the jury verdict finding that Nurse Cruce's negligence was a legal cause of Roddenberry's death stands as law of the case.[2]

SUMMARY OF ARGUMENT

I. SECTION 768.13(2)(b)1., FLORIDA STATUTES (Certified Question)

By its express terms, the partial immunity afforded by section 768.13(2)(b)1., Florida Statutes (1997), is limited to licensed hospitals, hospital employees and persons licensed to practice medicine and does not cover nurse anesthetists or other non-physician medical assistants employed by independent contractors. This construction of the statute is supported by at least three established principles. First, when a statute is clear and unambiguous, the courts are bound by the language chosen

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[2] Plaintiffs presented considerable evidence establishing that Roddenberry did not die from his initial burn injuries but instead died from the untoward esophageal intubation performed by Nurse Cruce. (T-VIII [R-XXII] 1267; Plaintiffs' Exh. 3; T-IX [R-XXIII] 1345, 1374-75). The medical examiner who performed the autopsy testified that Roddenberry sustained only a "mild inhalation injury" from his burns and that his death was caused by hypoxia (low oxygen) from the esophageal intubation. (T-VIII [R-XXII] 1264-68). James DeRespino, M.D., plaintiffs' expert in emergency medicine, testified emphatically that "[w]hat killed Mr. Will Roddenberry in that emergency department was putting the endotracheal tube in the wrong place, paralyzing him and nobody figuring it out." (T-VII [R-XXI] 1077). Plaintiffs' burn injury expert, Susan Miller Briggs, M.D., testified that with adequate emergency medical treatment Roddenberry had a 90 percent or better chance of surviving his burns and ultimately reaching a normal life expectancy. (T-IX [R-XXIII] 1345, 1374-75).

by the legislature and must give the statute its plain and ordinary meaning notwithstanding any contrary statements of legislative intent. Second, when a statute enumerates the persons covered, the statute should be construed to exclude those persons not expressly mentioned. Third, section 768.13(2)(b)1. is in derogation of the common law and must be strictly construed.

Applying the plainly-worded statute to the facts at bar, the undisputed evidence shows that Nurse Cruce and Bay were independent contractors, not hospital employees. Under the Anesthesia Services Agreement, Bay retained the right to exercise control over its nurse anesthetists assigned to Jackson Hospital and explicitly reserved its status as an independent contractor. The relationship between Nurse Cruce and Dr. Griffin, the emergency room physician employed by Jackson Hospital, further supports Nurse Cruce's status as an independent contractor. Although Dr. Griffin made the decision to intubate the patient and selected the method of intubation, Nurse Cruce alone performed the intubation without direct supervision from Dr. Griffin. Further, although Nurse Cruce was a member Dr. Griffin's emergency room "team," she was a well-trained medical specialist certified by the state of Florida and performed her duties independently.

Also, Nurse Cruce was not a "person licensed to practice medicine" as contemplated by section 768.13(2)(b)1. Based on the applicable licensing statutes (Chapters 458, 459 and 464), legislative history and common usage, the language "person licensed to practice medicine" refers exclusively to a licensed physician. Bay

never argued to the contrary until rehearing in the district court.

Finally, section 768.13(2)(b)1. does not violate the equal protection clause merely because it excludes health care providers who are not physicians, hospitals or hospital employees. Physicians and hospitals play the most significant role in our health care system and were the entities most affected by exorbitant medical malpractice insurance premiums which the subject legislation attempted to address. These distinctions provide a rational basis for limiting the statute's "reckless disregard" standard to physicians, hospitals and hospital employees.

II. APPORTIONMENT OF FAULT TO ORIGINAL TORTFEASORS

Based on decisions from this court and several district courts of appeal, apportionment of fault based on section 768.81(3), Florida Statutes (1997), is limited to cases involving joint tortfeasors. Under the common law rule which still prevails in Florida, a tortfeasor who causes the initial injury and a subsequent medical provider who aggravates the injury by malpractice are not joint tortfeasors. Thus, the courts below correctly determined that Bay could not apportion fault pursuant to section 768.81(3) to the persons or entities allegedly responsible for Roddenberry's industrial accident.

III. DR. MONZINGO'S EXPERT TESTIMONY

For several reasons, the trial court did not abuse its discretion by refusing to allow Bay's burn injury specialist, Dr. Monzingo, to testify on the issue of survivability of Roddenberry's burn injuries. First, Bay called Dr. Monzingo to testify immediately after it presented the testimony of another burn injury specialist with comparable qualifications, Dr. Luterman, who was prepared to express opinions on the survivability issue identical to Dr. Monzingo's proffered opinions. Bay, however, did not solicit Dr. Luterman's specific opinion about survivability but, instead, called Dr. Monzingo for that purpose, apparently attempting to enhance the defense's numerical advantage in burn injury experts from 2-1 to 3-1. The trial court justifiably barred Dr. Monzingo's testimony under those circumstances. Further supporting the trial court's ruling, Jackson Hospital's burn injury specialist with similar qualifications, Dr.

Tompkins, had already testified on the survivability issue, and his opinion was identical to Dr. Monzingo's proffered opinion and Dr. Luterman's opinion (had he been asked). Thus, Dr. Monzingo's proffered testimony was cumulative and repetitive. Finally, because Dr. Tompkins' opinion was identical to Dr. Monzingo's proffered opinion, and because several other defense experts testified that Roddenberry died from his burn injuries rather than the esophageal intubation, any error in excluding Dr. Monzingo's testimony on the survivability issue was harmless.

IV. APPORTIONMENT OF FAULT TO EXONERATED PARTY

A party cannot apportion fault under section 768.81(3), Florida Statutes, to another party whose fault, if any, did not contribute to plaintiff's injuries and resulting damages. Because the district court below determined, as a matter of law, that Dr. Griffin's conduct (whether reckless disregard, negligence or otherwise) did not cause Roddenberry's death, it correctly held that Bay could not apportion fault to Dr. Griffin's employer, Jackson Hospital, and therefore Bay is responsible for 100 percent of plaintiffs' damages.

JURISDICTIONAL STATEMENT

The court's jurisdiction in this case is based on a question of great public importance certified by the district court. Certified questions to the Supreme Court of Florida should be reserved for those exceptional cases which generate recurring legal issues of significant statewide impact. See Philip J. Padovano, Florida Appellate Practice § 3.11 at 54-55 (2003 ed.). Although the application of section

768.13(2)(b)1., Florida Statutes, to non-physician contract health care providers presents a question not previously decided by any reported decisions, the issue does not, in respondents' opinion, address a widespread, recurring problem. See Raoul G. Cantero, III, Certifying Questions to The Florida Supreme Court: What's So Important?, 7 The Record 1, 6 (Dec. 1998) ("Indeed, that a case presents an issue of first impression in this state would not in itself establish a question of great public importance. One can think of many esoteric questions, of no particular relevance in other cases, that no Florida court has decided."). In fact, the subject amendment to section 768.13(2)(b)1. has been in effect for 15 years[3] with only one other reported case discussing the health care providers covered by the statute. See Knox v. Adventist Health Systems/Sunbelt, Inc., 817 So. 2d 961 (Fla. 5th DCA 2002) (holding that section 768.13(2)(b)1. does not apply to paramedics employed by a hospital for emergency medical services rendered outside the hospital emergency room). Additionally, the district court decided this case by following firmly-engrained principles of statutory construction governing the interpretation of plainly-worded legislative enactments. Any change in unambiguous statutory language should come from the legislature rather than the courts through the vehicle of a certified question. See Young v. St. Vincent's Medical Center, Inc., 653 So. 2d 499, 507 (Fla. 1st DCA 1995) (Webster, J., dissenting), approved, 673 So. 2d 482 (Fla. 1996); Fisel v. Wynns, 650 So. 2d 46, 52 (Fla. 5th DCA 1994) (Cobb, J., dissenting), approved, 667 So. 2d

[3] See Ch. 88-1, § 46, Laws of Fla.

761 (Fla. 1996). For these reasons, respondents respectfully urge this court to decline review because the question certified by the district court does not raise an issue of great public importance sufficient to invoke this court's jurisdiction.

In the event this court accepts jurisdiction based on the certified question, respondents urge this court to decline review of the three unrelated issues raised by Bay, particularly the second and third issues which were not mentioned in the district court opinion. See Beach v. Great Western Bank, 692 So. 2d 146, 153 (Fla. 1997) ("We decline to address the other issues raised by the Beaches which were neither in the district court's opinion nor within the scope of the certified question.").

ARGUMENT

I. SECTION 768.13(2)(b)1., FLORIDA STATUTES (Certified Question)

Standard of Review

As the district court correctly observed, the interpretation of statutes presents a question of law subject to de novo review. See Jackson County, 835 So. 2d at 329. See generally Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000) ("[T]he standard of review for a pure question of law is de novo.").

Discussion

Section 768.13(2)(b)1., Florida Statutes (1997), establishes a "reckless disregard" standard of care in medical malpractice actions involving emergency room treatment rendered in good faith by "[a]ny hospital licensed under chapter 395, any employee of such hospital working in a clinical area within the facility and providing patient care, and any person licensed to practice medicine." Bay contends that the courts below erred by failing to apply the reckless disregard standard to its CRNA, Teresa Cruce, arguing that Cruce, although employed by Bay and not by Jackson Hospital, was a hospital "employee" or a "person licensed to practice medicine" for purposes of the statute. For the reasons that follow, the courts below correctly determined that section 768.13(2)(b)1. did not apply to Nurse Cruce under the facts of this case and the certified question should be answered in the negative.

A. Based on clear and unambiguous language, section 768.13(2)(b)1., Florida Statutes, does not apply to non-physician health care providers employed by independent contractors.

"It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis." Florida Convalescent Centers v. Somberg, 28 Fla. L. Weekly S122, S123 (Fla. Feb. 6, 2003). "The Legislature's intent must be determined primarily from the language of the statute." Rollins v. Pizzarelli, 761 So. 2d 294, 297 (Fla. 2000). "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (quoting A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 1144, 137 So. 157, 159 (1931)). Here, section 768.13(2)(b)1. unambiguously limits its application to licensed hospitals, hospital employees and persons licensed to practice medicine and leaves no room for a more expansive interpretation to cover non-physician independent contractors. Because Nurse Cruce was not a member of any of the classes of health care providers enumerated by the statute, neither she nor her vicariously liable employer was entitled to the statute's limited immunity. See Jackson County, 835 So. 2d at 330 ("Because section 768.13(2)(b)1. clearly and unambiguously immunizes only hospitals licensed under chapter 395, employees of such hospitals working in a clinical area within the facility, and physicians, we are bound to follow the plain and obvious meaning of the statute."); Knox, 817 So. 2d at 962 (finding that section 768.13(2)(b)1. "is clear and unambiguous and conveys a clear and definite meaning . . . .").

Although the statute under scrutiny unambiguously excludes Nurse Cruce

without resort to extrinsic rules of statutory construction, two such rules bolster the district court's interpretation. First, "[i]t is a rule of statutory construction that a statute in derogation of the common law must be strictly construed." Ady v. American Honda Fin. Corp., 675 So. 2d 577, 581 (Fla. 1996). "A court will presume that such a statute was not intended to alter the common law other than by what was clearly and plainly specified in the statute." Id. By imposing a more stringent "reckless disregard" standard of care, section 768.13(2)(b)1., Florida Statutes, alters plaintiffs' common law right to sue for damages in tort based on negligence. Therefore, this court should presume that the legislature did not intend to alter the common law rule of negligence except for actions against the persons and organizations "clearly and plainly specified in the statute," namely, licensed hospitals and their employees and persons licensed to practice medicine.

Second, the district court's construction of section 768.13(2)(b)1. also is supported by the well-settled principle that when "a statute specifically enumerates those persons to be covered, ordinarily the statute will be construed as excluding from its operation all those other persons not expressly mentioned." Zopf v. Singletary, 686 So. 2d 680, 681-82 (Fla. 1st DCA 1996). See also Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976) ("It is, of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. Hence, where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation

all those not expressly mentioned.”).

This principle was applied in Finkelstein v. North Broward Hosp. Dist., 484 So. 2d 1241 (Fla. 1986), where this court construed now-repealed section 768.56, Florida Statutes, which authorized prevailing party attorney’s fees in medical malpractice actions involving “‘any medical or osteopathic physicians, podiatrist, hospital or health maintenance organization.’” Finkelstein, 484 So. 2d at 1243. One of the unsuccessful defendants in a medical malpractice action, Nurse Poore, contended that the trial court lacked authority to assess attorney’s fees against her because nurses were not among the health care professionals enumerated by this statute. This court agreed based on the following analysis:

> Nurse Poore is not a medical or osteopathic physician, a podiatrist, a hospital or a health maintenance organization. Therefore, the trial court erred in assessing attorney’s fees against Nurse Poore because she is not a member of any of the classes of persons enumerated in section 768.56.
>
> The principle that the mention of one thing in a statute implies the exclusion of another, Thayer v. State, 335 So. 2d 815 (Fla. 1976), coupled with the requirement that statutes awarding attorney’s fees must be strictly construed, Roberts v. Carter, 350 So. 2d 78 (Fla. 1977), mandates reversal of the trial court’s order assessing attorney’s fees against Nurse Poore.

Finkelstein, 484 So. 2d at 1243. This analysis applies at bar with equal force.

B. Bay Anesthesia and Nurse Cruce were independent contractors, not hospital “employees.”

Applying section 768.13(2)(b)1. to the facts of this case, the record indicates without dispute that Bay’s employee, Nurse Cruce, was not a hospital “employee” as

contemplated by the statute because she retained her status as an independent contractor. This conclusion is supported both by the contract between Bay and Jackson Hospital and by the relationship between Cruce and Dr. Griffin in the clinical setting.

"'The standard for determining whether an agent is an independent contractor is the degree of control exercised by the employer or owner over the agent. More particularly, it is the right of control, and not actual control, which determines the relationship between the parties.'" Villazon v. Prudential Health Care Plan, Inc., 28 Fla. L. Weekly S267, S270 (Fla. Mar. 27, 2003) (quoting Nazworth v. Swire Fla., Inc., 486 So. 2d 637, 638 (Fla. 1st DCA 1986)) (emphasis the court's). "This Court has held that the right to control depends upon the terms of the employment contract." Stoll v. Noel, 694 So. 2d 701, 703 (Fla. 1997). Thus, when determining a person's status as an independent contractor or employee, "courts should initially look to the agreement between the parties, if there is one, and honor that agreement, unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status." Keith v. News & Sun Sentinel Co., 667 So. 2d 167, 171 (Fla. 1995). When the contract plainly disavows an employer-employee relationship, the court should respect the parties' chosen legal status. See Mingo v. ARA Health Services, Inc., 638 So. 2d 85, 86 (Fla. 2d DCA) (corporation which contracted with Sheriff to provide medical services at the county jail was not entitled to sovereign immunity when contract provided that the corporation was an independent contractor

and not an employee or agent of the Sheriff), rev. denied, 645 So. 2d 450 (Fla. 1994).

In this case, Bay unquestionably retained the right to control the employment-related activities of its anesthetists under its Anesthesia Services Agreement with Jackson Hospital. In this respect, the contract explicitly provides:

> Notwithstanding anything herein to the contrary, the Hospital will not have or exercise control over the manner in which the medical duties of the Anesthetists or anyone providing services under this Agreement are performed as would jeopardize the status of the Corporation [Bay] as an independent contractor.
>
> ***
>
> The Corporation [Bay] will be fully responsible for performing or assuring that any Anesthetist performs professional services in compliance with the provisions of this Agreement.

(Plaintiffs' Exh. 65 at 2-3, 8) (Appendix at Tab 2). The agreement further recites that Bay is an independent contractor and that the nurse anesthetists employed by Bay to fulfill the contract requirements "shall not act or hold themselves out to third parties as a partner, employee, or agent of the Hospital in the provision of patient services under this Agreement." (Plaintiffs' Exh. 65 at 6). In addition, the contract includes several other provisions confirming the independent contract relationship that existed between Jackson Hospital and Bay:

_ Bay, not Jackson Hospital, scheduled the work hours for its personnel assigned to the hospital's anesthesia department. (Plaintiffs' Exh. 65 at 3).

_ Bay, not Jackson Hospital, had the obligation to conduct and professionally staff the hospital's anesthesia department. (Plaintiffs' Exh. 65 at 4).

_ Bay, not Jackson Hospital, was required to obtain professional liability insurance for its nurse anesthetists. (Plaintiffs' Exh. 65 at 4).

_ Bay agreed to indemnify and hold Jackson Hospital harmless from any liability caused by Bay's negligence or intentional acts. (Plaintiffs' Exh. 65 at 12).

In addition to the contract, prevailing case law demonstrates that Bay and Nurse Cruce retained their status as independent contractors even though Dr. Griffin accepted responsibility for Roddenberry's intubation as "captain" of the emergency room team. In Vargas v. Dulzaides, 520 So. 2d 306, 307-08 (Fla. 3d DCA), rev. denied, 528 So. 2d 1184 (Fla. 1988), the court summarized the law on this point as follows:

> A surgeon in the operating room may be liable for the acts of assisting personnel as the "captain of the ship," e.g. Hudmon v. Martin, 315 So. 2d 516 (Fla. 1st DCA 1975); however, a surgeon will not be liable for the negligence of a fellow specialist such as an anesthetist or an intern. Dohr v. Smith, 104 So. 2d 29 (Fla. 1958); Fortson v. McNamara, 508 So. 2d 35 (Fla. 2d DCA 1987); Parmerter v. Osteopathic Gen. Hosp., 196 So. 2d 505 (Fla. 3d DCA 1967). The rationale behind the rule that a trained professional will not be deemed a borrowed servant for whom a surgeon is vicariously liable was explicated by the Florida supreme court in Dohr:
>
>> The surgeon may have been generally in command from the beginning of the operation to the end or, as appellant terms him in the brief, "Captain of the ship," but it is clear to us that he and the anesthetist were working in highly expert fields peculiar to each and despite the common goal, ... their responsibilities were not inextricably bound together.
>
> Id. at 32.

Vargas, 520 So. 2d at 307-08. In the instant case, although Dr. Griffin and Nurse Cruce undoubtedly shared a common goal, they were experts in separate medical fields and "their responsibilities were not inextricably bound together."

Based on closely analogous facts, the second district's decision in Fortson v. McNamara, 508 So. 2d 35 (Fla. 2d DCA 1987), rev. denied, 520 So. 2d 584 (Fla. 1988), is quite instructive on this point. In that case, plaintiff's decedent died after cesarean section performed by Dr. McNamara when a CRNA employed by the hospital improperly placed an endotracheal tube in the patient's esophagus rather than her trachea. In the subsequent medical malpractice suit, the trial court ruled that the CRNA was not the obstetrical surgeon's "borrowed servant" and therefore the surgeon was not vicariously liable for her negligence. On appeal, plaintiff argued that "that Dr. McNamara, as the surgeon in charge of the operating room, should be held vicariously liable for the negligence of the nurse anesthetist, who has completed a two-year course of special training in the field of anesthesiology and is Board Certified to administer anesthesia." Fortson, 508 So. 2d at 36. The court rejected plaintiff's contention and concluded that the CRNA's negligence could not be imputed to the surgeon based on the following rationale:

> Ms. Wingate was not under the direct supervision of Dr. McNamara and, in fact, performed her duties independently. She is certified by the state of Florida as a nurse anesthetist and "may, to the extent authorized by established protocol approved by the medical staff of the facility in which the anesthetist service is performed, perform any or all of the following: ... (4) Perform under the protocol procedures

> commonly used to render a patient insensible to pain during the performance of surgical, obstetrical ... procedures." § 464.012, Fla. Stat. (1979).

Fortson, 508 So. 2d at 36-37. Similarly, Nurse Cruce is a highly-trained anesthesia specialist licensed by the state of Florida as a certified registered nurse anesthetist. (T-XV [R-XXIX] 2210-16). See § 464.012(2)(a), Fla. Stat. (1997). A CRNA licensed under section 464.012 is authorized to perform a variety of anesthesia-related services, including "intubation procedures." § 464.012(4)(a)6., Fla. Stat. (1997). Although Dr. Griffin selected the method of intubation in this case, the record reflects that Nurse Cruce performed the procedure independently without direction from the physician. (T-XV [R-XXIX] 2224-42; T-XVII [R-XXXI] 2510-11). In fact, Dr. Griffin acknowledged that he asked Nurse Cruce to perform the intubation because of her specialized training and experience. (T-XVII [R-XXXI] 2500-01).

As noted in Vargas, a physician may be liable as "captain of the ship" for the conduct of health care assistants who lack the type of certification and specialized training held by Nurse Cruce. For example, in Buzon v. Mercy Hosp., Inc., 203 So. 2d 11 (Fla. 3d DCA 1967), the court held that a surgeon could be vicariously liable for a nurse who assisted in making a sponge count. In Hudmon v. Martin, 315 So. 2d 516 (Fla. 1st DCA 1975), the court held that a surgeon was responsible for the negligence of a "scrub nurse" employed by the hospital. Distinguishing those cases, the Fortson court observed that "[n]either case [Buzon nor Hudmon] involved a nurse with the specialized training of a nurse anesthetist who was not under the immediate personnel

supervision of the surgeon as in the instant case." Fortson, 508 So. 2d at 36. Finally, in Vargas, the court held that a cardiac surgeon was vicariously liable for a perfusionist's negligence because "[t]he record shows that the errant perfusionist was not certified, unlike the licensed professionals in Dohr and Fortson." Vargas, 520 So. 2d at 308. In the instant case, Nurse Cruce's specialized training and certification by the state of Florida differentiate her status from less specialized medical assistants.

On this point, Bay cites Stoll v. Noel, supra, for the proposition that "where appropriate, [a] contract physician has been held an agent of the state for the purpose of immunity under § 768.28, Fla. Stat. (1993)." IB at 16. In Stoll, the court found that physician consultants were independent contractors but were entitled to sovereign immunity because they were considered "agents of the state." Stoll, 694 So. 2d at 703. The governmental agency in Stoll, however, retained nearly exclusive control over the consulting physicians and acknowledged complete financial responsibility for their actions. In the present case, Bay retained control over its nurse anesthetists and other employees assigned to the Jackson Hospital anesthesiology department and accepted financial responsibility for their negligence.

Further distinguishing Stoll, this court determined that the physician consultants in that case were "agents of the state" entitled to sovereign immunity under section 768.28(9)(a) which extends immunity to any "officer, employee or agent of the state . . . ." § 768.28(9)(a), Fla. Stat. (1997) (emphasis supplied). This court did not determine that the physician consultants were "employees." The term "agent" is

broader than the term "employee," the statutory term used by the legislature in section 713.28(2)(b)1., Florida Statutes. See Economic Research Analysts, Inc. v. Brennan, 232 So. 2d 219, 221 (Fla. 4th DCA 1970). The district court below expanded upon this important distinction to support its construction of the statute:

> Here, the contract between JH and Bay clearly provides for an independent contractor relationship between the two entities. Bay, conceding that it was Cruce's employer, argues that Cruce essentially became an agent of JH by acting under the direction of Dr. Griffin and, therefore, was entitled to the protection of section 786.13(2)(b)1. However, the Legislature did not expressly include independent contractors or agents who are not licensed to practice medicine within the protection of section 768.13(2)(b)1. In contrast, in section 768.28(9)(a), which addresses the State's limited waiver of sovereign immunity for torts, the Legislature expressly included within the statute's immunity protection officers, employees, and agents. The Legislature's inclusion of the term "agent" in section 768.28(9)(a), a statute similar to section 768.13(2)(b)1., in that both serve to immunize those enumerated classes from civil liability, and its omission of the word "agent" from section 768.13(2)(b)1. demonstrate that if the Legislature had intended to include agents of hospitals or their independent contractors who are not licensed to practice medicine but who render care within their emergency rooms within the protection of section 768.13(2)(b)1., it would have done so.

Jackson County, 835 So. 2d at 329.

In sum, the district court correctly concluded that "Section 768.13(2)(b)1. conveys a clear and definite meaning, a meaning that precludes the application of this statute to Cruce." Jackson County, 835 So. 2d at 330. "To interpret the statute otherwise to include Cruce merely because Dr. Griffin directed Cruce to perform an

oral intubation would be to rewrite the statute, which is an endeavor not within the purview of this Court." Id. See also Hawkins v. Ford Motor Co., 748 So. 2d 993, 1000 (Fla. 1999) ("[T]his Court may not rewrite statutes contrary to their plain language.").

C. Nurse Cruce was not a "person licensed to practice medicine."

As an alternative argument, Bay contends that Nurse Cruce was entitled to the limited immunity provided by section 768.13(2)(b)1. as a "person licensed to practice medicine." See IB at 13-15. For several reasons, the district court correctly assumed that the phrase "person licensed to practice medicine" refers to a physician. See Jackson County, 835 So. 2d at 330 ("Because section 768.13(2)(b)1. clearly and unambiguously immunizes only hospitals licensed under chapter 395, employees of such hospitals working in a clinical area within the facility, and physicians, we are bound to follow the plain and obvious meaning of the statute.") (emphasis supplied).[4]

The phrase "any person licensed to practice medicine" employed by section 768.13(2)(b)1. logically refers to physicians licensed pursuant to Chapter 458, Florida Statutes, or osteopathic physicians licensed pursuant to Chapter 459, Florida Statutes. Although the dictionary definition cited by Bay gives the unqualified word "medicine" a broad meaning sufficient to encompass all forms of the healing arts, Chapter 458 limits the term "physician" to "a person who is licensed to practice medicine in this

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[4] Bay did not raise the argument that Nurse Cruce was a "person licensed to practice medicine" until it filed its motion for rehearing which may explain why the district court did not mention this issue in its opinion.

state." § 458.305(4), Fla. Stat. (1997). Section 459.003(4), Florida Statutes (1997), provides an analogous definition for osteopathic physicians. Thus, in statutory parlance (as well as common usage), a "person licensed to practice medicine" unquestionably means a licensed physician.[5]

Further refuting Bay's interpretation of section 768.13(2)(b)1., the statutory scheme which establishes the licensing requirements for certified registered nurse anesthetists, sections 464.001-464.027, Florida Statutes (1997)**, refers to such licensees as persons engaged in the "'[p]ractice of professional nursing,'" or "'[a]dvanced or specialized nursing practice.'" § 464.003(3)(a) and (c), Fla. Stat. (1997). The statutes do not describe certified or advanced nurse practitioners as persons practicing medicine or persons licensed to practice medicine.**

Finally, to the extent the language "person licensed to practice medicine" might be considered ambiguous, the legislative history summarized in the Senate Staff Analysis supports the conclusion that the phrase refers to physicians:

> The bill amends Florida's Good Samaritan Act to provide immunity for hospitals, employees of hospitals, and <u>physicians</u> who render care or treatment in response to an emergency within a hospital or trauma center unless such care or treatment is provided in a manner "demonstrating reckless, but not conscious, disregard for consequences so as to affect the life or health of another."

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[5] The state of Florida also licenses chiropractic physicians (Chapter 460) and podiatric physicians (Chapter 461), but those physicians are not likely to practice in hospital emergency rooms.

Fla. S. Comm. on Commerce, SB 6E (1988), Staff Analysis 2 (Feb. 3, 1988) **(Appendix at Tab 3) (emphasis supplied).**

D. The legislature's statement of intent cannot override unambiguous statutory language.

Bay also contends that the district court's interpretation of section 768.13(2)(b)1. conflicts with the legislature's expressed intent to "to promote the availability of emergency medical care by providing immunity from civil liability to hospitals and trauma centers and the medical emergency care providers rendering care therein to medical emergency patients, unless such care is rendered with reckless disregard for the life or health of the patient." Ch. 88-1, § 45(2), Laws of Fla. (emphasis supplied).[6] Because Nurse Cruce meets the broad definition of "medical emergency care providers," Bay reasons that the statute should receive the same construction. See IB at 13.

In response to this same argument, the district court correctly stated:

> While Cruce would undoubtedly come within the purview of the broad term "medical emergency care providers," the Legislature chose not to incorporate this more encompassing phrase within section 768.13(2)(b)1. Therefore, because legislative intent is determined primarily from the language of the statute, see State v. Rife, 789 So. 2d 288, 292 (Fla. 2001), and because Cruce, who was employed by Bay and who worked only as an independent contractor at JH, is not a member of any of the classes of persons enumerated in section 768.13(2)(b)1., Cruce was not entitled to the protection of the reckless disregard

[6] The statement of legislative intent was included in the bill that passed the legislature but was not enacted into the Florida Statutes. Compare Ch. 88-1, § 45-46, Laws of Fla., with § 768.13(2)(b)1., Fla. Stat. (Supp. 1988).

standard of care.

Jackson County, 835 So. 2d at 330. The district court's reasoning recognizes that although a statement of legislative policy expressed in a bill provides some guidance in determining legislative intent, it is not a part of the statute and cannot alter unambiguous statutory language. See Dorsey v. State, 402 So. 2d 1178, 1181 (Fla. 1981) ("'[T]he preamble is no part of the act, and cannot enlarge or confer powers nor control the words of the act, unless they are doubtful or ambiguous.'") (quoting Yazoo & Mississippi Valley R.R. v. Thomas, 132 U.S. 174, 188, 10 S. Ct. 68, 73, 33 L. Ed. 302 (1889)); 1A Norman J. Singer, Sutherland Statutory Construction § 20.12 at 139-40 (6th ed. 2002) ("The policy section like a preamble is available for the clarification of ambiguous provisions of the statute, but may not be used to create ambiguity. The declaration of policy like the preamble is not a part of the substantive portion of the statute.").[7]

Also on this point, Bay cites Beebe v. Richardson, 156 Fla. 559, 23 So. 2d 718 (1945), for the following proposition: "Where the strict letter of a statute 'taken literally conflicts with a plain legislative intent clearly discernable, the contest [sic] must yield to the legislative purpose, for otherwise the intent of the lawmakers would be defeated." IB at 13 (quoting Beebe, 156 Fla. at 562, 23 So. 2d at 719). In response,

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[7] Although legislative history cannot supplant the plain meaning of the statute, it may be "beneficial to mention the conflicting legislative history to put the Legislature on notice that, if they did not intend for the statute to operate according to its plain meaning, the Legislature should amend the statute." Florida Convalescent Centers, 28 Fla. L. Weekly at S126 n.5 (Anstead, C.J., specially concurring).

the strict letter of a statute yields to legislative intent only when the statute is ambiguous and requires interpretation. See Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank, 609 So. 2d 1315, 1317 (Fla. 1992) ("The legislative history of a statute is irrelevant where the wording of a statute is clear."). As determined by the district court below and the fifth district in Knox, section 768.13(2)(b)1. contains no ambiguity or uncertainty. See Jackson County, 835 So. 2d at 330; Knox, 817 So. 2d at 962.

E. The district court's construction of the statute excluding independent contract health care providers does not violate equal protection.

Bay further contends that unless section 768.13(2)(b)1. is construed to cover independent contract health care providers working side by side with hospital employees and physicians, the statute violates equal protection guaranteed by the constitution. The district court disagreed and concluded "that section 768.13(2)(b)1. does not violate the Equal Protection Clause of the Florida Constitution as it bears a reasonable relationship with a permissible legislative objective of providing civil immunity to hospitals, their employees, and physicians." Jackson County, 835 So. 2d at 330.

"[I]n the absence of a fundamental right or a protected class, equal protection requires only that a distinction which results in unequal treatment bear some rational relationship to a legitimate state purpose." Hechtman v. Nations Title Ins. of N.Y., 28 Fla. L. Weekly S119, S120 (Fla. Feb. 6, 2003). Because section 768.13(2)(b)1. does not implicate a fundamental right or protected class, the court should apply the rational basis test to "determine (1) whether the statute serves a legitimate governmental

purpose, and (2) whether it was reasonable for the Legislature to believe that the challenged classification would promote that purpose." Id. In applying this test, the burden is on the party challenging the legislation on equal protection grounds to prove that the statute is unreasonable or arbitrary. See Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365, 367 (1981). "That the statute may result incidentally in some inequality or that it is not drawn with mathematical precision will not result in its invalidity." In re Estate of Greenberg, 390 So. 2d 40, 42 (Fla. 1980), appeal dismissed, 450 U.S. 961, 101 S. Ct. 1475, 67 L. Ed. 2d 610 (1981).

The legislature amended the Good Samaritan Act in 1988 to address an apparent crisis in emergency medical care caused by an increase in civil lawsuits brought by emergency health care patients which resulted in escalating liability insurance premiums. See Ch. 88-1, § 45, Laws. of Fla. The legislature addressed these concerns by amending section 768.13(2)(b)1. to provide limited immunity for hospitals, hospital employees and physicians providing emergency medical care in hospital emergency rooms. See Ch. 88-1, § 46, Laws of Fla. Like similar legislation in the medical malpractice field, the amendment to section 768.13(2)(b)1. "bears a reasonable relationship to the legitimate state interest of protecting the public health by ensuring the availability of adequate medical care for the citizens of this state." Pinillos, 403 So. 2d at 368.

The legislative history indicates that section 768.13(2)(b)1. was intended to reduce skyrocketing medical malpractice insurance premiums paid by physicians and

hospitals which threatened the quality and availability of emergency medical care. See Fla. S. Comm. on Commerce, SB 6E (1988), Staff Analysis 4-5 (Feb. 3, 1988) (Appendix at Tab 3). There is no indication from the legislative history that auxiliary health care providers, such as nurses and technicians, were experiencing the same insurance crisis or that non-physician contract health care providers increased the cost of liability insurance paid by physicians and hospitals. This distinction provides a rational basis in the equal protection analysis for distinguishing non-physician contract health care professionals from physicians, hospitals and hospital employees. Thus, the courts below correctly rejected Bay's challenge on equal protection grounds. See Hechtman, 28 Fla. L. Weekly at S120 ("It is not within our authority to pass upon the wisdom of the Legislature's classification. We must only consider whether there are any reasonable facts to support the classification attempt made by the Legislature.").[8]

II. APPORTIONMENT OF FAULT TO ORIGINAL TORTFEASORS

Standard of Review

This issue concerns the interpretation of section 768.81, Florida Statutes. As stated previously, the interpretation of statutes presents a question of law subject to

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[8] A similar distinction between physician and non-physician health care providers was noted by the second district when interpreting certain provisions of the Birth-Related Neurological Injury Compensation Association (NICA) plan. See Fluet v. Florida Birth-Related Neurological Injury Comp. Ass'n, 788 So. 2d 1010, 1013 n.6 (Fla. 2d DCA 2001) ("The legislative decision to protect nurse midwives under this plan only if they are supervised by a participating physician may have many explanations. For example, because the Act is designed to minimize the insurance premiums paid by obstetrical physicians, it is likely that the legislature concluded that unsupervised midwives had little, if any, impact upon the premiums paid by obstetricians.").

de novo review. See Jackson County, 835 So. 2d at 329.

Discussion

Under its second issue, Bay contends that the trial court should have permitted the jury to apportion fault pursuant to section 768.81(3), Florida Statutes (1997), to the parties allegedly responsible for Roddenberry's industrial accident which caused his burn injuries. Because Nurse Cruce and the other health care providers who treated Roddenberry were not joint tortfeasors with the parties who allegedly caused Roddenberry's initial injuries, the trial court and district court correctly decided this issue.

A. Section 768.81(3) applies only to joint tortfeasors.

"At common law, under the doctrine of joint and several liability, all negligent defendants were held responsible for the total of the plaintiff's damages regardless of the extent of each defendant's fault in causing the accident." Gouty v. Schnepel, 795 So. 2d 959, 961 (Fla. 2001) (citing Fabre v. Marin, 623 So. 2d 1182, 1184 (Fla. 1993)). "The enactment of section 768.81, Florida Statutes, represented a policy shift in the State of Florida from joint and several liability that resulted in a single recovery for the plaintiff to the apportionment of fault." Gouty, 795 So. 2d at 961. Because section 768.81, Florida Statutes, was intended to supplant the common law doctrine of joint and several liability, the statute is limited to cases involving joint tortfeasors. See Beverly Enterprises-Fla., Inc. v. McVey, 739 So. 2d 646, 650 (Fla. 2d DCA 1999) ("Thus, section 768.81, Florida Statutes (1993), and Fabre are limited to incidents

involving joint tortfeasors."), rev. denied, 751 So. 2d 1250 (Fla. 2000).

B. The parties allegedly responsible for Roddenberry's industrial accident and the subsequent treating health care providers were not joint tortfeasors.

"Joint tortfeasors are usually defined as two or more negligent entities whose conduct combines to produce a single injury." D'Amario v. Ford Motor Co., 806 So. 2d 424, 435 n.12 (Fla. 2001). In applying this definition, Florida courts, following Frank M. Stuart, M.D., P.A. v. Hertz Corp., 351 So. 2d 703, 705 (Fla. 1977), hold that "an initial wrongdoer who causes an injury is not to be considered a joint tortfeasor with a subsequent medical provider whose negligence enhances or aggravates injuries caused by the initial wrongdoer." D'Amario, 806 So. 2d at 435 (footnote omitted). See also Association for Retarded Citizens-Volusia, Inc. v. Fletcher, 741 So. 2d 520, 524-25 (Fla. 5th DCA) ("Under the common law, a medical provider who aggravates an injury inflicted by the original tortfeasor is not considered to be a joint tortfeasor, but instead, a distinct and independent tortfeasor."), rev. denied, 744 So. 2d 452 (Fla. 1999).

In this case, the parties allegedly responsible for Roddenberry's industrial accident and the parties who committed the subsequent medical malpractice were not joint tortfeasors. The industrial accident caused burn injuries which, according to plaintiffs' experts, were survivable and did not cause Roddenberry's death. (T-VIII [R-XXII] 1267; Plaintiffs' Exh. 3; T-IX [R-XXIII] 1345, 1374-75). The subsequent medical malpractice caused oxygen deprivation when Nurse Cruce incorrectly

intubated Roddenberry through the esophagus with fatal consequences. (T-V [R-XVIX] 745; T-VII [R-XXI] 962). Thus, Roddenberry's industrial accident and his subsequent medical treatment produced separate and distinct injuries. Consequently, the persons or entities allegedly responsible for Roddenberry's initial burn injuries and the negligent health care providers who aggravated the injuries and caused his death were not joint tortfeasors. Accordingly, the trial court properly refused to permit the jury to apportion fault to the initial tortfeasors pursuant to section 768.81(3) and Fabre.

C. D'Amario controls.

This court's recent decision in D'Amario is dispositive of this issue. In that case, the court held "that principles of comparative fault concerning apportionment of fault as to the cause of the underlying crash will not ordinarily apply in crashworthiness or enhanced injury cases." D'Amario, 806 So. 2d at 426. In reaching that conclusion, the court relied on the medical malpractice analogy from Stuart v. Hertz, comparing the second injury in crashworthiness cases to the medical provider's subsequent negligence:

> In the context of a medical neglect case, for example, courts in this state have concluded that (1) the cause of an initial injury which may require medical assistance is not ordinarily considered as a legal cause of injuries resulting from the subsequent negligence of the medical-care provider; and (2) an initial wrongdoer who causes an injury is not to be considered a joint tortfeasor with a subsequent medical provider whose negligence enhances or aggravates injuries caused by the initial wrongdoer. In other words, in cases involving medical malpractice, the cause of the underlying condition that brought the patient to the professional, whether a disease or an accident, is not to be

> compared to the cause of the independent enhanced injury allegedly resulting from medical neglect.

D'Amario, 806 So. 2d at 435 (footnotes omitted) (emphasis supplied). Although dicta, this pronouncement effectively guts Bay's argument and validates the lower courts' rulings on this issue. See also Association-S is not controlling because that case involved an enhanced injury while "[i]n the instant case it is clear that the initial injury would have produced death, and the victims [sic] only hope was for successful emergent medical intervention." IB at 20. In response, Bay is precluded from arguing on review that Roddenberry's original injury was alone sufficient to produce his death because it did not challenge in either the trial court or the district court the jury's verdict finding that Nurse Cruce's negligence was a legal cause of Roddenberry's death. See pages 3-4, supra.

The second district's decision in Beverly--.81(3) did not apply and the trial court correctly determined that the jury could not apportion fault to the original tortfeasors.

In support of its position on this issue, Bay cites the concurring opinion in Letzter v. Cephas where Judge Klein advanced the following argument:

> Although some courts have held that the Act applies only where the defendants are joint tortfeasors, and adhere to Stuart, there is no language in the legislation which limits its applicability to joint tortfeasors. The title of the Act, sections 768.71-81, is "Damages," and the provision specifically applicable in this case, section 768.81(3) is entitled "Apportionment of Damages."

Letzter v. Cephas, 792 So. 2d 481, 488-89 (Fla. 4th DCA) (Klein, J., specially

concurring) (footnote omitted), rev. granted, 796 So. 2d 535 (Fla. 2001), rev. dismissed, 28 Fla. L. Weekly S278 (Fla. Mar. 27, 2003). With all due respect, several decisions from this court and the district courts of appeal disagree with Judge Klein's analysis and have squarely held or suggested by dicta that apportionment of fault under section 768.81 applies only when joint tortfeasors contribute to plaintiff's injuries. See D'Amario, 806 So. 2d at 435 ("Fabre involved a simple automobile accident involving joint and concurrent tortfeasors, and did not involve successive tortfeasors or enhanced or secondary injuries . . . .") (emphasis the court's); Gouty, 795 So. 2d at 961 ("The enactment of section 768.81, Florida Statutes, represented a policy shift in the State of Florida from joint and several liability that resulted in a single recovery for the plaintiff to the apportionment of fault."); Fabre, 623 So. 2d at 1186 ("[S]ection 768.81 was enacted to replace joint and several liability . . . ."); Suarez v. Gonzalez, 820 So. 2d 342, 347 (Fla. 4th DCA) ("Section 768.81 and Fabre apply to incidents involving joint tortfeasors."), rev. denied, 832 So. 2d 105 (Fla. 2002); Association--S are limited to incidents involving joint tortfeasors.").

Further distinguishing Letzter-----.81 offers the only method to apportion fault since the concurrent cause instruction given in this case did not provide a "basis upon which the jury could relieve the subsequent health care provider to any extent, if the jury believed that the medical care contributed to the condition (death) but did not produce the whole injury." IB at 20. In response, a jury cannot apportion responsibility for aggravation or enhancement of a pre-existing condition which causes

death in the same manner as bodily injury not resulting in death. As explained by the fifth district:

> Asking a jury to apportion death damages under the requested instruction would be confusing. A victim of a negligent act may be more severely injured than otherwise, due to a prior or concurring cause, and thus it is possible to ask a jury to determine to what extent the negligent act made the original injury worse or more severe than it otherwise would have been. See Auster; Swain v. Curry, 595 So. 2d 168 (Fla. 1st DCA 1992), rev. denied, 601 So. 2d 551 (Fla. 1992). But death is the ultimate and complete injury. As a matter of common sense, it cannot be separated into greater or lesser degrees. All of the medical malpractice cases we have found, which hold that the failure to give the aggravation instruction was reversible error, concern injuries, not death suffered by a patient.

Reyka v. Halifax Hosp. Dist., 657 So. 2d 967, 969 (Fla. 5th DCA 1995).

III. DR. MONZINGO'S EXPERT TESTIMONY

Standard of Review

The abuse of discretion standard of review governs the trial court's ruling admitting or excluding expert testimony. See Buchman v. Seaboard Coast Line R.R. Co., 381 So. 2d 229, 230 (Fla. 1980).

Discussion

A review of the pretrial proceedings and the trial testimony confirms that the trial court did not abuse its discretion or otherwise commit reversible error by excluding the testimony of David W. Monzingo, M.D. On its pretrial witness list, Bay identified four retained expert witnesses, including Dr. Monzingo and Arnold Luterman, M.D. (R-V 938). Dr. Monzingo is medical director of the regional burns center at Shands Hospital at the University of Florida. (T-XV [R-XXIX] 2358). Dr. Luterman is medical director of the regional burns center at the University of South Alabama in Mobile. (T-XV [R-XXIX] 2330). Both physicians have considerable experience and expertise on the subject of survivability from severe burn injuries. (T-XV [R-XXIX] 2361; R-X 1811-12).

Apparently anticipating some overlap, plaintiffs filed a pretrial motion "to limit each side to a reasonable number of medical expert witnesses, and in particular to address the multiple experts identified by the defendants to address the burn survivability issue." (R-VIII 1567). The trial court denied the motion "without prejudice to Plaintiff raising the issue of redundancy of the testimony at trial . . . ." (R-

IX 1631).

The retained expert witnesses who ultimately testified at trial addressed three primary subjects: (1) standard of care, (2) cause of death (whether Roddenberry died from burns or esophageal intubation) and (3) survivability (whether Roddenberry "more likely than not" would have survived his burn injuries but for the esophageal intubation). The second and third issues are essentially the same. On standard of care, plaintiffs called Thomas Correl, CRNA, to testify regarding Nurse Cruce's negligence, and James DeRespino, M.D., an emergency room physician, concerning Dr. Griffin's treatment and management of the patient. (T-VII [R-XXI] 958, 998, 1027). Dr. DeRespino also offered expert opinions regarding cause of death. (T-VII [R-XXI] 962-63, 1027). On survivability, plaintiffs presented the testimony of Susan Miller Briggs, M.D., a burn injury specialist who practices at Massachusetts General Hospital (Harvard) and the Shriners Burn Institute in Boston. (T-IX [R-XXIII] 1329-31). Dr. Briggs testified that had he received appropriate emergency medical treatment, Roddenberry had a 90 percent or better chance of surviving his burn injuries. (T-IX [R-XXIII] 1329-31).

On the defense side, Jackson Hospital presented the testimony of Carmel Quigley, M.D., an emergency medicine specialist, concerning Dr. Griffin's standard of care, while Bay called Vincent C. Palmire, M.D., an anesthesiologist, to cover Nurse Cruce's treatment. (T-XVII [R-XXXI] 2557, 2560; T-XIII [R-XXVII] 2072, 2080). Dr. Quigley and Dr. Palmire also gave opinions regarding cause of death. (T-XVII [R-

XXXI] 2563-65; T-XIII [R-XXVII] 2093, 2108). Each defendant also presented specialists in the treatment of burns. Jackson Hospital called Ronald Tompkins, M.D., who, like Dr. Briggs, practices at Massachusetts General Hospital and the Shriners Burn Institute in Boston. (T-XIII [R-XXVII] 1922). Dr. Tompkins covered both cause of death and survivability and opined that Roddenberry had only a 10 percent or lower chance of surviving his burn injuries. (T-XIII [R-XXVII] 1982).

After Dr. Tompkins testified, Bay called Dr. Luterman, one of the two burn injury experts listed on its pretrial witness list. (T-XV [R-XXIX] 2328). Dr. Luterman's qualifications and experience compared favorably to the credentials offered by Drs. Briggs and Tompkins. (T-XV [R-XXIX] 2330-35). When deposed before trial, Dr. Luterman offered extensive opinions regarding cause of death and survivability. (R-X 1774-1782, 1789-1802, 1806-11 [cause of death]; 1802-05 [survivability]). On the latter subject, Dr. Luterman opined on deposition that Roddenberry had only a 10 percent chance of surviving his burns. (R-X 1802-03). At trial, Bay elicited Dr. Luterman's opinion regarding cause of death but never asked Dr. Luterman to specifically address the survivability issue, although when he testified that Roddenberry died from his burns he essentially testified that his injuries were not survivable. (T-XV [R-XXIX] 2336-37). Instead, Bay attempted to call a second burn injury specialist, Dr. Monzingo, for that purpose. Roddenberry objected on the ground that his testimony was cumulative to Dr. Luterman's and Dr. Tompkins' testimony, noting also that "this last witness [Dr. Luterman] was perfectly capable of

testifying to that. In fact, we were prepared for him to testify to that. In fact, he testified to that on his deposition." (T-XV [R-XXIX] 2356). The trial court agreed and commented: "You know, you are really splitting hairs, and what you are doing is you are sliding in under the door what could have been brought in through the door by the man that just left [Dr. Luterman] easily. . . . . In other words, you are sliding in the door another witness to buttress what this one said because you didn't want to ask him the exact same question, bottom line." (T-XV [R-XXIX] 2357). Bay's attorney actually conceded, "[t]hat is certainly partially true." (T-XV [R-XXIX] 2357). Bay then proffered the excluded testimony, and Dr. Monzingo gave the same opinion previously offered by Dr. Tompkins and Dr. Luterman on deposition—that Roddenberry had only a 10 percent or lower chance of surviving his burn injuries. (T-XV [R-XXIX] 2361-62).

A. The trial court did not abuse its discretion by excluding Dr. Monzingo's testimony on the issue of survivability.

The trial court holds the inherent authority to limit the number of expert witnesses each side may call to testify at trial. See Stager v. Florida East Coast Ry. Co., 163 So. 2d 15 (Fla. 3d DCA 1964), cert. discharged, 174 So. 2d 540 (Fla. 1965), cert. denied, 382 U.S. 878, 86 S. Ct. 162, 15 L. Ed. 2d 119 (1965); Fla. R. Civ. P. 1.200(b)(4) (authorizing the trial court to limit the number of expert witnesses by pretrial order). The trial court also has broad discretion under the Florida Evidence Code, section 90.403, Florida Statutes, to exclude needlessly repetitious expert testimony as "cumulative evidence." See C. Ehrhardt, Florida Evidence § 403.1 at p. 155 (2001 ed.). See generally Hall v. State, 614 So. 2d 473, 477 (Fla. 1993) (trial court enjoys broad discretion to exclude cumulative evidence), cert. denied, 510 U.S. 834, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1993).

The trial court in the present case correctly determined that Dr. Monzingo's proffered testimony was redundant and cumulative. First, Dr. Monzingo's qualifications and opinion on the issue of survivability (10 percent survivability) were substantially the same as that of Dr. Tompkins who had already testified. Although the co-defendant called Dr. Tompkins, the record indicates that Bay and Jackson Hospital presented a united front throughout the trial. Second, Bay easily could have elicited the same opinion (10 percent survivability) from Dr. Luterman consistent with

his deposition testimony.[9] (R-X 1802-03). Bay also could have selected Dr. Monzingo over Dr. Luterman as its burn injury specialist. But, as the trial court recognized, Bay apparently was attempting to enhance the defense's numerical advantage in the battle of expert witnesses by "sliding in under the door" with Dr. Monzingo. The trial court justifiably halted the pretense and did not abuse its discretion by excluding the witness.

Bay Anesthesia cites Elder v. Farulla, 768 So. 2d 1152, 1154 (Fla. 2d DCA 2000), for the proposition that "in a case involving multiple defendants, each defendant should be able to present its own witnesses, even if the testimony would be cumulative to that presented by a co-defendant." IB at 22. In Elder, however, the plaintiff, not a co-defendant, was the party deprived of a fair trial when the trial court enforced a rule limiting each party to one expert per specialty which gave the two co-defendants a 2-1 numerical advantage over plaintiff in expert causation witnesses. In the instant case, each party was allowed one burn injury specialist which gave the co-defendants a 2-1 edge in that department. Allowing Dr. Monzingo to testify would have increased the defense advantage to a lopsided 3-1 and would have been particularly unfair to plaintiffs since before trial they filed two motions to add a second burn injury specialist to their witness list to even the score. (R-VIII 1383, 1516). The defendants opposed plaintiffs' motions and they were denied. (R-VIII 1541; R-IX 1630).

B. Any error excluding Dr. Monzingo's testimony was harmless.

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[9] Bay's attorney acknowledged that both Dr. Luterman and Dr. Monzingo were "similarly situated, similarly trained." (T-XV [RXXIX] 2357).

Any possible error excluding Dr. Monzingo's proffered testimony on the survivability issue was harmless in light of Dr. Tompkins' identical expert testimony. See Nicholson v. Hospital Corp. of Am., 725 So. 2d 1264, 1265 (Fla. 4th DCA 1999) (error in excluding expert's opinion on cause of patient's death was harmless since her proffered testimony on this issue was cumulative to testimony of two other experts who essentially testified to the same opinion). Further, any error was harmless because Dr. Monzingo's proffered testimony on survivability was cumulative to other defense expert testimony regarding the broader subject of cause of death. As noted by the trial judge, the distinction in this case between survivability and cause of death "is splitting hairs." (T- XV [R-XXIX] 2356). If Roddenberry died from his burn injuries rather than the esophageal intubation, obviously the burns were not survivable. Thus, when Dr. Luterman testified that Roddenberry died from his burns (T-XV [R-XXIX] 2336-37), he necessarily concluded that Roddenberry's burn injuries were not survivable. Additionally, Dr. Palmire, Dr. Quigley, Dr. Tompkins and Dr. Richard Bruner likewise testified for the defense that Roddenberry died from his burns, not from an esophageal intubation. (T-XIII [R-XXVII] 1982, 2093; T-XVI [R-XXX] 2393; T-XVII [R-XXXI] 2581). Thus, Dr. Monzingo's proffered testimony was cumulative to five other defense witnesses who testified regarding cause of death. See Sims v. Brown, 574 So. 2d 131, 134 (Fla. 1991) ("Even if wrongfully excluded, the exclusion of cumulative testimony is not an adequate basis for vacating a jury verdict.").

IV. APPLICATION OF COMPARATIVE FAULT

Standard of Review

This issue concerns the interpretation of section 768.81, Florida Statutes, which presents a question of law subject to de novo review. See Jackson County, 835 So. 2d at 329.

Discussion

The jury apportioned fault sixty percent to Jackson Hospital and forty percent to Bay and judgment was entered accordingly against each defendant for its proportionate share of plaintiffs' damages. (R-X 1948-50; R-XIII 2501-04). Nevertheless, having determined that Jackson Hospital was not liable for Roddenberry's death as a matter of law, the district court held on cross-appeal that Bay was responsible for 100 percent of plaintiffs' damages, citing Southern Bell Tel. & Tel. Co. v. Florida Dep't of Transp., 668 So. 2d 1039 (Fla. 3d DCA) (on motion for rehearing), rev. dismissed, 671 So. 2d 788 (Fla. 1996). See Jackson County, 835 So. 2d at 331-32.

In Southern Bell, the court held that if a "defendant is exonerated because there is no evidence of fault, that defendant does not go on the verdict." Southern Bell, 668 So. 2d at 1041 (emphasis the court's). Bay argues that the district court below misconstrued or misapplied Southern Bell based on the following analysis:

> In that case [Southern Bell], the trial court found that one of two defendants was not negligent as a matter of law. In the instant case, this Court has found that the co-defendant was not guilty of reckless disregard. The Court did not find that

> the co-defendant was not guilty of negligence. Therefore, that issue is still open for determination under a defense based upon Florida Statute § 768.81.

IB at 24 (emphasis in original). This argument lacks merit because under the comparative fault statute, section 768.81, Florida Statutes (1997), "the defendant has the burden of presenting at trial that the nonparty's fault contributed to the accident in order to include the nonparty's name on the jury verdict." Nash v. Wells Fargo Guard Servs., Inc., 678 So. 2d 1262, 1264 (Fla. 1996) (footnote omitted; emphasis supplied). In the present case, the district court not only held that plaintiffs failed to present sufficient evidence to prove that Dr. Griffin acted in "reckless disregard," the court also held that his conduct was not a legal cause of Roddenberry's death as a matter of law. See Jackson County, 835 So. 2d at 327-28. In other words, the district court determined that any fault attributable to Dr. Griffin and Jackson Hospital—whether based on reckless disregard, negligence or otherwise—did not contribute to Roddenberry's death and the damages sustained by decedent's survivors. Therefore, Bay is not entitled to apportion fault to Jackson Hospital pursuant to section 768.81(3), regardless of the standard of care used to measure Dr. Griffin's conduct. Accordingly, the district court correctly held that Bay must bear 100 percent responsibility for plaintiffs' damages.

As additional basis for approving the district court's ruling on cross-appeal, Bay did not ask the trial court to submit Jackson Hospital's "negligence" to the jury and therefore waived this issue. (T-XVIII [R-XXXII] 2669, 2707-08).

CONCLUSION

Based on the foregoing, this court should answer the certified question in the negative and approve the district court decision.

Respectfully submitted:

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DONALD M. HINKLE Fla. Bar No. 0301027 HINKLE & FORAN 1545 Raymond Diehl Road Suite 150 Tallahassee, Florida 32308 (850) 205-2055 (850) 205-2056 (fax)	LOUIS K. ROSENBLOUM Fla. Bar No. 194435 LOUIS K. ROSENBLOUM, P.A. 4300 Bayou Boulevard, Suite 36 Pensacola, Florida 32503 (850) 475-1211 (850) 475-1290 (fax) Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to G. Bruce Hill, Esquire, and Daniel S. Green, Esquire, Hill, Reis, Adams, Hall & Schieffelin, P.A., Post Office Box 1090, Winter Park, Florida 32790-1090; and V. James Facciolo, Esquire, Hayden & Facciolo, P.A., 1551 South 14th Street, Suite B, Amelia Island, Florida 32034 by U.S. Mail this 22nd day of April, 2003.

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a Times New Roman 14-point font in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

____
LOUIS K. ROSENBLOUM
Fla. Bar No. 194435
LOUIS K. ROSENBLOUM, P.A.
4300 Bayou Boulevard, Suite 36
Pensacola, Florida 32503
(850) 475-1211
(850) 475-1290 (fax)

Attorneys for Respondents