IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,894

DIRK FRANZEN, M.D., and
DIRK FRANZEN, M.D., P.A.

Petitioners,

v.

HENRY E. MOGLER, and
DONNA MOGLER, individually,
and as Personal Representative of the
Estate of Michael Mogler, deceased

Respondents.

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

Case No. 96-2356

AMICUS CURIAE'S INITIAL BRIEF
FLORIDA DEFENSE LAWYERS ASSOCIATION

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INTRODUCTION

In this brief, the Petitioners, Dirk Franzen, M.D. and Dirk Franzen, M.D., P.A., will be referred to collectively as "Dr. Franzen." Respondents, Henry E. Mogler and Donna Mogler, will be referred to collectively as "the Moglers." Citations to the record on appeal will be made by the letter "R." and appropriate page number.

All emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The district court decision under review arose out of an award entered in voluntary binding arbitration of a medical malpractice claim pursuant to section 766.207, Florida Statutes (1995). The Moglers asserted a medical negligence claim against Dr. Franzen arising from his treatment of their son, Michael, which resulted in Michael's death. In response to the Moglers' notice of intent to initiate medical malpractice litigation, Dr. Franzen offered to submit the issue of damages to voluntary binding arbitration. [R.167] The offer was accepted, and the claim was submitted to voluntary binding arbitration with a chief arbitrator supplied by the Division of Administrative Hearings.

Ultimately, a final arbitration award was entered which awarded the claimants a total of $905,637.00 in economic damages. [R.267-270] The panel's award included damages to both surviving parents for past and future medical expenses; damages to the surviving mother for past and future wage loss; and damages to the Estate for "wage loss of Michael Mogler." The amounts awarded for economic damages are summarized below:

Surviving father, Henry Mogler:

1.	medical expenses		
	(a.)	past	$9,125.00
	(b.)	future	$29,750.00
2.	loss of services		
	(a.)	past	$2,521.00
	(b.)	future	$5,429.00

Surviving mother, Donna Mogler:

1.	medical expenses		
	(a.)	past	$46,593.00
	(b.)	future	$46,000.00
2.	wage loss		
	(a.)	past	$57,636.00
	(b.)	future	$304,189.00
3.	loss of services		
	(a.)	past	$2,521.00
	(b.)	future	$5,429.00

Estate of Michael Mogler:

1.	funeral, cemetery expenses	$3,088.00
2.	medical bills	$5,084.00
3.	wage loss of minor decedent	$388,272.00
Total Economic Damages:		**$905,637.00**

[R.267-270] The final arbitration award also awarded noneconomic damages in the amount of $250,000.00 to each surviving parent, and attorneys' fees and costs in the amount of $210,844.05. [R.267-270] The total award was $1,616,481.05. [R.267-270]

The final arbitration award was signed by two of the three arbitrators. The third arbitrator, Janet W. Adams, filed a separate dissenting opinion which expressed disagreement with the panel's sizeable award of economic damages which are not recoverable under the

Wrongful Death Act.[1] [R.271-275] Ms. Adams reasoned that since the cause of action depends upon the Wrongful Death Act for its very existence, the damages which may be awarded are only those available under section 768.21, Florida Statutes (1995):

> Since the Wrongful Death Statute is applicable in the instant action, both Donna and Henry Mogler's claims for past and future medical expenses in regard to the psychiatric treatment received by them as a result of Michael Mogler's death are specifically prohibited pursuant to the Fourth District Court of Appeal's opinion in *Wade v. Alamo Rent-A-Car, Inc.*, 510 So. 2d 642 (Fla. 4th DCA 1987). Additionally, the damages claimed by Petitioners for Donna Mogler's past and future wage loss are not cognizable under 768.21 and therefore are damages that should not be awarded in the instant case.
>
> Similarly, Petitioners' claims for the lost wages of Michael Mogler, the decedent, are damages which are not awardable under the Wrongful Death Statute. Indeed, the arbitrators' award of $388,272.00 to the Estate of Michael Mogler for the alleged loss of wages creates a windfall to the Estate of Michael Mogler in two respects. First of all, these damages are clearly not damages allowable under the Wrongful Death Act. Secondly, in reaching the figure awarded for these lost wages, the arbitrators did not reduce the amount of lost earnings by the amount of support and services Michael Mogler would have consumed in providing himself the basic physical necessities of surviving throughout his lifetime. Consequently, the Estate of Michael Mogler, under the current arbitration award, received a tremendous windfall. It is precisely this sort of windfall that the Legislature sought to avoid in creating the Wrongful Death Statute. Consequently, no award of damages for the wage loss of Michael Mogler should have been contained within the arbitration award.

[R.273-275]

On appeal, the Fourth District Court of Appeal reversed the award for noneconomic

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[1] The economic damages awarded by the arbitration panel which are not recoverable under the Wrongful Death Act amount to $881,565.00

damages, relying upon *St. Mary's Hospital, Inc. v. Phillipe*, 699 So. 2d 1017 (Fla. 4th DCA 1997), which was decided the same day. The district court summarily affirmed the award of economic damages, based upon reasoning expressed in *Phillipe*: "We affirm on the economic damages issue because we have concluded that such damages are controlled by the Medical Malpractice Act and not by the Wrongful Death Act." *Franzen v. Mogler*, 699 So. 2d 1026 (Fla. 4th DCA 1997).

On the parties' motions for rehearing, the district court certified a question to this Court regarding the application of the "per incident" cap on noneconomic damages to claims arising under the Wrongful Death Act as one of great public importance, but declined to disturb its holding with respect to the award of economic damages. *Franzen v. Mogler*, 22 Fla. L. Weekly D2451 (Fla. 4th DCA October 22, 1997).

POINT INVOLVED ON REVIEW

WHETHER THE ELEMENTS OF ECONOMIC DAMAGES WHICH MAY BE AWARDED IN VOLUNTARY BINDING ARBITRATION OF A MEDICAL NEGLIGENCE CLAIM WHICH ARISES OUT OF THE DEATH OF A PATIENT ARE GOVERNED BY THE WRONGFUL DEATH ACT?

SUMMARY OF ARGUMENT

The Moglers' claim is statutory in nature and exists solely by virtue of the Wrongful Death Act; therefore, the elements of economic damages which the estate and the survivors may recover are governed by the Wrongful Death Act, regardless of the forum. The fact that Dr. Franzen offered to submit the issue of damages to voluntary binding arbitration did not take the Moglers' claim outside the operation of the Wrongful Death Act.

Section 766.207(7), Florida Statutes (1995), does not provide a new right of action, nor does it create new elements of economic damages. It does provide certain limitations which govern the manner in which the amount of recoverable items of damages are to be calculated and awarded in a medical malpractice arbitration proceeding. Simply stated, the Wrongful Death Act establishes the nature of economic damages recoverable; section 766.207(7) relates to the manner in which such damages are to be awarded in voluntary binding arbitration. Interpreting the statutes in a manner which gives full reach to both the Wrongful Death Act and the Medical Malpractice Act is the only rational, sensible construction of the statutes.

Of the $905,637 awarded as economic damages in this case, $881,565 was awarded for elements of economic damages which could not have been recovered had the case proceeded to trial. The district court's conclusion that arbitrators are free to award elements of economic damages not compensable under the Wrongful Death Act produces results which are contrary to the legislative intent behind the Medical Malpractice Act, and threatens the viability of voluntary binding arbitration as an option for prompt claims resolution.

ARGUMENT

THE ELEMENTS OF ECONOMIC DAMAGES WHICH MAY BE AWARDED IN VOLUNTARY BINDING ARBITRATION OF A MEDICAL NEGLIGENCE CLAIM WHICH ARISES OUT OF THE DEATH OF A PATIENT ARE GOVERNED BY THE WRONGFUL DEATH ACT

The district court's conclusion that the elements of economic damages recoverable in voluntary binding arbitration are "controlled by the Medical Malpractice Act and not by the Wrongful Death Act" is without logical or legal basis. There is simply no support in Chapter 766 or its legislative history for the proposition that the Legislature intended to change the substantive law regarding the elements of economic damages which are compensable when a defendant's negligence results in the death of a patient. The district court's summary affirmance of the arbitration panel's award of $881,565.00 in economic damages which would not be compensable in a judicial forum represents a manifest injustice which threatens the viability of voluntary binding arbitration as an option for the prompt resolution of medical negligence claims.

The disparity between the amount of economic damages awarded by the arbitration panel and the amount of economic damages which could have been recovered at trial is staggering. The only elements of economic damages included in the final arbitration award which are recoverable under the Wrongful Death Act are the survivors' loss of services, and medical and funeral expenses incurred by the Estate, totaling $24,072. § 768.21, Fla. Stat. (1995). In addition to these recognized elements of economic damages, however, the

arbitrators in this case awarded additional economic damages for the cost of past and future psychiatric treatment of the surviving parents ($131,468); past and future wage loss of the surviving mother ($361,825); and loss of wages of the minor decedent ($388,272). These elements of damages are plainly not recoverable under the Wrongful Death Act. *See Wade v. Alamo Rent-A-Car, Inc.*, 510 So. 2d 642 (Fla. 4th DCA 1987) (surviving parents' loss of wages and cost of medical or psychiatric treatment not compensable under Wrongful Death Act); *Marks v. Delcastillo*, 386 So. 2d 1259, 1267 (Fla. 3d DCA 1980), *rev. denied*, 397 So. 2d 778 (Fla. 1981) (estate of deceased minor child not entitled to recover damages for loss of prospective net accumulations).

The Wrongful Death Act defines the elements of damages recoverable and the persons entitled to recover such damages, in *any* action for damages caused by a "wrongful act" which results in death.[2] Section 768.19, Florida Statutes (1995), provides:

> When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, . . . and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person . . . that would have been liable in damages if death had not ensued shall be liable for damages *as specified in this act* notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

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[2] This was even recognized by the district court in its decision on rehearing when it stated: "[The Wrongful Death Act] also specifies the kind of damages recoverable for each beneficiary entitled to damages. § 768.21(1)-(8), Fla. Stat. (1995)." *Franzen v. Mogler*, 22 Fla. L. Weekly at D2451. The district court, however, made no effort to reconcile its conclusion that economic damages were not governed by the Wrongful Death Act with the rationale expressed in its decision on rehearing on the issue of noneconomic damages.

Quite clearly, the Moglers' claim for damages falls within the plain language of section 768.19, to which it owes its very existence. *See Stern v. Miller,* 348 So. 2d 303, 304-305 (Fla. 1977) ("An action for wrongful death is a creature of statute, unknown to the common law."); *White v. Clayton*, 323 So. 2d 573 (Fla. 1975) (same).

The purpose of enacting the current version of the Wrongful Death Act in 1972 was "to consolidate the wrongful death statutes of Florida into *one cohesive scheme. . .*" *McKibben v. Mallory*, 293 So. 2d 48, 54 (Fla. 1974). Among the reasons expressed for the need for revision of Florida's wrongful death statutes was the existence of "a great deal of uncertainty about the damages recoverable." *Id., quoting Florida Law Revision Commission, Recommendations and Report on Florida Wrongful Death Statutes.*

Indeed, the Wrongful Death Act leaves little room for doubt about the economic damages recoverable. The decision of the Fourth District Court of Appeal in *Wade v. Alamo Rent-A-Car, Inc., supra* at 643, speaks directly to the damages awarded by the arbitrators in this case:

> The right to recover damages for a negligently-caused death is entirely a creature of statute. There was no such common law cause of action. Accordingly, we look to the statute alone to discover who can recover and what may be recovered. Section 768.21(4), Florida Statutes (1983), permits each parent of a deceased minor child to "recover for mental pain and suffering from the date of injury." While the facts of medical, including psychiatric, treatment and loss of work are appropriate subjects for consideration by a jury in its attempt to measure by some reasonably objective standard the degree of mental pain and suffering inflicted on a parent by the death of a child, *neither the cost of such treatment nor the loss of wages is directly compensable under the statute. . .* We therefore affirm on that point with the observation that any perceived unfairness in this result is a matter

properly addressed to the legislature.

There is simply no question that the economic damages awarded to the Moglers for the surviving parents' past and future medical expenses and loss of wages, as well as loss of wages of the decedent[3] are not compensable elements of damages under the Wrongful Death Act.

The district court ignored this clear Florida law, reasoning that the economic damages recoverable in voluntary binding arbitration of medical negligence claims are "controlled by the Medical Malpractice Act and not by the Wrongful Death Act." *Franzen v. Mogler*, 699 So. 2d at 1027. The court's reasoning was explained more fully in the companion case, *St. Mary's Hospital, Inc. v. Phillipe*, *supra* at 1025-1026:

> Defendants also complain that the arbitrators awarded economic damages not permitted by the Wrongful Death Act, specifically lost earning capacity of the decedent. The problem with this argument is that the claim for economic damages in this arbitration is controlled by the Medical Malpractice Act, and not by the Wrongful Death Act. At least two provisions of the Medical Malpractice Act authorize an award for lost earning capacity. *See* §§ 766.202(3) ("'Economic damages' means financial losses which would not have occurred but for the injury giving rise to the cause of action, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity.") and 766.207(7)(a) ("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 . . . [n]et economic damages shall be awardable,

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[3] Even if the estate were entitled to recover loss of prospective net accumulations, which it is not, *see Marks v. Delcastillo*, *supra* at 1267, the estate would not be entitled to recover loss of wages of the decedent unreduced by the cost of his personal consumption. § 768.18(5), Fla. Stat. (1995). As noted by the dissenting arbitrator, this award represents a tremendous windfall to the estate in this regard.

> including . . . loss of earning capacity, offset by any collateral source payments."). We thus find no error in the award of lost earning capacity.

The district court's conclusion is not only wrong, it positively upends the goals expressed by the Legislature when it enacted the Medical Malpractice Act. However, legislative intent is the pole star by which the court must be guided in interpreting these statutory provisions. *Wakulla County v. Davis*, 395 So. 2d 540, 542 (Fla. 1981). To determine the legislative intent, the court must "consider the act as a whole '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 bearing on the subject.'" *State v. Webb*, 398 So. 2d 820, 824 (Fla. 1981), *quoting Foley v. State*, 50 So. 2d 179, 184 (Fla. 1951).

In 1988, the Legislature enacted a comprehensive package of medical malpractice reform measures designed to alleviate a financial crisis in the medical liability insurance industry. Ch. 88-1, *Laws of Florida;* § 766.201, Fla. Stat. (1995). The statutory scheme features a mechanism for voluntary binding arbitration of damages which has as its primary goal the prompt resolution of medical negligence claims. §§ 766.201(2), 766.207, Fla. Stat. (1995). Voluntary binding arbitration offers medical malpractice claimants the benefit of a speedy resolution without the expense and effort required to prove liability, and offers defendants the opportunity to invoke statutory limitations on damages. *See generally University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993), *cert. denied*, 510 U.S. 915 (1993).

The Medical Malpractice Act[4] is made up of a statement of legislative findings and intent;[5] a definitional section, defining the terms used in the Act;[6] a section dealing with presuit investigation of claims;[7] and a section addressing voluntary binding arbitration.[8] In expressing the intent behind the voluntary binding arbitration provisions, the Legislature stated:

> (2) *It is the intent of the Legislature to provide a plan for prompt resolution of medical negligence claims.* Such plan shall consist of two separate components, presuit investigation and arbitration. Presuit investigation shall be mandatory and shall apply to all medical negligence claims and defenses. Arbitration shall be voluntary and shall be available except as specified.
>
> * * *
>
> (b) Arbitration shall provide:
>
> 1. *Substantial incentives for both claimants and defendants to submit their cases to binding arbitration, thus reducing attorney's fees, litigation costs, and delay.*
>
> 2. A conditional limitation on noneconomic damages where the defendant concedes willingness to pay economic damages and reasonable attorney's fees.
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> 3. Limitations on the noneconomic damages components of large awards to provide *increased predictability of outcome of the*

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4 § 766.201-212, Fla. Stat. (1995).

5 § 766.201, Fla. Stat. (1995).

6 § 766.202, Fla. Stat. (1995).

7 §§ 766.203-206, Fla. Stat. (1995).

8 §§ 766.207-212, Fla. Stat. (1995).

claims resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims.

§ 766.201(2), Fla. Stat. (1995)

The Legislature defined "economic damages" as used in sections 766.201-212 as: "financial losses which would not have occurred but for the injury giving rise to the cause of action, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity." § 766.202(3), Fla. Stat. (1995). Section 766.207, Florida Statutes (1995), sets forth the procedures for voluntary binding arbitration and outlines certain limitations on damages which may be recovered:

> (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:
>
> (a) *Net economic damages shall be awardable, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments.*
>
> (b) Noneconomic damages shall be limited to a maximum of $250,000 per incident. . .
>
> (c) Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to s. 766.202(8) and shall be offset by future collateral source payments.

Section 766.209(4), Florida Statutes (1995), outlines the effects of a claimant's refusal to accept a defendant's offer to enter voluntary binding arbitration in similar terms:

> (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. . .
>
> (b) *Net economic damages reduced to present value shall be awardable, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments.*
>
> (c) Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to s. 766.202(8), and shall be offset by future collateral source payments.

Contrary to the conclusion reached by the district court, these statutes do not evidence an intent on the part of the Legislature to displace existing Florida law governing the elements of damages which are compensable, including the Wrongful Death Act.[9] Rather, the statutory scheme evidences a desire on the part of the Legislature to establish certain limitations and guidelines to be applied in calculating and awarding economic damages and noneconomic damages. These limitations and guidelines promote the legislative goal of "increased predictability of outcome of the claims resolution process," which encourages early settlement of claims. § 766.201(2)(b)(3), Fla. Stat. (1995).

The definition of "economic damages" provided in section 766.202(3) was clearly not intended to supplant existing tort law, either by expansion or contraction. The definitions of "economic damages" and "noneconomic damages" provided by the Legislature -- which are plainly broad enough to encompass claims for damages which exist by virtue of the

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[9] "(C)ourts, in construing a statute, must, if possible, avoid such construction as will place a particular statute in conflict with other apparently effective statutes covering the same general field." *Wakulla County v. Davis*, *supra* at 542, *quoting Howarth v. City of DeLand*, 117 Fla. 692, 701, 158 So. 294, 298 (1934).

Wrongful Death Act -- serve to distinguish between the two categories of damages for the purpose of implementing the statutory limitations which apply to each.[10] Noneconomic damages are subject to a "per incident" limitation, and are to be "calculated on a percentage basis with respect to capacity to enjoy life." § 766.207(7)(b), Fla. Stat. (1995). Economic damages, on the other hand, are not subject to a "per incident" limitation, but are subject to other considerations; i.e., awards for economic damages are offset by past and future collateral source payments; future economic damages are payable in periodic payments; and awards for lost wages and loss of earning capacity are subject to an 80 percent limitation. §§ 766.207(7)(a), (c), Fla. Stat. (1995).

Furthermore, these limitations are not only applicable in voluntary binding arbitration proceedings under section 766.207; they are also applicable at trial when a claimant has rejected a defendant's offer to arbitrate. *See* § 766.209(4), Fla. Stat. (1995). The fundamental flaw in the district court's reasoning is evident when the language of section 766.209(4) is considered. The Legislature used the identical language to describe the manner in which economic damages are to be awarded at trial when a claimant *rejects* a defendant's offer to enter voluntary binding arbitration, as it did to describe the manner in which economic damages may be awarded at arbitration. The Legislature surely did not intend to *reward* a claimant for rejecting a defendant's offer to arbitrate by removing the substantive limitations on economic damages recoverable in a wrongful death case.

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[10] *Cf.* § 768.81(1), Fla. Stat. (1995) (definition of "economic damages" for purposes of applying comparative fault statute).

Interpreting the statutes governing voluntary binding arbitration in a manner which provides a windfall to claimants produces an absurd and incongruous result, which cannot be sanctioned. *See Weber v. Dobbins*, 616 So. 2d 956, 958-959 (Fla. 1993) (statutory language should not be interpreted literally where to do so would lead to an absurd result); *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (same); *McKibben v. Mallory*, *supra* at 51 ("Construction of a statute which would lead to an absurd result should be avoided."); *Wakulla County v. Davis*, *supra* at 543 (courts must avoid interpretation of statute which produces unreasonable consequences). The Legislature unequivocally intended to impose *limitations* on the recovery of damages when the arbitration provisions are invoked. There is no indication whatsoever that it intended to *expand* the scope of compensable damages. Had the Legislature intended such a radical departure from well-settled law, it certainly would and should have said so in unequivocal terms. *Carlile v. Game & Fresh Water Fish Commission*, 354 So. 2d 362, 364 (Fla. 1977).

Moreover, having created "one cohesive scheme" for resolution of wrongful death claims when it adopted the current Wrongful Death Act, it is inconceivable that the Legislature would intend to re-introduce fragmentation and uncertainty over the elements of damages recoverable for tortiously-caused deaths. Reading the Wrongful Death Act together with the Medical Malpractice Act, giving effect to the legislative intent of both,[11] compels

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[11] *See Starr Tyme, Inc. v. Cohen*, 659 So. 2d 1064, 1068 (Fla. 1995) ("There must be a hopeless inconsistency between two statutes before rules of construction are applied to defeat the plain language of one of the statutes in favor of the other."); *Holmes County School Board v. Duffell*, 651 So. 2d 1176, 1178-1179 (Fla. 1995)(where the legislature was

a finding that the Wrongful Death Act -- which establishes the personal representative's right to recover damages -- governs the elements of compensable damages, while the manner in which those damages are to be calculated and awarded is governed by section 766.207(7).

Although the district court observed on rehearing that "[t]he Legislature has concluded that voluntary arbitration and predictability of outcome are in the public interest in controlling increased medical care costs,"[12] its conclusion on the issue of economic damages drastically undermines the legislative goals in enacting the Medical Malpractice Act. Voluntary binding arbitration as envisioned by the Legislature encourages the prompt resolution of claims because it removes two major obstacles to early settlement: the arbitrariness inherent in a jury's award of noneconomic damages, and the uncertainty of liability defenses. Once these two elements of uncertainty have been removed, and the range of possible recovery more clearly defined, the chances of settlement increase dramatically. Introducing a new element of uncertainty over the elements of economic damages which are compensable makes it more difficult to settle wrongful death claims before litigation, and

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silent with respect to simultaneous operation of statutes, court is guided by the plain and obvious meaning of both statutes; in the absence of express declaration, court cannot assume that the legislature intended that the provisions of one statute would "trump" the express language of the other); *Carawan v. State*, 515 So. 2d 161, 168 (Fla. 1987)(court must adopt interpretation that harmonizes two related statutory provisions while giving effect to both; construction that gives each statute a field of operation is favored over one which considers the former repealed by implication); *City of Boca Raton v. Gidman*, 440 So. 2d 1277, 1282 (Fla. 1983)("The law favors a rational, sensible construction."); *State v. Gadsden County*, 63 Fla. 620, 58 So. 232, 235 (Fla. 1912) ("[t]he mere fact that a later statute relates to matters covered in whole or in part by a prior statute does not cause a repeal of the older statute.").

[12] *Franzen v. Mogler*, 22 Fla. L. Weekly at D2452 n.3.

therefore does not promote the prompt resolution of medical negligence claims.[13]

Perhaps more fundamentally, the risk that arbitrators will award economic damages which are not recoverable in a judicial forum actively discourages defendants from offering to arbitrate, contrary to the stated legislative intent that parties be encouraged to elect voluntary binding arbitration in order to reduce litigation expenses. § 766.201(2)(b)(1), Fla. Stat. (1995). When defendants offer to enter voluntary binding arbitration, they assume a certain degree of risk that the arbitrators will be naturally inclined toward generosity in awarding economic damages in light of the statutory limitation on noneconomic damages. Because economic damages are, for the most part, readily ascertainable within a certain range,[14] the existence of this risk does not impair the viability of voluntary binding arbitration as an option for prompt resolution of claims.

Defendants seeking to take advantage of the arbitration provisions should not, however, be required to assume the further risk that the arbitrators will award elements of economic damages which are not otherwise compensable under Florida law. This additional risk *does* impair the viability of arbitration as an option for claims resolution because it discourages defendants from electing arbitration as a means of resolving medical negligence

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[13] Alleviating uncertainty regarding the damages recoverable was one of the goals behind the Wrongful Death Act as well. *See McKibben v. Mallory, supra* at 54.

[14] This is consistent with the Legislature's observation in the preamble to Chapter 88-1, Laws of Florida: "WHEREAS, the Legislature finds that there are certain elements of damage presently recoverable that have no monetary value, except on a purely arbitrary basis, while other elements of damage are either easily measured on a monetary basis or reflect ultimate monetary loss. . . " *University of Miami v. Echarte, supra* at 192 n.12.

claims. Defendants are understandably reluctant to chose a forum where there is a risk that the claimant will recover many multiples[15] of the amount of economic damages which could have been recovered had the claim simply been denied at the conclusion of presuit screening. Because defendants are unwilling or unable to accept the intolerable risk that a result similar to that condoned by the district court below will occur in arbitration, the voluntary binding arbitration mechanism cannot function as intended by the Legislature. The end result is that cases which could have been promptly resolved instead proceed into litigation, contrary to the expressed intent of the Legislature.

In the final analysis, adopting conditional limitations on the recovery of noneconomic damages where a defendant is willing to admit liability and pay economic damages will have been a futile gesture on the part of the Legislature if the scope of recovery of economic damages is to be expanded beyond all previously-recognized legal boundaries. The district court's summary affirmance of an award which included $881,565 in economic damages which could not have been recovered had the case proceeded to litigation lays waste to the legislative goals of encouraging parties to elect voluntary binding arbitration in order to reduce litigation expenses, and facilitating early settlement of claims by increasing the "predictability of outcome."

A construction of the applicable statutes which permits the recovery of economic damages which are not compensable under applicable Florida law, including the Wrongful

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[15] The Moglers were awarded over *36 times* the amount of economic damages they would have been entitled to recover in a jury trial.

Death Act, will effectively eliminate voluntary binding arbitration as an option for alternative claims resolution. Moreover, such a construction will undermine the very purpose of the Wrongful Death Act, because it will encourage fragmentation of wrongful death remedies, and introduce an element of confusion and uncertainty into an area of the law which has been well-settled. Interpreting the statutes in a manner which gives full reach to both the Wrongful Death Act and the Medical Malpractice Act is not only possible, it is the only rational, sensible construction of the statutes.

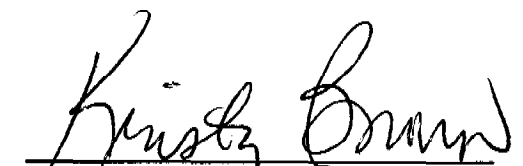
CONCLUSION

Based upon the foregoing arguments and authorities, Amicus Curiae, Florida Defense Lawyers Association, respectfully requests this Court to quash the decision of the Fourth District Court of Appeal to the extent that it affirms the arbitrators' award of economic damages which are not recoverable under the Wrongful Death Act.

Respectfully submitted,

GAIL LEVERETT PARENTI

and



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Amicus Curiae Brief of Respondents was mailed this 12th day of January, 1998, to: **Ralph Anderson, Esq.,** Hicks, Anderson & Blum, 100 North Biscayne Boulevard, Suite 2402, Miami, Florida 33132; **Jane Kreusler-Walsh, Esq.**, Jane Kreusler-Walsh, P.A., 501 South Flagler Drive, Suite 503, West Palm Beach, Florida 33401; **Jeffrey Fulford, Esq.**, Bobo, Spicer, Ciotoli, Fulford, Bocchino, DeBevoise & Le Clainche, 222 Lakeview Avenue, Sixth Floor, West Palm Beach, Florida 33401; **Lake Lytal, Jr., Esq.**, Lytal, Reiter, Clark, Sharpe, Roca, Fountain & Williams, Post Office Box 4056, West Palm Beach, Florida 33402-4056; **Joseph H. Lowe, Esq.**, Winitz, Minkin & Lowe, 9350 South Dixie Highway, Penthouse 1, Miami, Florida 33156; **Theodore Babbitt, Esq.**, Post Office Box 24426, West Palm Beach, Florida 33402; and **Claudia B. Greenberg, Esq.**, Grossman & Roth, P.A., 2665 South Bayshore Drive, Grand Bay Plaza, Penthouse One, Miami, Florida 33133.

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