IN THE SUPREME COURT OF FLORIDA

DIRK FRANZEN, M.D., etc.,

Petitioner/Cross Respondent,

v. CASE NO.: 91,894

HENRY E. MOGLER, etc., et al.,

Respondents/Cross Petitioners,

_____/

HENRY MOGLER, etc., et al.,

Petitioners/Cross Respondents,

v. CASE NO.: 91,934

DIRK FRANZEN, M.D., etc.,

Respondent/Cross Petitioner.

_____/

On Petition for Review from the District Court of Appeal
Fourth District

Case No.: 96-2356

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PRELIMINARY STATEMENT

In this brief, Dirk Franzen, M.D. and Dirk Franzen, M.D., P.A., will be referred to collectively as "Dr. Franzen." Henry E. Mogler and Donna Mogler, will be referred to collectively as "the Moglers" or in their representative capacity as "personal representative of the Estate of Michael Mogler."

The Florida Defense Lawyers Association ("FDLA") files this Brief in support of the position of Dr. Franzen, and presents the FDLA's position on two issues: (1) whether a single cap on noneconomic damages applies to all survivors in a wrongful death action involving medical malpractice; and (2) whether the distinction, if any, created by the Florida Medical Malpractice Association Statute between common law personal injury claimants and statutory wrongful death claimants is a rational distinction meeting constitutional equal protection requirements.

STATEMENT OF THE CASE AND FACTS

The FDLA adopts the Statement of the Case and Facts set forth in Dr. Franzen's brief.

SUMMARY OF ARGUMENT

To resolve what the Florida Legislature determined to be a financial crisis in the medical liability insurance industry, the Legislature enacted a statutory scheme which consisted of two separate components, presuit investigation and arbitration. The arbitration component of this statutory scheme provided substantial incentives for both parties to agree to arbitration by providing a conditional limitation on noneconomic damages where a defendant concedes liability. Through this statutory scheme, the arbitration provision limits the noneconomic damages component of potentially large awards as a means of providing increased predictability of outcome to the claims resolution process for insurers. The Florida Legislature concluded this increased predictability of results would stabilize and reduce insurance premium rates, thereby benefitting the public with greater access to health care services and wider availability of insurance funds to compensate victims of medical negligence. In the absence of these statutory changes, the Legislature concluded many Floridians injured as a result of medical negligence would be unable to recover damages for either their economic losses or their noneconomic losses because of the functional unavailability of medical liability insurance to many health care providers.

Within this back drop, this Court is called upon to interpret the cap on noneconomic damages included within the arbitration provision, and, specifically, whether this statutory cap on noneconomic damages applies collectively to all survivors claiming

entitlement under a wrongful death action or applies separately to each survivor. Section 766.207(7) dictates that once voluntary binding arbitration is entered into, it is undertaken with the understanding "[n]oneconomic damages shall be limited to the maximum of $250,000 per incident." (emphasis added). This language unambiguously mandates the maximum which can be awarded as a result of any one incident of malpractice is $250,000, regardless of the number of claimants who are seeking compensation. Thus, neither the number of claimants nor the number of defendants have any relevance in determining whether multiple caps are applicable. As the statutory language expressly states, the cap applies on a "per incident" basis, and the only statutory authorization for multiple caps is if there exists multiple "incidents" of malpractice. There are no allegations in the present case that multiple incidents of malpractice occurred, and, accordingly, only a single cap should apply regardless of the number of claimants involved.

The requirement the cap be interpreted as an aggregate limit on all claimants seeking recovery is dictated not only by the express language of the statute, but by consideration of the intent behind the statute's enactment. An interpretation of this statute which applies a single cap to all claimants effectuates the legislature's intent by adding increased predictability of noneconomic damage awards and thereby lowering insurance rates which have been found by the legislature to be one of the primary causes of Florida's current medical malpractice crisis.

Even if Section 766.207 is interpreted as entitling each separate "claimant" to a separate recovery up to the maximum amount available under the cap, this does not mean that each separate survivor under a wrongful death action is entitled to a separate statutory cap. In connection with the arbitration provisions of 766.207, the term "claimant" is defined as "any person who has a cause of action arising from medical negligence." §766.202(1), Fla. Stat. Under Florida law, only a decedent's personal representative may bring a cause of action for wrongful death which is brought for the benefit of the decedent's estate as well as its survivors. Thus, in a wrongful death action, there is only one "claimant," the personal representative for the estate, and, therefore, only one statutory cap is applicable.

Once again, the Legislature's intent behind the enactment of the statutory scheme at issue dictates an interpretation which precludes survivors in a wrongful death action from each recovering the maximum amount allowable under the cap. If this Court concludes each "claimant" is separately entitled to recover up to the maximum amount allowable under the cap, then the definition as to who qualifies as a "claimant" must be strictly construed in order to effectuate the intent behind the statute. In order for the statute to accomplish its goal, the number of large noneconomic damage awards must be reduced and insurers must be provided with a predictable basis for estimating the potential future amounts of such awards. A strict interpretation of the statute which limits

all survivors in a wrongful death action to a single cap accomplishes this goal.

Thus, whether analyzed in terms of effectuating the legislative intent behind this statutory scheme or in terms of the precise language utilized in the statute, the same result is mandated: a single noneconomic damage cap applies to all survivors of a wrongful death action involving medical malpractice.

Finally, an interpretation of Sections 766.207 and 766.209 which limits all survivors to a single cap on noneconomic damages does not unconstitutionally discriminate between common law personal injury claimants and statutory wrongful death claimants. First, these statutes create no difference between common law claimants and wrongful death claimants because regardless of the number of persons seeking to recover damages, there is only one statutory cap applicable "per incident." Thus, the categories of claimants -- common law personal injury and wrongful death -- are not treated differently. Regardless of the type of action or number of derivative claims, there is only one statutory cap applicable to claims arising from one medical incident. Thus, there is no different treatment and, accordingly, there is no violation of equal protection.

Even if the statute were interpreted such that survivors in a wrongful death action were required to split a single statutory cap, but each personal injury claimant were allowed to recover a separate statutory cap, this would not violate the equal protection clause. These two categories of litigants, common law personal

injury litigants and wrongful death litigants, are not similarly situated groups requiring equal protection before the law.

Finally, even if these two categories of litigants are viewed as being similarly situated, different treatment of them is rationally related to the legitimate legislative purpose of lowering noneconomic damage awards in order to control medical liability insurance costs and thereby expanding affordable medical services for all Floridians. Limiting all survivors to a single cap reasonably limits the potential noneconomic damages awarded in wrongful death actions which without such a limitation might vary greatly depending on the number of survivors in any given wrongful death action. By contrast, the ultimate exposure for noneconomic damages in any one personal injury action is relatively constant, the claims of the injured claimant and the potential loss of consortium claims of a spouse. Keeping the range of noneconomic damage recoveries consistent in both wrongful death and personal injury cases satisfies the legitimate and rational desire of the legislature to place some reasonable limits on noneconomic damages recoverable in cases involving the medical malpractice arbitration statute. Thus, the statute, as applied in the instant case, does not violate the equal protection clause of either the Florida or federal constitution.

ARGUMENT

I. A SINGLE CAP ON NONECONOMIC DAMAGES APPLIES TO ALL SURVIVORS IN A WRONGFUL DEATH ACTION INVOLVING MEDICAL MALPRACTICE

When a medical malpractice claimant accepts a health care defendant's request for voluntary binding arbitration, Section 766.207(7) outlines the damages recoverable in such arbitration and states in pertinent part:

> (7) Arbitration pursuant to this section shall preclude recourse to any other remedy by the claimant against any participating defendant, and shall be undertaken with the understanding that:
>
> * * *
>
> (b) Noneconomic damages shall be limited to a maximum of $250,000 per incident . . . .

When a medical malpractice claimant rejects a health care defendant's request for voluntary binding arbitration, Section 766.209(4) limits the damages awardable at any subsequent trial and states in pertinent part:

> (4) If the claimant rejects a defendant's offer to enter voluntary binding arbitration:
>
> (a) The damages awardable at trial shall be limited to net economic damages, plus noneconomic damages not to exceed $350,000 per incident. . . .

The arbitrators in the instant litigation interpreted these statutory provisions in the context of a wrongful death claim and concluded each survivor was separately entitled to the maximum

amount recoverable under the noneconomic damage cap. The Fourth District Court of Appeal reversed the arbitrators' decision concluding a single statutory cap applied to all survivors. A review of the legislative history and intent behind these particular statutory provisions, as well as the language of the statute itself, demonstrates the propriety of the District Court's conclusions.

A. LEGISLATIVE HISTORY AND INTENT

In 1988 the Florida Legislature determined Florida was experiencing a financial crisis in the medical liability insurance industry. Chapter 88-1, Laws of Florida; *University of Miami v. Echarte*, 618 So. 2d 189, 191 n.12 (Fla.), *cert. denied*, 510 U.S. 915 (1993). Medical liability insurance premiums were increasing at an astronomical rate resulting in increased health care cost and making liability insurance "functionally unavailable" for some physicians. *Echarte*, 618 So. 2d at 196. If the crisis was not resolved, the Legislature concluded the unavailability of liability insurance for health care providers would mean that many Floridians injured as a result of medical negligence would "therefore be unable to recover damages for either their economic losses or their noneconomic losses." Chapter 88-1, Laws of Florida; *Echarte*, 618 So. 2d at 191 n.12.

These findings were based upon the study and recommendations made by the Academic Task Force for Review of the Insurance and Tort System which was established by the Legislature to review this

specific problem. *Echarte*, 618 So. 2d at 191. The Legislature further found the primary cause for increased medical malpractice insurance premiums was a tremendous increase in loss payments to claimants and, in particular, the size and increasing frequency of very large claims. §766.201(1)(b), Fla. Stat.; *Echarte*, 618 So. 2d at 191 (quoting Academic Task Force for Review of the Insurance and Tort System, Medical Malpractice Recommendations at 10-11 (November 6, 1987)). In considering this increase in substantial damage claims, the Legislature concluded noneconomic damages recoverable under the existing system "had no monetary value, except on a purely arbitrary basis," and that while the Legislature desired to provide a rational basis for determining damages for noneconomic losses, it recognized that "the interests of the injured parties should be balanced against the interests of society as a whole, in that the burden for compensating for such losses is ultimately born by all persons, rather than by the tortfeasor alone." Chapter 88-1, Laws of Florida; *Echarte*, 618 So. 2d at 191-92 n.12.

In order to resolve this crisis and assure the availability of medical treatment and insurance coverage to all of Florida's citizens, the Legislature enacted a statutory scheme which consisted of two separate components, presuit investigation and arbitration. *Echarte*, 618 So. 2d at 192. The arbitration component of this statutory scheme was enacted as a means of providing substantial incentives for both claimants and defendants

to submit their cases to binding arbitration thereby reducing attorney's fees, litigation costs, and delay. §766.201(2)(b)1, Fla. Stat. This incentive was provided by means of a conditional limitation on noneconomic damages where the defendant concedes willingness to pay economic damages and reasonable attorney's fees. §766.201(2)(b)2, Fla. Stat. Under this legislative scheme, the arbitration provision limits the noneconomic damages component of large awards as a means of "provid[ing] increased predictability of outcome of the claims resolution process for insurer anticipated losses planning." §766.201(2)(b)3, Fla. Stat. Thus, the cap on noneconomic damages was intended to substantially reduce the "purely arbitrary basis" of noneconomic damage awards in order to increase predictability of results and thereby stabilize and reduce insurance premium rates.

Any interpretation of the arbitration provisions at issue must be made within the context of these legislative findings. Indeed, Legislative intent is the polestar by which courts must be guided in interpreting statutory provisions. *In re: Order of Prosecution of Criminal Appeals*, 561 So. 2d 1130, 1137 (Fla. 1990). To determine legislative intent, courts must consider the act as whole, i.e., the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence. *Department of Envtl. Regulation v. SCM Glidco Organics Corp.*, 606 So. 2d 722, 725 (Fla. 1st DCA 1992).

Moreover, even though some individuals may disagree as to the existence, scope, or resolution of the problems identified by the Legislature, indisputably the Legislature has the *final* word on declarations of public policy, and the courts of this state are bound to give great weight to legislative determinations of fact. *Echarte*, 618 So. 2d at 196. Further, legislative determinations of public policy and facts are presumed correct and entitled to difference. *Id.*

The legislative intent that the cap on noneconomic damages limit large awards as a means of increasing the predictability of the claims resolution process for insurers in order to decrease the overall cost of liability insurance and increase its overall availability, can only be accomplished through an interpretation of the arbitration statute which places one overall limit upon the recovery of all survivors in a wrongful death action.

B. A SINGLE DAMAGE CAP APPLIES TO ALL CLAIMANTS

Section 766.207(7) dictates that once voluntary binding arbitration is entered into, it is undertaken with the understanding "[n]oneconomic damages shall be limited to a maximum of $250,000 per incident." (emphasis added). This language unambiguously mandates the maximum which can be awarded as a result of any one incident of malpractice is $250,000, regardless of the number of claimants who are seeking compensation. In order to award more than a total of $250,000 in the instant case, it would be necessary to re-write the language of the statute to expand its

application to both "per incident" *and* "per claimant." As written, the statutory cap only applies "per incident," and the Moglers have never contended that more than one incident of malpractice was involved in this case. Accordingly, under the plain language of the statute, only one aggregate cap is applicable. A conclusion to the contrary would require judicial modification of the statutory language which is beyond the authority of the court. *In re: Order of Prosecution*, 561 So. 2d at 1137 (courts should not add additional words to a statute not placed there by the legislature); *Hialeah, Inc. v. B&G Horse Transp., Inc.*, 368 So. 2d 930, 933 (Fla. 3d DCA 1979) ("a court may not invoke a limitation or add words to a statute not placed there by the legislature.").

Other states have similarly interpreted their medical malpractice damage caps as applying in the aggregate regardless of the number of claimants seeking compensation. *See, e.g., Todd v. Sauls*, 647 So. 2d 1366, 1379-80 (La. Ct. App. 1994), *cert. denied*, 651 So. 2d 289 (La. 1995)[1]; *LaMark v. NME Hosps., Inc.*, 542 So. 2d 753, 756 (La. Ct. App.), *cert. denied*, 551 So. 2d 1334 (La. 1989); *Robinson v. Charleston Area Medical Center, Inc.*, 186 W.Va. 720,

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[1]The Louisiana statute states: "[t]he total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits as provided in RS 40:1299.43, shall not exceed Five Hundred Thousand Dollars plus interest and costs." La. Acts 40.1299.42(B(1).

414 S.E.2d 877, 888-89 (1991)[2]; *Bulala v. Boyd*, 239 Va. 218, 389 S.E.2d 670, 674-75 (1990)[3]; *Starnes v. United States of America*, 923 F.2d 34 (4th Cir.), *cert. denied*, 502 U.S. 809 (1991); *Yates v. Pollock*, 194 Cal. App. 3d 195, 239 Cal. Rptr. 383, 385-86 (1987)[4]; *Rose v. Doctors Hosp.*, 801 S.W. 2d 841, 846-47 (Tex. 1990)[5]; *see generally Annotation: Validity, Construction, and Application of State Statutory Provisions Limiting Amount of Recovery in Medical Malpractice Claims*, 26 ALR5th 245, 346-350. Clearly, a majority of the jurisdictions to enact statutory caps on medical malpractice damages have interpreted them such that a single cap applies to the claims of all claimants.

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[2]The West Virginia statute states: "in any medical professional liability action brought against a health care provider, the maximum amount recoverable for damages for noneconomic loss shall not exceed $1,000,000 and the jury may be so instructed." W. Va. Code §55-7B-8.

[3]The Virginia statute states in pertinent part: "in any verdict returned . . . in any action for malpractice . . . the total amount recoverable for any injury to, or death of, a patient shall not exceed $750,000." Va. Code §8.01-581.15.

[4]The California statute states in pertinent part: "(a) in any action for injury against a health care provider based upon professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses . . . (b) in no action shall the amount of damages for noneconomic losses exceed Two Hundred Fifty Thousand Dollars ($250,000)." Cal. Civ. Code §3333.2.

[5]The Texas statute states "[i]n an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for damages of the physician or health care provider shall be limited to an amount not to exceed $500,000." Tex. Rev. Civ. Stat. Ann. art. 4590i §11.02(a).

The Moglers argue the statutory cap on noneconomic damages applies to each separate survivor under a wrongful death action allowing each the potential of recovering the maximum amount under the cap. This analysis, in essence, redrafts the language of the statute and, as such, is improper. Under Florida's statutory cap, only if there are multiple "incidents" of malpractice will multiple caps be available. Neither the number of claimants nor the number of defendants have any relevance in determining whether multiple caps are available. As indicated by the express language of the statute, the cap applies on a "per incident" basis, and the only statutory authorization for multiple caps is if there exists multiple incidents of malpractice.

The requirement the cap be interpreted as an aggregate limit on all claimants seeking recovery is dictated not only by the express language of the statute, but by a consideration of the intent behind the statute's enactment. As detailed above, the cap on noneconomic damages was intended to reduce the number of large noneconomic damage awards as a means of increasing the predictability of losses for insurers and thereby decreasing the cost of medical liability insurance to the benefit of all Florida citizens. Obviously, an interpretation of the statute which applies a single cap to all malpractice claimants for injury or death arising from a single incident of malpractice would be in accord with the intent of the legislature in enacting this statute. Such an interpretation adds increased predictability, thereby lowering insurance rates which have been found by the legislature

to be one of the primary causes of Florida's current medical malpractice crisis.

Other state courts which have interpreted similar statutory damage caps have concluded the public policy behind the enactment of their statutes supported the conclusion the cap applied to all claimants and not to each claimant separately. For example, in *Todd*, the Louisiana Court of Appeals addressed the issue of whether its statutory cap on damages applied collectively to all survivors seeking recovery under a wrongful death action brought as a result of medical malpractice or applied separately to each survivor. 647 So. 2d at 1366. In concluding a single cap applied to all survivors collectively, the court focused upon the legislative intent behind the statute's enactment. Specifically, the purpose behind the Louisiana Legislation's enactment of the statutory cap was to reduce liability insurance premiums in order to insure the availability and affordability of medical care for the citizens of Louisiana. In *Todd*, as in the present case, the claimants promoted an interpretation of the statute which allowed each separate wrongful death survivor a right to recover the statutory maximum, as opposed to an interpretation which placed a single limit on the total amount recoverable for all malpractice claimants. The court rejected this interpretation concluding that "[i]f we were to accept [the survivor's] interpretation, we would inject incalculable instability into the computation of the surcharge levied against health care providers . . . . This instability would undoubtedly increase the surcharge, the cost of

which would be expected to be passed to the patients of Louisiana." 647 So. 2d at 1380 (quoting *LaMark*, 542 So. 2d at 756). Accordingly, Louisiana courts in interpreting its statutory cap on medical malpractice damages have concluded that "[w]hether there is one or eight plaintiffs is of no moment. The physician's negligence is not multiplied by the number of plaintiffs." *Moody v. United Nat'l Ins. Co.*, 657 So. 2d 236, 240 (La. Ct. App.), *cert. denied*, 663 So. 2d 713 (La. 1995).

Other courts in interpreting their state's cap on damages recoverable in medical malpractice actions have similarly concluded the legislature's stated intent of reducing liability insurance rates and increasing the overall availability of health care mandates an interpretation which limits the total amount recoverable by all claimants as a result of a single incident of malpractice. *See, e.g., Bulala*, 389 S.E.2d at 674-75; *Yates*, 239 Cal. Rptr. at 385. Thus, as detailed above, and contrary to the suggestion of the Academy in its Amicus Curiae Brief, other jurisdictions interpreting their caps as applying in the aggregate to all claimants have done so based primarily upon public policy considerations which are identical to those expressed by the Florida Legislature, and not based upon the dollar amount of the cap at issue.

Additionally, an interpretation of the statute which limits all claimants to a single, aggregate cap is supported by the decisions of other Florida courts which have interpreted similar

statutory caps. For example, in *Florida Ins. Guar. Assoc., Inc. v. Cole*, 573 So. 2d 868 (Fla. 2d DCA 1990), *review denied*, 584 So. 2d 997 (Fla. 1991), the court considered the Florida Insurance Guaranty Association's ("FIGA") obligation to pay claims on behalf of insolvent insurers, which is limited by a statutory cap, where the claim at issue involved a wrongful death. FIGA argued the decedent's death resulted in a single claim by his estate which triggered only a simple, aggregate cap, regardless of the number of survivors claiming through the estate. The court agreed with FIGA's position and, additionally, pointed out that under general insurance principles derivative claimants, such as survivors in a wrongful death action, are entitled to only one aggregate limit under an insurance policy, regardless of the number of survivors. *Id.* at 870; *Jones v. Zagrodnik*, 600 So. 2d 1265, 1266 (Fla. 5th DCA 1992) (the derivative claims of survivors in a wrongful death action do not constitute separate claims for purposes of applying policy limits or deductibles in liability insurance policies); *Mackoul v. Fidelity & Cas. Co.*, 402 So. 2d 1259, 1260 (Fla. 1st DCA 1981), *petition denied*, 412 So. 2d 467 (Fla. 1982); *Skroh v. Travelers Ins. Co.*, 227 So. 2d 328, 330 (Fla. 1st DCA 1969); *see also Thompson v. St. Paul Fire & Marine Ins. Co.*, 108 Idaho 802, 702 P.2d 840, 841 (1985) (concluding spouse's claim for loss of consortium was not separate from patient's personal injury claim for purposes of determining limits of liability under medical

professional liability insurance policy); *Chicago Ins. Co. v. Pacific Indem. Co.*, 566 F. Supp. 954, 957-60 (E.D. Pa. 1982) (same); *Guarantee Nat'l Ins. Co. v. North River Ins. Co.*, 909 F.2d 133, 137-38 (5th Cir. 1990) (under Texas law the factors which control the limits of liability under a medical liability insurance policy are the numbers of injuries or deaths resulting from malpractice, not the number of claimants).

The *Cole* court concluded insurance law was relevant because it was reasonable to assume the legislature intended the cap on recovery be interpreted consistent with general insurance principles since insurance coverage was the underlying issue. *Cole*, 573 So. 2d at 870. *See also Rumbough v. Tampa*, 403 So. 2d 1139, 1142-43 (Fla. 2d DCA 1981) (general insurance principles were relied upon in interpreting sovereign immunity statutory cap because court concluded cap was enacted with understanding sovereign might carry liability insurance up to the statutory maximum of liability). Accordingly, the court in *Cole* concluded all the survivors in a wrongful death claim were entitled to a single statutory cap, rather than multiple caps for each survivor. *Accord Florida Ins. Guar. Assoc., Inc. v. Bentley*, 583 So. 2d 729 (Fla. 1st DCA 1991).

Thus, both the legislative intent behind the enactment of the statute at issue as well as the language of the statute itself dictates an interpretation which limits all claimants to a single cap where only a single incident of malpractice is involved.

The only Florida case which even remotely considers the issue presented in this appeal in the context of interpreting sections 766.207 and 766.209 is *Bombalier v. Lifemark Hosp. of Fla.*, 661 So. 2d 849 (Fla. 3d DCA 1995), *review denied*, 666 So. 2d 901 (Fla. 1996). In this case, a pregnant mother alleged negligent medical treatment caused the premature birth and death of her twins. As a result, a notice of intent to initiate litigation was served on the hospital indicating that the mother and father were bringing claims for personal injury and loss of consortium respectively, as well as bringing a claim in their representative capacity for the estate of the twins and their survivors. The hospital offered to admit liability as to all the claims brought against it and to arbitrate the issue of damages. The mother and father responded by agreeing to submit the mother's claim for personal injury and the father's derivative claim for loss of consortium to voluntary binding arbitration. However, as personal representative of the twins' estate, they rejected the hospital's offer to arbitrate the wrongful death claim. The hospital, believing this was an improper response, initiated a declaratory judgment action seeking a determination that the response to its offer to arbitrate constituted an effective rejection since the claimants did not agree to arbitrate all claims identified in the notice of intent.

The Third District Court of Appeal in considering this issue concluded the statutory provisions of Sections 766.207 and 766.209 referred to the claims of a single claimant. As such, the court concluded each separate claimant was entitled to a separate offer

to arbitrate. The court specifically found the wife's cause of action for personal injuries was a separate and distinct claim from that of the estate's claim for wrongful death. Accordingly, the court concluded that these two separate and distinct claims, although arising from identical tortious acts, involved two separate claimants who were each entitled to decide separately whether they would agree to the hospital's offer to arbitrate.

In coming to this conclusion, the *Bombalier* court gave no consideration to the legislative intent or purpose behind the statutory scheme at issue, much less the limiting statutory language that the cap apply per medical incident of malpractice rather than per claimant. Accordingly, the court's conclusion that for purposes of these statutes, personal injury claims and wrongful death claims involve two separate and distinct claims with separate claimants who are each entitled to be considered separately is simply incorrect.

C. EVEN IF EACH CLAIMANT IS ENTITLED TO A SEPARATE PER INCIDENT DAMAGE CAP, EACH SURVIVOR IN A WRONGFUL DEATH ACTION DOES NOT QUALIFY AS A SEPARATE CLAIMANT

Even if the *Bombalier* court is correct in its interpretation of Section 766.207, this does not mean that each separate survivor under a wrongful death claim is entitled to a separate statutory cap. First, the *Bombalier* court did not address this specific issue. Moreover, even if, as suggested by *Bombalier*, the statutory cap was phrased in terms of the amount recoverable "per claimant" - which it is not - all survivors under a wrongful death claim would

still be entitled only to recover up to the limits of a single statutory cap.

Even in its broadest interpretation, *Bombalier* at best states only that each separate "claimant" must be considered separately when determining the applicability of Sections 766.207 and 766.209. Under this interpretation of the statute, the issue then becomes whether the personal representative for the estate and all the survivors each qualify separately as "claimants." Fortunately, the Florida Legislature provided specific guidance on this issue by including within the statutory scheme a definition for the term "claimant." Section 766.202(1) defines "claimant" as "any person who has a cause of action arising from medical negligence." It is well settled under Florida law that an action for wrongful death was not authorized at common law but instead is solely a creation of statute and the Legislature. *Stern v. Miller*, 348 So. 2d 303, 304 (Fla. 1977); *White v. Clayton*, 323 So. 2d 573 (Fla. 1975). Under Section 768.20 of the Wrongful Death Act, only the decedent's personal representative may bring a cause of action for wrongful death. *Funchess v. Gulf Stream Apartments of Broward, Inc.*, 611 So. 2d 43, 45 (Fla. 4th DCA 1992). Thus, contrary to the contention of the Moglers, the survivors do not have either a common law or statutory right to maintain a wrongful death cause of action, only the decedent's estate possesses such a right.

Accordingly, in a wrongful death action, there is only one "claimant," the personal representative for the estate, and,

therefore, only one statutory cap is applicable. The Legislature presumably enacted the statutory definition found in section 766.202(1) with knowledge that Florida courts have consistently held only one cause of action can be brought for wrongful death of a person. *Williams v. Jones*, 326 So. 2d 425, 435 (Fla. 1976) (Legislature is presumed to know existing law when it enacts statute and is also presumed to be acquainted with judicial construction of such laws); *Bidon v. Dept. of Professional Regulation*, 596 So. 2d 450, 452 (Fla. 1992).

Other state courts have interpreted their statutory caps in the context of wrongful death claims similarly. *Yates*, 239 Cal. Rptr. at 384-86 (court interpreted California cap on damages as entitling survivors under a wrongful death action to only a single aggregate cap because only one legally recognized claimant existed in such actions); *Todd*, 647 So. 2d at 1379-80.

Once again, the legislature's intent behind the enactment of the statutory scheme at issue dictates an interpretation which precludes survivors in a wrongful death action from each recovering the maximum amount allowable under the cap. If this court concludes each "claimant" is separately entitled to recover up to the maximum amount allowable under the cap, then the definition as to who qualifies as a "claimant" must be strictly construed in order to effectuate the intent behind the statute. In order for the statute to accomplish its goal, the number of large noneconomic damage awards must be reduced and insurers must be provided with a

predictable basis for estimating the potential future amounts of such awards. A strict interpretation of the statute which limits all survivors in a wrongful death action to a single cap accomplishes this goal.

Thus, even if the statute is interpreted as allowing a separate recovery of the statutory cap "per claimant," the definition of "claimant" contained within this specific statutory scheme limits the cap's availability to only the personal representative of the estate, the only person under these facts who has a cause of action against the health care provider. The legislative intent behind the enactment of this statute further mandates such an interpretation. Additionally, Florida's interpretation of analogous statutory caps as well as relevant insurance law principles leads to the conclusion that a single cap should apply to a wrongful death action, regardless of the number of survivors seeking recovery through the estate's cause of action.

II. APPLICATION OF A SINGLE STATUTORY CAP TO ALL CLAIMANTS IN A WRONGFUL DEATH ACTION IS CONSTITUTIONAL

The constitutionality of sections 766.207 and 766.209 were addressed by this Court in *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1983), *cert. denied*, 510 U.S. 915 (1993), and *HCA Health Serv. of Fla., Inc. v. Branchesi*, 620 So. 2d 176 (Fla. 1993). This Court twice found the statutes constitutional. These statutes were challenged on a myriad of constitutional grounds, including right of access to courts, right of trial by jury, equal protection guarantees under both the Florida and Federal

constitution, procedural and substantive process rights under both Florida and Federal constitutions, the Florida constitution single subject requirement, unlawful taking without compensation, and improper delegation of authority. This Court considered all these alleged constitutional infirmities but held the statute was constitutional. 618 So. 2d at 191.

Significantly, the court in *Branchesi* found the statutory cap on damages constitutional in the context of a wrongful death claim. Although this court in its *Branchesi* written opinion did not fully expand upon the constitutional analysis it conducted in connection with the wrongful death claim, this does not mean the court failed to fully consider the constitutional arguments relevant to wrongful death actions in coming to its decision. *See Bowles v. Mitchell Inv., Inc.*, 365 So. 2d 1028, 1029 (Fla. 3d DCA 1978) (merely because the court did not expressly in its written opinion discuss a particular argument presented by an appellant does not mean such an argument was not fully considered in coming to its decision). Thus, this Court has already ruled on the constitutionality of these statutes and held them constitutional.

Even if this Court were to conclude that its earlier decisions did not conclusively establish the constitutionality of the statutes at issue in the context of wrongful death actions, the statutes do not unconstitutionally discriminate against similarly situated classes of plaintiffs.

Under both federal and Florida law, all similarly situated persons are equal before the law. *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 251 (1987). Thus, in order for a statute to comply with the statutory equal protection requirement, all statutory classifications that treat one person or group differently than others must appear to be based at a minimum on a rational distinction having a just and reasonable relationship to a legitimate state objective. *Id.*; *In Re: Greensberg Estate*, 390 So. 2d 40, 42 (Fla. 1980). The rational relationship test requires a statute bear a reasonable relationship to a legitimate state interest, and the burden is on the challenger to prove the statute does not rest on any reasonable basis or that it is arbitrary. *Pinillos v. Cedars of Lebanon Hosp. Corp.*, 403 So. 2d 365, 367 (Fla. 1981).

The above legal principles must be utilized in determining the constitutionality of the statutes at issue. The Moglers argue the statutory cap when applied to wrongful death actions makes an inequitable distinction between personal injury claimants, on the one hand, and wrongful death claimants, on the other. This argument is premised upon the assumption the statutes violate equal protection because they allow each separate claimant/plaintiff in a personal injury action to potentially recover a separate noneconomic damage cap, while limiting the single claimant in a wrongful death action -- the personal representative who may be

representing several survivors as well as the estate -- to one statutory cap.

As discussed in section I.B. above, the basic premise of this analysis is flawed in that if properly interpreted the statutes create no difference between common law claimants and wrongful death claimants. Regardless of the number of persons seeking to recover damages, there is only one statutory cap applicable "per incident." Under this interpretation, the categories of claimants -- common law personal injury and wrongful death -- are not treated differently. Indeed, they are treated identical. Regardless of the type of action or number of derivative claims, there is only one statutory cap applicable to claims arising from one medical incident. Thus, regardless of whether the patient's personal injury claim is accompanied by his spouse's loss of consortium claim or whether there are four survivors seeking recovery of damages in a wrongful death action, in each type of action there is only one cap applicable to the aggregate of all claims being made. Since there is no different treatment, there is no violation of equal protection.

Moreover, even if the statute were interpreted such that all survivors in a wrongful death action were required to split a single statutory cap, but each separate claimant in a personal injury action were allowed to recover a separate statutory cap, this would not violate the equal protection clause. The Moglers' claim that as applied the statutory cap makes an inequitable distinction between common law personal injury litigants and

wrongful death litigants. What this argument neglects to recognize, however, is common law personal injury litigants and wrongful death litigants are not two similarly situated groups requiring equal protection before the law. *Department of Ins. v. Southeast Volusia Hosp. Dist.*, 438 So. 2d 815, 821 (Fla. 1983) (although statute treated two categories of health care providers -- hospitals and physicians -- dissimilarly, since these two categories were not similarly situated, their equal protection rights were not violated). A personal injury claimant brings an action which was recognized at common law, but an action for wrongful death did not exist at common law. *Stern v. Miller*, 348 So. 2d 303, 304 (Fla. 1977). A wrongful death action is a product of statutory creation. *Id.* Thus, the rights granted by the legislature to survivors in wrongful death actions may be limited by the legislature with respect to wrongful death actions involving medical malpractice. *See Rose v. Doctor's Hosp.*, 801 S.W.2d 841, 845-847 (Tex. 1990) (statutory cap on noneconomic damages in medical malpractice action as applied to wrongful death action was constitutional because of statutory nature of wrongful death action).

Even if these two categories of litigants are viewed as being similarly situated, any different treatment of them would be rationally related to a legitimate legislative purpose. Florida courts apply the rational relationship test when reviewing general, social, and economic legislation which does not employ a suspect

class or impinge upon a fundamental right. *B&B Steel Erectors v. Burnsed*, 591 So. 2d 644, 647 (Fla. 1st DCA 1991), *review denied*, 599 So. 2d 654 (Fla. 1992). The statutes currently under consideration clearly do not employ a suspect classification nor do they impinge upon a fundamental right. *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1173, n. 16 (5th Cir. 1979) (merely because proponent of constitutional infirmity claims a statute adversely affects a fundamental constitutional right does not mean strict scrutiny is employed).

Thus, the rational relationship test dictates the constitutionality of the statutes presently under consideration. Indeed, both Florida and federal courts have previously used the rational relationship test when considering the constitutionality of other sections of the medical malpractice reform act which in some manner constrained a malpractice victim's means of recovering against a health care provider. *Florida Patients Compensation Fund v. Von Stetina*, 474 So. 2d 783, 789 (Fla. 1985); *Pinillos*, 403 So. 2d at 367; *Woods*, 591 F.2d at 1172-75. Moreover, the United States Supreme Court in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83 (1978), found a legislative cap on damage recovery "a classic example of an economic regulation" to which the rational relationship test was applicable.

This Court in *Echarte* determined Florida has a legitimate state interest in modifying medical malpractice liability in order

to control excessive medical liability and insurance costs which adversely affect availability and affordability of medical services in Florida. This being the case, the only remaining issue is whether a statute which caps recovery on noneconomic damages in wrongful death actions to one cap split among all survivors and caps recovery in personal injury actions to one cap per plaintiff, is rationally related to this state interest. The court in *Echarte* explicitly determined a statutory classification which limits the recovery of those most severely injured as opposed to those less severely injured was rationally related to this state's legislative purpose. This being the case, an interpretation of the statute in which only one cap is applicable to wrongful death actions, despite the fact there may be a greater number of persons seeking recovery of noneconomic damages, is rationally related to the goal of controlling medical liability insurance costs.

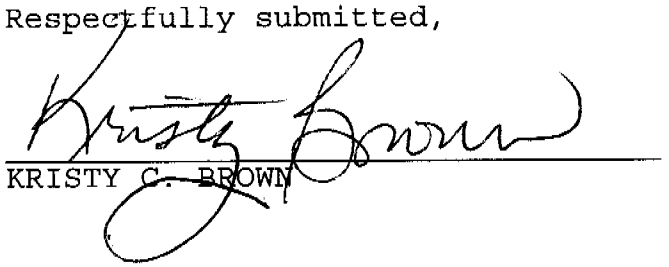
Further, as noted earlier, the legislature specifically identified substantial damage claims, and in particular noneconomic damages which are recoverable on a purely arbitrary basis, as one of the factors necessitating enactment of the medical malpractice arbitration statute. Given this identified problem, enactment of a statutory cap which limits recovery in wrongful death actions to a single statutory cap is rationally related to the overall legislative intent of limiting noneconomic damage recoveries and providing a predictable basis for insurance carriers to evaluate their potential exposure to noneconomic damage claims. This interpretation reasonably limits the potential noneconomic damages

awarded in wrongful death actions which without such an interpretation might be subject to substantial increases due to the varying numbers of survivors which might seek recovery in any given wrongful death action. By contrast, the ultimate exposure for noneconomic damages in any one personal injury action is relatively constant, such claims being limited to the injured claimant and potential loss of consortium claims filed by the claimant's spouse. Keeping the range of noneconomic damage recoveries consistent in both wrongful death and personal injury cases satisfies the legitimate and rational desires of the legislature to place some reasonable limits on noneconomic damages recoverable in cases involving the medical malpractice arbitration statute. Thus, the statute, as applied in the instant case, does not violate the equal protection clause of either the Florida or federal constitution.

CONCLUSION

Thus, based upon all the foregoing, Amicus Curiae, Florida Defense Lawyers Association, respectfully requests this Court affirm the decision of the Fourth District Court of Appeal and reverse the noneconomic damage award entered by the arbitrators and limit the total amount recoverable for noneconomic damages to a maximum of $250,000 to be split among all survivors.

Respectfully submitted,



KRISTY C. BROWN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 25th day of March, 1998 to Alyssa R. Campbell, Esq., Hicks, Anderson & Blum, 100 North Biscayne Boulevard, Suite 2402, Miami, FL 33132; Jane Kreusler-Walsh, Esq., Jane Kreusler-Walsh, P.A., 501 South Flagler Drive, Suite 503, West Palm Beach, FL 33401; Jeffrey Fulford, Esq., Bobo, Spicer, Ciotoli, Fulford, Bocchino, DeBevoise & Le Clainche, 222 Lakeview Avenue, Sixth Floor, West Palm Beach, FL 33401; Lake Lytal, Jr., Esq., Lytal & Reiter, P.O. Box 4056, West Palm Beach, FL 33402-4056; Joseph H. Lowe, Esq., Winitz, Minkin & Lowe, 9350 South Dixie Highway, Penthouse One, Miami, FL 33156; and Shelley H. Leinicke, Esq., Wicker, Smith, Tutan, O'Hara, McCoy, Graham & Ford, P.A., P.O. Box 14460, Ft. Lauderdale, FL 33302.

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