THE SUPREME COURT
OF THE STATE OF FLORIDA

Case No.: SC03-286

JACKSON COUNTY HOSPITAL CORPORATION d/b/a JACKSON HOSPITAL and BAY ANESTHESIA, INC.

Defendants/Appellants,

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,

Plaintiffs/Appellees.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL
Lower Tribunal Case Numbers: 1D01-4079, 1D01-4042
Lower Tribunal Filing Date: 2/17/03

APPELLANT BAY ANESTHESIA, INC.'S BRIEF

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I. SUMMARY OF THE CASE AND THE FACTS

This case is here on appeal from a judgment based upon a verdict rendered in a wrongful death action. Said judgment was reviewed by the District Court of Appeal for the First District of Florida. Jackson County Hospital Corp., et al. v. Aldrich, 835 So.2d 318 (Fla. 1st DCA 2002). It is from that decision that the jurisdiction of this Court is invoked pursuant to Rule 9.030(a)(2)(A)(v) Florida Rules of Appellate Procedure.

A. FACTS

On the morning of February 14, 1997 William Roddenbery, Jr. was critically burned over 85% of his body by an explosion and fire in his workplace when he applied a torch to a fifty-five gallon drum containing some unknown quantity of lacquer thinner. (T. 1858 – 1898). He was ultimately transported by Fire and Rescue to the emergency room of Jackson County Hospital, Mariana, Florida. (T. 603 – 626). Once delivered to the emergency room, Mr. Roddenbery was attended by a team of health care providers, including an emergency room physician, two surgeons, nurses, respiratory therapists, and a nurse anesthetist. The nurse anesthetist was Theresa Cruce. She provided anesthesia services to the hospital pursuant to a contract between Bay Anesthesia, Inc. and the hospital. (T. 2210, 2288 – 2290). This entire team of health care professionals was under the direction of the emergency room

physician, Dr. John Brent Griffin. Specifically, with respect to Theresa Cruce, the extent or scope of the supervision exercised by Dr. Griffin was extensive. It included the necessity for intubation, the decision to have Ms. Cruce perform the intubation, the method of intubation, the route of intubation, the choice of a paralytic and the efforts to confirm proper placement of the airway, the endotracheal tube. (T. 2482 – 2495). Dr. Griffin was an employee of the hospital, and the hospital was a governmental institution entitled to the limitation of liability contained in §768.28. Consequently Dr. Griffin was not a named defendant at trial.

This case went to trial against Jackson County Hospital Corporation and Bay Anesthesia, Inc. Jackson County Hospital's liability was defined at trial as vicarious for the acts of Dr. Griffin. Bay Anesthesia's liability was defined at trial as vicarious for the acts of Theresa Cruce. The gravamen of the plaintiff's view of liability was that the intubation was an esophageal intubation rather than a proper tracheal intubation, and that caused the patient's death.

At trial the jury returned a verdict for the plaintiff finding that Dr. Griffin was guilty of reckless indifference and that Theresa Cruce was guilty of negligence.

On appeal, Bay Anesthesia argued that the trial court erred in the following respects:

1. It refused to apply the emergency room/trauma center standard of care set forth in §768.13(2)(b), Florida Statutes (1988) to Theresa Cruce.

2. It erred in holding that as a matter of law §768.81, Florida Statutes (1992) did not apply to permit the jury to consider the acts of negligence that caused the critical injuries that required emergency room treatment in this wrongful death case.

3. The trial court erred in excluding the testimony of one of the petitioner's defense experts.

4. The plaintiff/appellee filed a cross appeal arguing that if either defendant prevailed in its appeal, but the other defendant did not, that the non-prevailing defendant would be responsible for 100% of the plaintiff's damages.

With respect to the appeal filed by Bay Anesthesia, Inc., the First District Court of Appeal, in a divided decision, decided that §768.13(2)(b), Florida Statutes (1988) did not apply to a contract nurse anesthetist providing a critically burned patient an artificial airway, in the emergency room, under the direction of the hospital's emergency room physician. The appellate court affirmed without citation or discussion on the second and third issues raised by Bay Anesthesia. The appellate court also held that Bay Anesthesia would be responsible for 100% of plaintiff's damages below, because it found as a matter of law Dr. Griffin could not be found guilty of reckless indifference and that his conduct could not be deemed a legal cause

of the death of William Roddenberry, because the credible evidence was that Roddenberry could not have survived his injuries. The First District Court of Appeals certified the following as a question of great public importance:

> "Whether medical emergency care providers who are not employed by hospitals licensed under Chapter 395 and who are not licensed to practice medicine but who render care within the emergency room or trauma centers of such hospitals enjoy civil immunity pursuant to §768.13(2)(b)(1), Florida Statutes, unless such care evinces a reckless disregard for the life or health of another."

II. SUMMARY OF ARGUMENT

A. The District Court of Appeal for the First District of Florida failed to properly interpret §768.13(2)(b), Florida Statutes (1988).

Although the lower court acknowledged that the legislative intent was "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 emergency care patients . . . *see* Ch. 88-1 §45(2) Laws of Florida.'" the Court determined that it could not give effect to that legislative intent because of what it deemed to be the clear language of the Statute. It is submitted that the language is clear and includes any health care provider such as Theresa Cruce within the meaning of the term "any person licensed to practice medicine". The Court also should have found that Therese Cruce is within the protected class of the Statute

as "an employee of such facility" [hospital], because of the extent of control exercised by the hospital over her conduct in this resuscitation, and because the term "employee" is broad enough to be accorded a meaning consistent with the acknowledged intention of the legislature. To interpret the Statute so as to deny this nurse anesthetist the protection of the Statute, because of her employment relationship with Bay Anesthesia, frustrated the acknowledged purpose of the legislature.

The nurse anesthetist is indistinguishable in every material respect from every employee of the hospital acting in this resuscitation. As such, she should have been accorded the equal protection of this Statute. The District Court of Appeals failed to apply the proper two prong standard in evaluating Bay Anesthesia's contention that an interpretation of the Statute denying or withholding its application from this nurse anesthetist would be a violation of her right to equal protection under the law.

B. The District Court of Appeal erred when it affirmed the Trial Court's decision to prohibit the jury from considering the decedent's negligence in producing the injury that was, in and of itself, sufficient to cause his death.

The First District Court of Appeals did not discuss this element of the appeal but affirmed the trial court without discussion. In passing Florida Statute §768.81 (1992) the Legislature modified pre-existing case law by establishing, as the policy of Florida, that when multiple tortfeasors contribute to the production of an indivisible injury, then the recovery against any one of those tortfeasors for the intangible portion

of the damages should be limited to that tortfeasors' percentage of negligence when compared with the negligence of all other negligent parties contributing to the injury. In order to accomplish the legislative purpose for this statute, the term "each party liable" should be interpreted to mean each party liable for "the injury". When the injury is one that would commonly result in death absent successful medical resuscitation, and the medical health care provider is alleged to have provided that medical resuscitation negligently, the person or persons causing the original injury and the subsequent medical health care provider should be treated as "joint tortfeasors" for purposes of §768.81 Florida Statutes. If, for some conceptual reason, such parties are deemed concurrent tortfeasors, then this statute should be interpreted and applied to concurrent tortfeasors who can both be said to have produced an injury which could independently have resulted in the decedent's death.

C. The District Court of Appeal erred when it affirmed, without discussion, the challenge to the Trial Court's decision to exclude the testimony of an important expert for Bay Anesthesia.

The Trial Court's decision on this issue denied the defendant due process, because it excluded an expert witness on the grounds that a prior expert could have testified on the matters for which the expert was being offered. The trial court provided no forewarning that it would impose such a limitation, leaving the defendant without the ability to have the jury consider evidence beneficial to the defense. As

previously noted, the decedent suffered extraordinary burns involving approximately 85% of his body. The importance of various observations and medical tests such as arterial blood gas and blood studies were pivotal on the issue of causation and survivability of the injury. Bay Anesthesia offered the testimony of two experts who had had extensive experience in caring for severely burned patients. The first, Dr. Luterman, did testify and offered opinions as to the factors contributing to the death of William Roddenberry, Jr. Specifically, his testimony focused on the severity of Mr. Roddenberry's burns and the severity of the inhalation injury that he suffered. Dr. David Mozingo of the University of Florida was then called to the stand. Because Dr. Mozingo's qualifications were essentially similar to those of Dr. Luterman, Dr. Mozingo was not allowed to testify, though his proferred testimony was on a point different than the points to which Dr. Luterman testified. Specifically, Dr. Mozingo was asked to testify as to the general survivability of patients with burn injuries such as William Roddenberrys. He would have offered the opinion that even if Mr. Roddenberry had been successfully delivered to the burn center unit at Shands Hospital as opposed to the small county hospital in Madison, his chances of survival would have been less than 10%. Dr. Mozingo's opinion would have been helpful to the jury in determining disputed issues regarding survivability of patients with burn injuries as extensive as those suffered by Mr. Roddenberry, and would have been

helpful to the Court in determining the applicability of Florida Statute §768.81. It was inappropriate and prejudicial for the court to deprive the jury and Bay Anesthesia, Inc. of this testimony. In doing so, the court abused its discretion.

D. The District Court of Appeal erred when it held that Bay Anesthesia must bear 100% of the damages without a new trial.

When the First District Court of Appeal held that the trial court should have granted a directed verdict to Jackson County Hospital, it also held that Bay Anesthesia would be liable for all of the plaintiffs' damages. For support of that holding the court relied upon Southern Bell Telephone & Telegraph v. Florida Department of Transportation, 668 So.2d 1039 (Fla. 3d DCA 1996).

Since the court's decision in favor of Jackson County Hospital was not based upon a finding that Jackson County Hospital was not negligent, but instead upon a finding that it was not guilty of "reckless disregard", the holding of Southern Bell, *supra*, does not apply.

III. ARGUMENT

A. The standard of liability set forth in §768.13(2)(b) is applicable to a contract nurse functioning under the direction of the hospital's

emergency room physician in providing emergency room care to a severely injured patient.

The pertinent language of the statute in question is as follows:

> "Any 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 who in good faith renders medical care or treatment necessitated by a sudden, unexpected situation or occurrence resulting in a serious medical condition demanding immediate medical attention, for which the patient entered the hospital through its emergency room or trauma center, shall not be held liable for any civil damages as a result of such medical care or treatment, unless such damages resulted from providing, or failing to provide, medical care or treatment under circumstances demonstrating a reckless disregard for the consequences so as to effect the life or health of another."

The protection afforded by this statute should encompass Theresa Cruce for the following two reasons. First, the acknowledged intention of the legislature requires it and there is nothing in the literal language of the statute that prohibits it. Secondly, it would be a violation of the right to equal protection under law to deny application of the statute's protection to Therese Cruce. As previously noted, the emergency room physician, Dr. Griffin, was an employee of the defendant hospital. In this circumstance he exercised direct and extensive control over the conduct of Therese Cruce. It was at his request that an endo tracheal intubation was to be performed. He selected the method of intubation (rapid sequence). He insisted that Therese Cruce

utilize the oral route of intubation (as opposed to the nasal route). He determined that this should be a rapid sequence intubation as opposed to an awake intubation. He selected the paralytic agent (zemuron) and he participated directly in the efforts to confirm the proper placement of the endo tracheal tube. (T. 2482 – 2495). Ms. Cruce was, in effect, an extension of the emergency room physician, acting upon his order to intubate the patient, and using his methods. Furthermore, as a certified registered nurse anesthetist, Ms. Cruce was obliged by law to function under the general supervision of a physician or dentist. Florida Admin. Code R. 64B9-4.010(1). Florida Statutes §464.012(3) provides that all types of advanced registered nurse practitioners are to perform the functions permitted by that statute under the supervision of a practitioner licensed under Chapter 458, Chapter 459 or Chapter 466 (i.e., medical and osteopathic physicians and dentists). Dr. Griffin was Theresa Cruce's supervising physician in this resuscitation.

In Florida Department of Business and Professional Regulation, Division of Pari-Mutual Wagering v. Investment Corp. of Palm Beach, 747 So.2d 374 (Florida 1999) this court reviewed three of the rules most commonly employed in statutory interpretation. The court said:

> In summarizing our methods of statutory construction, we have often recited:

[L]egislative intent controls construction of statutes in Florida. Moreover, 'that intent is determined primarily from the language of the statute [and]...[t]he plain meaning of the statutory language is the first consideration.' St. Petersburg Bank and Trust Co. v Hamm, 414 So.2d 1071, 1073 (Fla. 1982) (citation omitted). This Court consistently has adhered to the plain meaning rule in applying statutory and constitutional provisions. *See* Holly v. Auld,450 So.2d 217, 219 (Fla. 1984); Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879, 882 (Fla. 1983); Carson v. Miller, 370 So.2d 10, 11 (Fla.1979); State ex rel. West v. Gray, 74 So.2d 114, 116 (Fla. 1954); Wilson v. Crews, 160 Fla. 169, 175, 34 So.2d 114, 118 (1948); City of Jacksonville v. Continental Can Co., 113 Fla. 168, 171-73, 151 So. 488, 489-90 (1933); Van Pelt v. Hilliard, 75 Fla. 792, 798, 78 So. 693, 694 (1918). As we recently explained:

Florida case law contains a plethora of rules and extrinsic aids to guide courts in their efforts to discern legislative intent from ambiguously worded statutes. However, '[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.' It has also been accurately stated that courts of this state are 'without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.' Holly, 450 So.2d at 219 (citations omitted, emphasis added).

Public Health Trust of Dade County v. Lopez, 531 So.2d 946, 948-49 (Fla 1988) (footnote omitted). However, we have also stressed that we will not give a statute 'a literal interpretation [that] would produce 'an unreasonable or ridiculous conclusion.' Perkins v. State, 682 So.2d 1083,

> 1085 (Fla. 1996) (quoting Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984)). (*Id*. at 382, 383).

The history of the act, the evil to be corrected, the purpose of the enactment and the existing laws on the same subject are all factors to be considered in discerning legislative intent. State Board of Accountancy v. Webb, 51 So.2d 296 (Fla. 1951). Another important principle of statutory construction in the context of this case is that quoted in Hiers v Mitchell, 95Fla. 345, 116 So. 81 (Fla. 1928)

> "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 187 U.S. 197, 205 [23 S. Ct. 108, 47 L. Ed. 139] (1902). And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not be repugnant to the constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. Harriman v. Interstate Com. Comm., 211 U.S. 407 [29 S. Ct. 115, 53 L. Ed. 253] (1908). United States v. Delaware & Hudson Co., 213 U.S., 366, 29 S. Ct. 527 [53 L. Ed. 836]...."A statute must be so construed, if fairly possible, as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.
>
> 'United States v. Jin Fuey Moy, 241 U.S. 394, 36 S. Ct. 658 [60 L. Ed. 1061]." (Id at 349).

The First District Court of Appeals acknowledged that §768.13(2)(b) resulted from the expressed legislative intent

> "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 emergency care patients . . . "
>
> *See*, Ch. 88-1, §45(2) Laws of Florida.

That court also acknowledged that Theresa Cruce was a "medical emergency care provider" rendering care to an emergency patient in a hospital emergency room. The First District Court of Appeals, however, took a view of the statutory language that was contrary to the acknowledged legislative intent. That interpretation was unnecessary, unreasonable and creates a substantial constitutional question. Where the strict letter of a statute 'taken literally conflicts with a plain legislative intent clearly discernable, the contest must yield to the legislative purpose, for otherwise the intent of the lawmakers would be defeated.' Beebe v. Richardson, 156 Fla. 559, 23 So.2d 718 (Fla. 1945) *Id*. at 562.

The language of the statute is certainly broad enough to include Theresa Cruce because she is a "person licensed to practice medicine" and because, under the circumstances of this case she should be deemed an employee of the hospital. If she qualifies under either of those categories, she qualifies under the statute.

It is often said that the plain meaning of language used in the statute is the preferred meaning for statutory interpretation. The commonly accepted meaning of "medicine" is "the science and art dealing with the maintenance of health and the prevention, alleviation or cure of disease", Webster's Ninth New Collegiate Dictionary (1983). *See also*, Black's Law Dictionary, Fourth Edition. Clearly medical arts and sciences encompass the delivery of anesthesia services. And just as clearly, Ms. Cruce is licensed by the State of Florida to deliver such services. Therefore, under the "plain meaning" of the term "persons licensed to practice medicine", Theresa Cruce comes within that term and therefore within the compass of §768.13(2)(b).

For some reason the court below engrafted onto the statutory language the term "physician" instead of the term used by the statute, which was "persons". The legislature did not employ any such restricted device in the language of the statute. A "physician" is merely a subspecies of the more generic classification of persons licensed to practice medicine. Specifically, a physician is a person licensed to practice allopathic medicine under Chapter 458 or a person licensed to practice osteopathic medicine under Chapter 459. But the legislature has also used the term "any person licensed to practice medicine" to apply to persons licensed to practice under Chapters 460, 461 or 466. *See* Florida Statutes §768.135.

In part, this appeal turns on the meaning of the term "employee" as that term is used in §768.13(2)(b). That term, when used in statutes, has been defined various ways by courts, depending on the legislative intent of the statute. In fact in Weber v. Dobins, 616 So.2d 956 (Fla. 1993), the court accorded two different meanings to the term "employee" as used in the Worker's Compensation Laws, because it was used in different contexts. The fact that the Worker's Compensation law, §440.02 Florida Statutes contained a definition of the word in one section, but the court chose another meaning makes it apparent that there is not one immutable meaning. The court in Weber v. Dobins refused to apply the statutory definition of "employee" to an amended section of the statute when doing so would create "an unreasonable or ridiculous conclusion"

Where the circumstances were appropriate, it was acknowledged that the term "employee" as used in the Human Rights Act of 1977, §23.161 *(et. seq.)* (Now §760.02 *et. seq.*) could be "subject to interpretation". Regency Towers Owners Ass'n, Inc. v. Pettigrew, 436 So.2d 266.268 (Fla. 1st DCA 1983). Appellant submits that this circumstance is appropriate for an interpretation of "employee" so as to give effect to the legislative intent, not to frustrate that intent. Specifically the term should be held to apply to any health care provider who provides care under the direct

supervision and control of the hospital in the emergent circumstances described in the statute.

In Hunte v. Blumental, 238 Conn. 146, 680 A.2d 1231 (Conn 1996), the Supreme Court of Connecticut held that foster parents are "state employees" for purposes of Connecticut's statute providing for defense and indemnification of state employees sued for negligence. The courts decision took note that the statute did not define the term "employees." The court further noted that since the statute was in derogation of the common law, it should be strictly construed. (Factors which apply equally here.) The court then added, "Strict construction does not, however, abrogate the manifest policy motivating these statutes, namely, the protection of state employees from employment....Strict construction does not preclude us from recognizing groups or persons who, in accordance with recognized tenets of statutory construction, legitimately fall within the definition of the term "employees." Id at p.1234.

Furthermore, where appropriate, a contract physician has been held to be an agent of the state for the purpose of immunity under § 768.28, Fla. Stat. (1993). Stoll v. Noel, 694 So.2d 701 (Fla. 1997). In Stoll the court was persuaded by factors that established that the contract physician was subject to substantial control by the State Department of Health and Rehabilitative Services' employee i.e. - the CMS Medical Director.

The legislature indicated its intention to place hospitals within the Act's protection. That intent would be frustrated by not extending the reckless disregard standard to those for whom the hospital would have vicarious liability. *See* Cuker v. Hillsborough County Hospital Authority, 605 So.2d 998 (Fla. 2d DCA 1992). It would be unconstitutional to extend the reckless disregard standard to a person such as Theresa Cruce when the hospital is alleged to be vicariously liable but deny the protection of the statute when the hospital's vicarious liability is not raised in the pleadings. It would be illogical and inconsistent to be told in the same case that a contract employee could be liable under a negligence standard but the hospital's vicarious liability for the contract employee could only be based upon the more restrictive standard of the statute. Such illogical or unconstitutional applications of the statute would be avoided by adopting Bay Anesthesia's position.

In setting forth the standard for determining any equal protection challenge this court has said:

> "With regard to this claim, the pertinent test is whether the statute bears a reasonable relationship to a permissive legislative objective and is not discriminatory, arbitrary or oppressive. [Citations omitted]"
>
> Abdala v. World Omni Leasing, Inc., 583 So.2d 330 at 333 (Florida 1991) (emphasis added).

While the First District Court cited Abdala, *supra*, it failed to articulate any rational basis upon which Theresa Cruce could be excluded from the protection of the statute. The First District Court of Appeals in State Department of Insurance v. Key Title and Abstract Company, Inc., 741 So.2d 599 (Fla. 1st DCA 1999) acknowledged that there should be a rational basis to support a statutory classification challenged as arbitrary. However, in this case, that issue was never addressed except to the extent that Judge Minor's dissent addressed it when he said that it is "irrational to maintain that the legislature intended to apply two different standards to people working as part of one trauma team . . . "

B. The lower court erred in holding as a matter of law that §768.81 Florida Statutes (1992) did not apply to permit the jury to consider the acts of negligence that caused the original injury which was in itself sufficient to cause death.

In this case, the decedent's negligence was not considered by the jury. And yet, as the First District Court of Appeal held the decedent's negligence was so likely to result in death they held, as a matter of law, that the conduct of the emergency room physician could not be considered a legal cause of the decedent's death. The statute in question commands that "any contributory fault chargeable to the claimant diminishes proportionally the amount awarded as economic and non-economic damages for an injury attributable to the claimant's contributory fault . . . " §768.81(2) Florida Statutes. The focus of the statute is "the injury", or more specifically,

contribution to "the injury". Nowhere does the statute focus on "the accident" or, more specifically, contribution to "the accident".

Whether the tortfeasors who contributed to producing the "injury" acted in different temporal or spacial context is not a matter which should determine the operation of the statute. As noted in Judge Kline's concurring opinion in Letzer v. Cephas, 792 So.2d 481 (Fla. 4th DCA 2001), "although some courts have held that the Act applies only where the defendants are joint tortfeasors (footnote omitted) and adhere to Stuart v. Hertz Corp., 351 So.2d 703 (Florida 1977), there is no language in the legislation which limits its applicability to joint tortfeasors . . . " *Id*. at 488, 489. More to the point perhaps is the fact that "joint tortfeasors" is a concept that can be defined broadly enough to include "those who act together in committing wrong, or those whose acts if independent of each other, unite in causing a single injury." Ass'n for Retarded Citizens - Volusia, Inc. v. Fletcher, 741 So.2d 520, 530 n.3 (Fla. 5th DCA 1999) (Harris, J. dissenting). This court has recently noted that "joint tortfeasors are usually defined as two or more negligent entities whose conduct combines to produce a single injury". D'Amario v. Ford Motor Company, 806 So.2d 424, 435 n.12 (Florida 2001). Florida law admits that multiple tortfeasors may share liability severally for an entire injury even when their acts are clearly separated both spacially

and temporally, but the result is one indivisible injury. Gross v. Lyons, 763 So.2d 276 (Florida 2000).

The instant case is of course distinguishable from crash worthiness cases such as D'Amario v. Ford Motor Company, *supra*, because those cases involve the concept of an enhanced injury. In the instant case it is clear that the initial injury would have produced death, and the victims only hope was for successful emergent medical intervention. The nexus of plaintiff's case is that the medical intervention was not successful because it was conducted negligently. However, since the original injury was competent to produce death and death is the injury at issue, there is no sound logic to exclude the operation of §768.81.

This conclusion is further buttressed by the fact that the law (and jury instruction) on concurrent causation given in this case provided no 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. *See*, Zigman v. Kline, 664 So.2d 968 (Fla. 4th DCA 1995); Reyka v. Halifax Hospital District, 657 So.2d 967 (Fla. 5th DCA 1995). If the circumstances of the indivisible injury permit no apportionment based on causation, the only method to obtain apportionment is by application of §768.81 Florida Statutes (1992).

C. The Trial Court abused its discretion when it denied Dr. Mozingo's expert witness' testimony to the jury.

While trial courts are allotted wide discretion in limiting the number of witnesses a party may present, each party should be able to fully litigate the case and present the witnesses it chooses. This rule particularly applies in medical malpractice cases where it is usually a battle of expert witnesses.

Typically, trial courts are allotted wide discretion in determining the manner in which a trial is conducted. Within this discretion, is the trial court's ability to limit the number of witnesses a party may call. *See* Elder v. Farulla, 768 So.2d 1152, 1155 (Fla. 2nd DCA 2000) (recognizing that the trial court has broad discretion in determining the number of witnesses either party may call); Delgardo v Allstate Ins. Co., 731 So.2d 11, 14 (Fla. 4th DCA 1999) ("Unless it can be shown that the testimony of a proposed witness will unnecessarily duplicate the subject matter of another witness's testimony, the judge should ordinarily allow the party to call the witness.") Despite this rule, however, the court must be mindful of each party's constitutional right to present witnesses on its own behalf. *See e.g.*, Johnson v. State, 408 So.2d 813, 815 (Fla. 3rd DCA 1982) (holding, in a criminal case, that the trial court denied the defendant his constitutional right to present witnesses on his own behalf by excluding a physician's testimony); M.W. v. Davis, 756 So. 2d 90, 97 (Fla. 2000) ("[T]he purpose of procedural due process is to 'serve as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are

at issue.'"). Accordingly, 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. *See* Elder, 768 So.2d at 1154 (approving trial court's decision to permit each defendant to present expert witnesses on the same issue).

The need for each defendant to present its own witnesses, even if cumulative to the testimony presented by co-defendants, is especially true in medical malpractice cases where the case "is always necessarily a battle of expert witnesses." Cenatus v. Naples Community Hospital, Inc., 689 So.2d 302, 304 (Fla. 2nd DCA 1997) (reversing in part based on the trial court's exclusion of expert testimony, irregardless of whether it was cumulative). While case law specifically addressing this issue could not be found, appellate courts have implicitly upheld a defendant's right to call its own witnesses, irrespective of the testimony offered by a co-defendant. *See* Elder v. Farulla, 768 So.2d 1152, 1154 (Fla. 2nd DCA 2000).

Although not dealing with multiple defendants, in Delgardo v. Allstate Insurance Co., 731 So.2d 11, 11 (Fla. 4th DCA 1999), the Fourth District Court of Appeal reversed the trial courts decision to grant a new trial after a jury verdict in favor of plaintiffs. In granting the motion for new trial, the trial court found that the testimony

for a second orthopedic surgeon prejudiced the defendant because it was cumulative to the first surgeon's testimony. *See id.* at 11-12.

Noting that, "[w]here there has been no pretrial order limiting the number of expert witnesses, the right of a party to call disclosed witnesses on issues to be decided by the jury presumptively constricts the trial judge's discretionary power to limit the number of witnesses," the court opined that unless a party can prove that the proposed testimony is duplicative of another witness's testimony, the judge should allow the witness. *Id.* at 14. In finding the second surgeon's testimony admissible, the court took note of the fact that, inter alia, both witnesses were disclosed during pretrial discovery and were named on each party's pretrial witness list. *See id.*

In the case at bar, it was an abuse of discretion for the trial court to deny Bay Anesthesia, Inc. the opportunity to present Dr. David Mozingo, regardless of whether the testimony would be cumulative to that of a co-defendant's witnesses. By prohibiting this witness without any fore notice, the trial court effectively denied the defendant the right to fully present and defend the suit against it. Furthermore, the testimony does not appear to be cumulative.

Dr. Mozingo's testimony, as demonstrated by the proffer was directed to the survivability of this injury, not to the cause of this patients cardiac arrest. Since the jury was obliged to determine whether the alleged negligence was a "substantial cause"

of death, Dr. Mozingo's testimony formed an important part of this defendant's defense.

D. **The Court misconstrued or misapplied Southern Bell Telephone & Telegraph v. Florida Department of Transportation, 668 So.2d 1039 (Fla. 3d DCA 1996) so as to require Bay Anesthesia to bear 100% of the damages awarded.**

The Court misconstrued or misapplied Southern Bell Telephone & Telegraph v. Florida Department of Transportation, 668 So.2d 1039 (Fla. 3d DCA 1996). In that case, 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. In the event this court finds that §768.13 does not apply to Theresa Cruce, then the appellant is entitled to a new trial for the purpose of determining respective degrees of negligence. If a new trial is ordered to determine whether appellant is guilty of reckless disregard, then the issue of whether the court's decision in Wal-Mart Stores, Inc. v. McDonald, 676 So.2d 12 (Fla. 1 DCA 1996) permits comparison between reckless disregard and negligence remains to be decided.

CONCLUSION

The judgment and the opinion below should be reversed and this case should be remanded for a new trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by U.S. Mail, to DONALD M. HINKLE, Esq., Fonvielle & Foran, Co-Counsel for Plaintiff's, 1545 Raymond Diehl Road, Suite 150, Tallahassee, Florida 32308, LOUIS K. ROSENBLOUM, Esq., Law Offices of Louis K. Rosenbloum , P.A., Co-Counsel for Plaintiffs, 4300 Bayou Boulevard, Suite 36, Pensacola, Florida 32503; and G. BRUCE HILL, Esq., Hill, Adams, Hall & Schieffelin, P.A., Post Office Box 533995, Orlando, Florida 32853-3995, attorney for Jackson County Hospital Corporation, by U.S. Mail, this _____ of April, 2003.

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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.

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