IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

vs.

CASE NO. 91,894
4DCA CASE NO. 96-02356

HENRY and DONNA MOGLER,
individually, and as personal
representatives of THE ESTATE
OF MICHAEL MOGLER, deceased,

Respondents.
_____/

HENRY and DONNA MOGLER,
individually, and as personal
representatives of THE ESTATE
OF MICHAEL MOGLER, deceased,

Petitioners,

vs.

CASE NO. 91,934
4DCA CASE NO. 96-02356

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

Respondents.
_____/

RESPONDENTS' ANSWER BRIEF/CROSS-PETITIONERS' INITIAL BRIEF ON CERTIFIED QUESTION

LAKE LYTAL, JR. and
JOE REITER of
LYTAL REITER CLARK
FOUNTAIN & WILLIAMS
P. O. Box 4056
West Palm Beach, FL 33402-4056
(561) 655-1990

and

JANE KREUSLER-WALSH of
JANE KREUSLER-WALSH, P.A.
Suite 503 - Flagler Center
501 S. Flagler Drive
West Palm Beach, FL 33401
(561) 659-5455

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PREFACE

This case involves issues pertaining to a final arbitration award following binding voluntary arbitration under sections 766.201-766.212, Florida Statutes, and Florida Administrative Code Chapter 60Q-3. Petitioners/defendants seek review based on conflict. Respondents/cross-petitioners/plaintiffs seek review based on the following certified question:

> WHEN THE ALLEGED MEDICAL NEGLIGENCE RESULTS IN THE DEATH OF A PATIENT, DOES THE CAP ON NONECONOMIC DAMAGES OF $250,000 PER INCIDENT IN A VOLUNTARY ARBITRATION UNDER §766.207 APPLY TO EACH BENEFICIARY UNDER THE WRONGFUL DEATH ACT, OR DOES THE $250,000 CAP APPLY IN THE AGGREGATE TO ALL WRONGFUL DEATH ACT BENEFICIARIES?

(A3, pp. 2-3).

The parties are referred to as plaintiffs and defendants or by their proper names. The following symbols are used:

R - Record
T - Transcript
A - Petitioners' Appendix

STATEMENT OF THE CASE AND FACTS

Petitioners' statement of the case and facts is essentially correct, but contains several misleading statements which require further comment.

Plaintiffs argued that they were entitled to separate noneconomic damages for each claimant, the Estate and the two

surviving parents (T 310-311). The arbitrators, however, awarded the Estate no noneconomic damages (R 267-269).

SUMMARY OF ARGUMENT

The Moglers and their son's estate advised Dr. Franzen and his P.A. of their claims for medical malpractice, arising from his treatment of their son, which resulted in his death. The parties agreed to voluntary binding arbitration under the Medical Malpractice Act. By agreeing to binding arbitration, the parties elected to have the claims determined by sections 766.201-766.212 and gave the arbitrators sole authority to determine plaintiffs' recoverable damages. See Mogler v. Franzen, 669 So. 2d 269, 271 (Fla. 4th DCA 1995). The Fourth District erroneously exceeded the statutory scope of review in analyzing the recoverable economic damages and the awards of noneconomic damages to each claimant.

If reviewable, the awards required affirmance. Defendants inconsistently invoke limitations and remedies of the Medical Malpractice and Wrongful Death Acts that suit them. They contend they are entitled to the limitations on noneconomic damages provided in section 766.207, but ignore that same statute's provision regarding economic damages. The legislature went to great lengths in the Medical Malpractice Act to define the economic and noneconomic damages a claimant can recover in a medical

malpractice action where the parties voluntarily agree to binding arbitration. The Fourth District correctly held that the Medical Malpractice Act exclusively governs the claimant's damages when the parties agree to arbitrate under the Act.

The Fourth District incorrectly determined, however, that the cap on noneconomic damages applies in the aggregate to the patient and not separately to each claimant. The arbitrators correctly interpreted section 766.207(7)(b) as affording noneconomic damages to each claimant. As stated in section 766.102(1), the Medical Malpractice Act applies to "any action for recovery of damages based on death or personal injury of any person in which it has alleged that such death or injury resulted from the negligence of the health care provider...." There are two types of medical malpractice actions -- those based on personal injury and those based on death. In personal injury claims, the patient has a claim to recover damages for personal injuries and medical expenses; the patient's spouse and children have separate causes of action for loss of consortium. Where the patient dies, the personal representative of the estate has a cause of action for the patient's/decedent's personal injuries and medical expenses; the patient's/decedent's survivors have separate causes of action for their damages. The statute clearly places a cap on each claimant's cause of action regardless of who brings the claim.

Defendants agreed to admit liability and arbitrate damages and must accept the ramifications of their choice. That portion of the arbitration award affirming the measure of damages under the Medical Malpractice Act should be approved. That portion holding that the statutory cap on noneconomic damages applies in the aggregate rather than to each claimant should be disapproved and the case remanded with directions to reinstate the arbitration award.

ARGUMENT

STANDARD AND SCOPE OF REVIEW

Plaintiffs submit that this Court should not address either certified question, except to hold that these issues were for the arbitrators to decide, requiring reinstatement of the arbitration award. Section 766.212(1), Florida Statutes, sets forth the standard of review in medical malpractice arbitration and limits appellate review of arbitration awards to "[t]he amount of an arbitration award..., the evidence in support of [the arbitration award], and the procedure by which [the arbitration award] is determined...." The Fourth District misinterpreted this standard and exceeded the statutory scope of review by delving into matters inherent to binding arbitration -- the recoverable economic damages and the cap on noneconomic damages (A 2, p. 6).

The $250,000 statutory cap on noneconomic damages is not an aspect of the amount of the award, but an intrinsic aspect of the arbitration itself. The existence of this cap sets arbitration apart from trial. The arbitrators' alleged error involved their interpretation of section 766.207(7)(a) and (b), not the amount of the arbitration award. Thus, the recoverable economic damages and the caps on noneconomic damages are unreviewable as the arbitration award was within the scope of the submission and the procedures comported with sections 766.201-766.212. See Schnurmacher Holding, Inc. v. Noriega, 542 So. 2d 1327, 1328-1329 (Fla. 1989).

The legislature plainly and deliberately limited appellate review in medical malpractice arbitration to the amount of the arbitration award, the evidence in support of that amount, and the procedures by which the arbitrators determined the amount. See §766.212(1), Fla. Stat. This limitation comports with the nature of arbitration. The Fourth District erroneously created a much broader standard of review and essentially imposed the same standard for arbitration proceedings as for trial, defeating any advantage to arbitration. Arbitration under the Medical Malpractice Act severely restricts a claimant's noneconomic damages, which provides a tremendous benefit to defendants.[1]

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[1]Grayson v. U.S., 748 F.Supp. 854, 862-863 (S.D. Fla. 1990), aff'd in part, vacated in part, 953 F.2d 650 (11th Cir. 1992),

The Fourth District's interpretation of section 766.212(1) as affording a "hybrid" form of limited review of malpractice arbitration awards conflicts with University of Miami v. Echarte, 618 So. 2d 189, 194 (Fla.), cert. denied, 510 U.S. 915 (1993), where this Court defined the standard of review as "limited appellate review of the arbitration award requiring a showing of 'manifest injustice'." (Emphasis added). This Court further held that an agreement to arbitrate under section 766.207 "binds both parties to the arbitration panel's decision and precludes other remedies by the claimant against the defendant." Id. at 193. The Fourth District's interpretation also conflicts with Santelli v. Arean, 616 So. 2d 1154 (Fla. 2d DCA), rev. denied, 624 So. 2d 268 (Fla. 1993), which held that claimants who agreed to voluntary binding arbitration under section 766.207 were precluded from challenging the constitutionality of the cap on noneconomic damages, even where the only cases on point at that time had held the cap unconstitutional.

The Fourth District's interpretation of the standard of review in section 766.212(1) ignores its plain language and the nature of the proceeding -- voluntary binding arbitration. The Fourth

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included an extensive study of noneconomic damages awarded to parents of deceased minor children and noted that in 1949, the average award was $900,000 per parent.

District exceeded the statutory standard of review, requiring disapproval of its opinion and reinstatement of the arbitration award.

POINT ON APPEAL

ECONOMIC DAMAGES AWARDABLE IN VOLUNTARY BINDING ARBITRATIONS OF MEDICAL MALPRACTICE ACTIONS WHERE THE MEDICAL NEGLIGENCE RESULTS IN THE DEATH OF A PATIENT ARE CONTROLLED BY THE MEDICAL MALPRACTICE ACT.

The arbitrators properly awarded damages pursuant to section 766.207, Florida Statutes, because the Medical Malpractice Act and not the Wrongful Death Act provides the exclusive remedies for medical malpractice when the parties agree to arbitrate. Defendants ignore that the arbitration provisions of the Medical Malpractice Act provide exclusive remedies where a health care provider, engaged in providing services involving the exercise of medical judgment, causes personal injuries or death and where the parties agree to arbitration. See Echarte, 618 So. 2d at 195; Porter v. Rosenberg, 650 So. 2d 79, 82 (Fla. 4th DCA), rev. denied, 661 So. 2d 825 (Fla. 1995); §§766.202-212, Fla. Stat.

In enacting the Medical Malpractice Act, the legislature adopted a new scheme of remedies and included specific elements of economic damages, including an 80% limit on some economic damages,

setoffs for future collateral sources, and restrictions on noneconomic damages. The plain language of section 766.207(7)(a) demonstrates the legislature's intent to alter the damages awardable in medical malpractice cases where the parties agree to arbitrate. §§ 766.207(7)(a), Fla. Stat.

That courts in other cases have applied wrongful death damages in medical malpractice cases is irrelevant because the parties there had not agreed to arbitrate. When faced with that precise issue in other contexts, however, courts have upheld the exclusive nature of the particular statutory remedy, even where the wrong resulted in death.

In Beverly Enterprises-Florida, Inc. v. Spilman, 661 So. 2d 867 (Fla. 5th DCA 1995), rev. denied, 668 So. 2d 602 (Fla. 1996), defendants made the identical argument defendants make here, but in the context of the Nursing Home Act, section 400.023, Florida Statutes. Like the arbitration provisions of the Medical Malpractice Act, the Nursing Home Act affords remedies not permitted under the Wrongful Death Act, i.e. damages for the decedent's physical pain and mental suffering. Defendants in Spilman contended that the Wrongful Death Act controlled the nature and measure of damages where a person died as a result of the deprivation of his or her nursing home resident's rights. The

Fifth District disagreed and held that the Nursing Home Act controls the damages. Id. at 869.

Similarly, University of Miami v. Klein, 603 So. 2d 651 (Fla. 3d DCA), rev. denied, 613 So. 2d 6 (Fla. 1992), held that birth-related neurological injuries that result in post-delivery death are governed exclusively by the Neurological Injury Compensation Plan. See also Ash v. Stella, 457 So. 2d 1377 (Fla. 1984)(holding that the applicable statute of limitations in a medical malpractice action where the medical negligence resulted in death is the medical malpractice statute of limitation and not the wrongful death statute); Arthur v. Unicare Health Facilities, Inc., 602 So. 2d 596 (Fla. 2d DCA), rev. denied, 613 So. 2d 4 (Fla. 1992)(same).

Defendants' reliance upon Wade v. Alamo Rent-A-Car, Inc., 510 So. 2d 642 (Fla. 4th DCA 1987), is misplaced. Wade was not a medical malpractice action and contains no discussion of the Medical Malpractice Act or the remedies peculiar to a medical malpractice arbitration. In fact, Wade contains language that supports plaintiffs' argument that the exclusive remedies contained in the Medical Malpractice Act control:

> 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."

Wade, 510 So. 2d at 643 (Italics in original; underlining added).

In a medical malpractice action where the parties agree to arbitration, the right to recover damages is a creature of statute -- the arbitrations provisions of the Medical Malpractice Act. §§766.202-766.207, Fla. Stat. Thus, the court must look to those provisions alone to determine who can recover and what they can recover. Under section 766.207(7)(a), each claimant can recover net economic damages "including, but not limited to, past and future medical expenses and 80% of wage loss and loss of earning capacity, offset by any collateral source payments." The only interplay with the Wrongful Death Act is that it provides the vehicle to litigate the causes of action following a death that resulted from medical negligence.

In a medical malpractice case where the parties agree to arbitrate and where the negligence results in death, the personal representative is the nominal plaintiff who brings the suit on behalf of the real parties-in-interest, the survivors and the decedent's Estate. See Ding v. Jones, 667 So. 2d 894, 898 (Fla. 2d

DCA 1996). The survivors and the Estate each have independent causes of action. See Id., at 898 (citing Rimer v. Safecare Health Corp., 591 So. 2d 232, 235 (Fla. 4th DCA 1991), approved, 620 So. 2d 161 (Fla. 1993)). As Justice Ehlrich recognized in his concurring opinion in Variety Children's Hosp. v. Perkins, 445 So. 2d 1010, 1013 (Fla. 1983):

> "The Florida Supreme Court has consistently found that ... [the] Wrongful Death Act ... creates an independent cause of action in the statutory beneficiaries." Perkins v. Variety Children's Hospital, 413 So. 2d at 761. This has been true throughout the history of the Act in Florida, despite the variety of revisions and reenactments it has undergone.

(Emphasis added, omissions in original).

Defendants' further argument, that the Fourth District's application of the Medical Malpractice Act to each claimant, Michael's father, his mother and his Estate, contravenes the Medical Malpractice Act and is inconsistent with the Fourth District's opinion regarding its interpretation of claimant in the context of noneconomic damages, ignores the definition of claimant, as set forth in the Act. A claimant is "any person who has a cause of action arising from medical negligence." Fla. Stat. §766.202(1). As this Court recognized in Variety Children's Hospital, 445 So. 2d 1013, each statutory beneficiary under the Wrongful Death Act has an independent cause of action. In this

case, where Michael died as a result of defendants' negligence, there are three statutory beneficiaries: Michael's Estate, his father and his mother. Section 766.207(7)(a) affords each claimant, i.e. each person who has a cause of action arising from medical negligence, a claim for, among other things, financial losses resulting from past and future medical expenses, wage loss and loss of earning capacity. These are exactly the damages the arbitrators considered and awarded here.

Moreover, the record contains substantial competent evidence to support the amount of economic damages the arbitrators awarded. Section 766.202(3), defines "economic damages" 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% of wage loss and loss of earning capacity." Section 766.207(7) implements this intent by limiting the claimant's recovery to "80% of wage loss and loss of earning capacity." This comports with the legislature's intent in section 766.201 to limit certain aspects of economic damages, i.e. wage loss and earning capacity. Thus, section 766.207 is not, as defendants contend, merely a limitation on economic losses (IBR 17).[2]

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[2]IBR denotes Petitioners' Initial Brief.

Defendants challenge the amount of lost future wages awarded to Michael's Estate as excessive, but cite no case requiring their reduction. Just as section 766.207(7)(a) defines the economic damages available to each claimant, section 766.207(7)(a) also describes the only setoffs available -- 80% of wage loss and loss of earning capacity, less any collateral source payments. The arbitrators gave defendants full credit for this reduction and awarded only 80% of the claimants' lost wages and lost earning capacity. Substantial competent evidence supports this award, requiring affirmance.

Defendants' additional challenge to the lost support and services award to the parents, based on U.S. v. Dempsey, 635 So. 2d 961 (Fla. 1994), is without merit since substantial competent evidence exists to support it. Under Dempsey, plaintiffs sought reimbursement for "ordinary day-to-day" services Michael would have rendered to them. These services are recoverable without proof of extraordinary income producing ability. Id., at 965. The arbitrators accepted plaintiffs' economic expert's calculation for lost support and services. These calculations were conservative (T 144). Defendants presented their own expert who used a similar minimum wage approach and calculated damages totaling about $3,000 less than the arbitrators awarded (T 161-163).

The arbitrators properly applied the measure of economic damages mandated by the arbitration provisions of the Medical Malpractice Act and correctly calculated those damages. This Court should approve the Fourth District's opinion, affirming the economic damage awards.

POINT ON CROSS-APPEAL AND CERTIFIED QUESTION

THE CAP ON NONECONOMIC DAMAGES AWARDABLE IN VOLUNTARY BINDING ARBITRATIONS OF MEDICAL MALPRACTICE ACTIONS APPLIES SEPARATELY TO EACH CLAIMANT.

Section 766.202(7) defines "noneconomic damages" as

> nonfinancial losses which would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses.

(Emphasis added).

Section 766.207(7) sets forth the damages awardable in arbitration. Section 766.207(7)(b) pertains to noneconomic damages and provides in context as follows:

> (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, and shall be calculated on a percentage basis with respect to capacity to enjoy life, so that a finding that the claimants' injuries resulted in a 50-percent reduction in his capacity to enjoy life would warrant an award of not more than $125,000 noneconomic damages.
>
> (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.

(Emphasis added).

When read in context, the "per incident" language in section 766.207(7)(b) clearly means that a claimant who has been damaged by multiple incidents of medical negligence is limited to $250,000 in noneconomic damages for each incident. This interpretation comports with the legislature's clear and repeated statement of the arbitration provisions in terms of a single claimant, indicating its intent to impose a cap on that claimant's recovery of noneconomic damages and not on the recovery against the individual

defendant. See §§766.106(1) and (2), 766.202(1), 766.207(7) (k), Fla. Stat.

Section 766.202(1) defines a claimant as "any person who has a cause of action arising from medical negligence." Section 766.106(2) requires each claimant to provide a notice of intent to each prospective defendant, although claimants can join claims in a single notice of intent. Significantly, section 766.207(7)(k) requires each defendant to submit an offer to arbitrate "to each claimant who has joined the notice of intent to initiate litigation."

The Administrative Rules promulgated by the Division of Administrative Hearings to implement the arbitration procedures in sections 766.201-.212 further demonstrate the legislature's intent to impose the cap per claimant and not in the aggregate. Administrative Rule 60Q-3.024 pertains to the arbitration award and provides in part as follows:

> (3) The arbitration award shall name all arbitrating defendants, indicating applicable policy limits for any insurer or self-insurer; and shall specify the amount of all damages as to each claimant, as a lump sum, with future damages, if any, reduced to present value.
>
> (4) In addition, unless waived by all parties, the arbitration award shall, as to each claimant who proves future economic

> damages, specify sufficient periodic payments to compensate the claimant for future economic damages, after offset for collateral sources, by setting the dollar amounts of the payments, the interval between payments, and the date of the final payment. When an arbitration award specifies such periodic payments, it shall also specify noneconomic damages and net economic damages already sustained and state each as a lump sum for each claimant.
>
> (5) The arbitration award shall specify the amount of any attorney's fees awarded and the name of the claimant or claimants to whom the fees are awarded. When a lawyer or a group of lawyers represents more than one claimant, attorney's fees may be awarded jointly to the claimants represented.

(Emphasis added).

Echarte, 618 So. 2d at 190, reinforces this interpretation:

> The issue here is whether sections 766.207 and 766.209, which provide a monetary cap on noneconomic damages in medical malpractice claims when a party requests arbitration, violate a claimant's right of access to the courts. We find that the statutes at issue provide a commensurate benefit to the plaintiff in exchange for the monetary cap, and thus, we hold the statutes satisfy the right of access to the court....

(Emphasis added).

This interpretation makes sense because each claimant has a separate cause of action, including where the negligence results in

death. The Fourth District's holding on rehearing, that the personal representative is the sole claimant in a medical malpractice action where the negligence results in death and the only individual "who derives a cause of action from the alleged medical negligence of the provider" (A 3, p. 2), is simply wrong and ignores the statutory definition of claimant as provided in section 766.202(1). The Fourth District ignored that the Wrongful Death Act creates independent causes of action in the estate and in each statutory beneficiary. See Variety Children's Hospital, 445 So. 2d at 1013; Ding, 667 So. 2d at 898; §768.21(1), Fla. Stat. The personal representative is the individual appointed by statute to bring the wrongful death action. The personal representative conducts the litigation on behalf of those for whose use it was instituted -- each survivor and the decedent's estate. See Ding, 667 So. 2d at 898.

The Fourth District's statement that "it is difficult to imagine multiple claimants for damages arising from a single incident of medical negligence" (A , p.2) is simply wrong. In a medical malpractice action involving a death there are distinct categories of claimants with distinct causes of action. Here, the claimants are: (1) each parent as a survivor, entitled to damages to compensate for his and her losses; and (2) Michael, the decedent through his Estate, entitled to damages that accrued to him because

of the tort. Each is a claimant and each has his or her separate cause of action that arose "out of the rendering of, or the failure to render, medical care or services." §766.202(1), Fla. Stat.

The same result applies where the patient survives the negligence because loss of consortium is a separate cause of action. This Court recognized this in Metropolitan Dade County v. Reyes, 688 So. 2d 311 (Fla. 1996), and held that loss of consortium is a separate cause of action; thus, the claimant seeking damages for loss of consortium must give proper notice under the sovereign immunity statute:

> Florida law recognizes that loss of consortium is a separate cause of action belonging to the spouse of the injured married partner, and though derivative in the sense of being occasioned by injury to the spouse, it is a direct injury to the spouse who has lost the consortium. Busby v. Winn & Lovett Miami, Inc., 80 So.2d 675 (Fla. 1955); see also Ryter v. Brennan, 291 So.2d 55 (Fla. 1st DCA), cert. denied, 297 So.2d 836 (Fla. 1974); Resmondo v. International Builders of Fla., Inc., 265 So.2d 72 (Fla. 1st DCA 1972) (both cases holding that husband's release did not abate wife's cause of action for loss of consortium, but was a property right in her own name); but see Gates v. Foley, 247 So.2d 40 (Fla. 1971) (termination of husband's cause of action because of adverse judgment on the merits should bar wife's cause of action for loss of consortium). ...

Id. at 312 (emphasis added; quoting Orange County v. Piper, 523 So. 2d 196, 198 (Fla. 5th DCA), rev. denied, 531 So. 2d 1354 (Fla. 1988)).

This Court distinguished Chandler v. Novak, 596 So. 2d 749 (Fla. 3d DCA 1992), which held that a spouse in a medical malpractice action need not give separate statutory presuit notice, because Chandler involved a different statute that did not waive sovereign immunity and, thus, was not subject to the same type of statutory construction. See Reyes, 688 So. 2d at 312-313. Despite this distinction, the portion of Chandler that held that "[a] derivative action is not a separate and distinct action," is no longer good law. See Reyes, 688 So. 2d at 312-313.

In a medical malpractice action where the patient survives, the spouse of the injured patient has a separate cause of action for loss of consortium, entitling each claimant to noneconomic damages. The identical analysis applies to children seeking recovery for the loss of a parent's services, comfort, companionship and society under section 768.0415, Florida Statutes., as a result of medical negligence. While the child's damages are "derivative," each child has a separate cause of action, rendering each child a claimant entitled to separate recovery under the Medical Malpractice Act. See Dempsey, 635 So.

2d at 965; Gomez v. Avis Rent A Car System, Inc., 596 So. 2d 510 (Fla. 3d DCA 1992).

The plain language of section 766.207(7)(b) places a cap of $250,000 on noneconomic damages on each claimant's cause of action, regardless of who brings the claim. Courts in other jurisdictions interpreting similar language have so held. Sander v. Geib, Elston, Frost Prof'l Ass'n, 506 N.W.2d 107, 127 (S.D. 1993), interpreted South Dakota's cap on damages in medical malpractice actions as applying separately to each statutory beneficiary entitled to bring a wrongful death action. See also Schwarder v. U.S., 974 F.2d 1118 (9th Cir. (Cal.) 1992); Knowles v. U.S., 91 F.3d 1147 (8th Cir. (S.D.) 1996). Tulewicz v. Southeastern Pennsylvania Transp. Authority, 606 A.2d 427 (Pa. 1992), held that a $250,000 cap on damages applies separately to consortium claims because they are separate causes of action and the cap is designed to award damages to distinct groups of plaintiffs.

Atkins v. Strayhorn, 273 Cal. Rptr. 231, 238-240 (Cal. Ct. App. 1990),[3] interpreted a statute similar to Florida's and held

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[3]California's Civil Code Section 3333.2 provides in pertinent part:

> (a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be able to recover noneconomic losses to

that the $250,000 limit of noneconomic damages applies separately to the injured patient and the injured patient's spouse's consortium claims:

> This statute focuses on the "injured plaintiff" who is entitled to recover noneconomic losses in an amount not to exceed $250,000. Nothing in this statute limits the defendant's liability to that amount. Had the legislature intended to limit the defendant's liability encompassing all legal proceedings arising from a single act of professional negligence at $250,000, it would have included the language "single act of negligence" to accomplish this purpose ... rather, recovery is limited for the discrete injury to each spouse because his damages flow from injury, not negligent acts.

Conversely, courts in other states that apply the cap in the aggregate interpret grossly different statutory language. For example, Colorado's medical malpractice damage statute provides as follows:

> The total amount recoverable for all damages for a course of care for all defendants in any civil action for damages in tort brought against a health care professional ..., shall not exceed one million dollars, present value

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> compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.
>
> (b) In no action shall the amount of damages for noneconomic losses exceed two hundred and fifty thousand dollars ($250,000).

> per patient, including any derivative claim by any other claimant, of which not more than two hundred fifty thousand dollars, present value per patient, including any derivative claim by any other claimant, shall be attributable to noneconomic loss or injury ...' except that if, upon good cause shown the court determines that the cap is unfair in light of the total amount of lost earnings and medical expenses added to other damages, in which case the court may then award damages in excess of the $1,000,000 cap.

Colo. Rev. Stat. §13-64-302 (1996 Supp.)(emphasis added).

Unlike Florida's statute, Colorado's statute makes clear that the cap on noneconomic damages is applied on a "per patient" basis and includes separate derivative claims. Florida's statute, however, is a "per claimant" cap, phrased in terms of the maximum amount recoverable by a claimant and not in terms of the maximum amount recoverable from a health care provider "per patient."

In contexts where the Florida legislature intended to impose a cumulative limitation on aggregate recovery of all claimants it has so stated. For example, the Florida sovereign immunity statute provides in section 768.28(5):

> (5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liabilities shall not include punitive damages or interest for the period before

> judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim or a judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000.

(Emphasis added). See Gerard v. Department of Transp., 472 So. 2d 1170, 1171-1172 (Fla. 1985)(interpreting this statute).

To construe section 766.207(7)(b) as foreclosing recovery by claimants with separate causes of action because there was only one patient who suffered the malpractice or because, in the case of death, only one person can bring the suit, thwarts the legislature's intent and further deprives injured claimants of noneconomic damages. The legislature obviously recognized that persons other than the injured or deceased patient have causes of action for medical negligence. Through the arbitration provisions of the Medical Malpractice Act, the legislature provided a significant benefit to health care providers by severely limiting the noneconomic damages of each claimant. Had the legislature intended to place a limit on a health care provider's liability for noneconomic damages of $250,000 for all claims, it could have and would have done so. Rather, The legislature intended to afford

noneconomic damages to each claimant who has a cause of action for medical negligence and incurred damages.

Further, if the legislature intended to apply the $250,000 cap on noneconomic damages in the aggregate to all Wrongful Death Act beneficiaries, the arbitration provisions of the Medical Malpractice Act are unconstitutional as applied. See Vildibill v. Johnson, 492 So. 2d 1047, 1050 (Fla. 1986); De Ayala v. Florida Farm Bureau Cas. Ins. Co., 543 So. 2d 204 (Fla. 1989). For example, under the defendants' interpretation, if the survivors were twins, age 8, whose mother had died, they would be limited to noneconomic damages of $150,000 each. If there were only one 8 year old surviving child in the same case, that one survivor would be entitled to $250,000. This is an arbitrary and illogical result that violates equal protection, due process and access to the courts which renders the arbitration provisions of the Medical Malpractice Act unconstitutional.

Clearly, Michael's Estate and his parents have separate "causes of action". Each is a claimant and each is entitled to separate damages as enumerated in the Medical Malpractice Act. Were it not for the arbitrary limits set forth in the Medical Malpractice Act, each claimant would be entitled to full noneconomic damages which undoubtedly would have exceeded the

$250,000 limit set by the legislature. See Grayson, 748 F.Supp. at 862-863.

The arbitrators properly interpreted the Medical Malpractice Act as affording noneconomic damages to each claimant. This Court should disapprove the Fourth District's decision and reinstate the arbitrators' award.

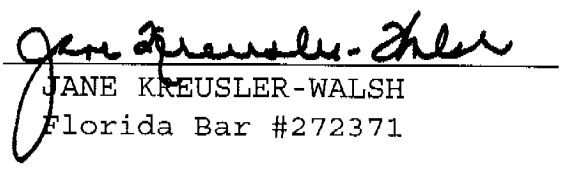
CONCLUSION

That portion of the Fourth District's opinion affirming the measure of economic damages under the Medical Malpractice Act should be approved. That portion of the decision holding that the statutory cap on noneconomic damages applies in the aggregate rather than to each claimant should be disapproved and the case remanded with directions to reinstate the arbitration award.

LAKE LYTAL, JR. and
JOE REITER of
LYTAL REITER CLARK
FOUNTAIN & WILLIAMS
P. O. Box 4056
West Palm Beach, FL 33402-4056
(561) 655-1990

and

JANE KREUSLER-WALSH of
JANE KREUSLER-WALSH, P.A.
Suite 503 - Flagler Center
501 S. Flagler Drive
West Palm Beach, FL 33401
(561) 659-5455

By: 
JANE KREUSLER-WALSH
Florida Bar #272371