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,

Respondents.

ON PETITION FOR REVIEW FROM THE DISTRICT
COURT OF APPEAL FOURTH DISTRICT
CASE NO: 96-2356

PETITIONER'S INITIAL BRIEF ON THE MERITS

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FLORIDA STATUTES

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STATEMENT OF THE CASE AND FACTS

This action arises from an arbitration award in favor of the Respondents, Henry and Donna Mogler ("the Moglers"), in a wrongful death case arising out of medical malpractice.

The decedent, Michael Mogler, the Moglers' minor son, was treated by Petitioner, Dirk Franzen, M.D. ("Dr. Franzen"). Michael Mogler died on February 16, 1993. Thereafter, the Moglers served a Notice of Intent to Initiate Litigation on Dr. Franzen and his Professional Association, claiming that Dr. Franzen had committed medical malpractice which resulted in Michael's death. The Notice of Intent was sent pursuant to Florida Statute § 766.106(2) on behalf of the Estate of Michael Mogler and the Moglers individually as the surviving parents. In response, Dr. Franzen offered to submit the issue of damages to voluntary binding arbitration, pursuant to Section 766.207, Fla. Stat., contingent upon the limitation of general damages provided for in that statute. The Moglers accepted this offer of arbitration unconditionally.

During arbitration discovery, a dispute arose as to the damages recoverable in the upcoming arbitration proceeding. See Mogler v. Franzen, 669 So. 2d 269 (Fla. 4th DCA 1996). Dr. Franzen filed a declaratory action seeking a determination that psychiatric care and treatment for the parents of a deceased child were not recoverable elements of economic damages in the arbitration of a wrongful death claim based on medical malpractice. Id. at 270. The circuit court, finding that it had jurisdiction, resolved this question in favor of Dr. Franzen. The Fourth District reversed,

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finding that the trial court had no jurisdiction to consider the issue prior to arbitration. Id. at 271. Although recognizing Dr. Franzen's argument that an arbitration award is subject to judicial appellate review pursuant to Sections 766.212(1) and 120.68, the Fourth District nevertheless found that declaratory relief was not available to a party prior to the rendering of an arbitration award. Id.

This wrongful death claim was thereafter arbitrated on June 3 and 4, 1996. (R. 267). Dr. Franzen's position at arbitration, consistent with his position in both the declaratory action and first appeal, was that the Moglers' claim for damages resulting from Michael's death was governed by the Wrongful Death Act. (T. 342). Dr. Franzen contended that since the Medical Malpractice Act's arbitration provisions merely provided a procedural alternative to a jury trial, the damages circumscribed by the Wrongful Death Act had to be applied in awarding damages in voluntary arbitration proceedings, pursuant to the Medical Malpractice Act, involving a wrongful death. (R. 121; T. 335, 342).

Thus, Dr. Franzen argued that the Moglers were not entitled to recover the expense of psychiatric treatment or Donna Mogler's lost wages; that Donna and Henry could not recover for loss of support and services because they could not satisfy the applicable criteria for such an award; and that there was no viable claim here for Michael's lost wages and/or the estate's net accumulations.[1] (T. 342, 344, 349).

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[1]On the issue of noneconomic damages, Dr. Franzen argued that the $250,000 limit on noneconomic damages could be applied only once, since there was only one medical incident at issue.

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The Moglers took the opposite position at arbitration. Although seeking recovery for a wrongful death claim, the Moglers argued that the Wrongful Death Act did not apply. Instead, they claimed that they were not limited to the damages provided in Section 768.21[2], but rather were entitled to a completely separate scheme of damages solely because the damages were being assessed at arbitration rather than at trial. (T. 251).

In this connection, the Moglers argued that they were entitled to economic damages consisting of their own past and future psychiatric care, Donna Mogler's lost wages, and both parents' loss of support and services. (T. 9,313, 317). Furthermore, they contended that Michael's estate should recover Michael's future lost wages, with no deduction for living expenses. The Moglers also argued that the $250,000 per-incident-cap on noneconomic damages provided by Section 766.207(7)(b) should be applied three times. (T. 367)(T. 315-316). Under the Moglers' theory, Henry Mogler, Donna Mogler, and the Estate of Michael Mogler were each "claimants" under Section 766.202(1), and were each entitled to an award of $250,000 in noneconomic damages. (T. 310-311).

The final arbitration award, entered on June 27, 1996, essentially tracked the Moglers' position. (R. 267). This award provided:

1. HENRY E. MOGLER

a.	for non-economic damages (past and future):	$250,000.00
b.	past medical expenses:	$ 9,125.00
c.	future medical expenses:	$ 29,750.00

[2] Section 768.21 delineates the only damages that are recoverable in a wrongful death action.

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d.	past wage loss:	$ 0	
e.	loss of service:	$ 2,521.00	(past)
		$ 5,429.00	(future)

2. DONNA L. MOGLER

a.	for non-economic damages (past and future):	$250,000.00	
b.	past medical expenses:	$ 46,593.00	
c.	future medical expenses:	$ 46,000.00	
d.	past wage loss:	$ 57,636.00	
e.	loss of service:	$ 2,521.00	(past)
		$ 5,429.00	(future)

3. ESTATE OF MICHAEL GLENN MOGLER

a.	for non-economic damages (past and future):	$ 0	
b.	funeral bills:	$ 1,756.00	
c.	cemetery lot:	$ 250.00	
d.	medical bills:	$ 5,084.00	
e.	wage loss of Michael Mogler:	$388,272.00	
	TOTAL	$1,405,627.00	

Arbitrator Adams filed a dissent, which adopted Dr. Franzen's position. (R. 271).

Dr. Franzen appealed from the arbitration award urging that the arbitrators' assessment of economic damages had to be set aside because the arbitrators failed to apply the damage provisions of the Wrongful Death Act.[3] In this regard, Dr. Franzen argued that this was a case of medical negligence resulting in the wrongful death of Michael Mogler and thus the Medical Malpractice Act had to be read in conjunction with the Wrongful Death Act (i.e., the Medical Malpractice Act affords the law of the underlying tort while the Wrongful Death Act supplies the cause of action and the law regarding damages). Thus, according to Dr. Franzen, the

[3]Dr. Franzen also argued that for non-economic damages that the award had to be set aside because only one section 766.207(7) limit applied to this single medical incident.

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arbitrators' failure to apply these statutes together resulted in an economic damage award never before contemplated, or intended, by the legislature for this type of claim.

The Moglers, for their part, contended that the Wrongful Death Act's damages provisions did not apply to this medical malpractice voluntary arbitration proceeding.

On July 30, 1997, the Fourth District issued its decisions in the instant case[4] and St. Mary's Hosp. v. Phillipe, 699 So. 2d 1017 (Fla. 4th DCA 1997), a companion appeal raising similar issues. (App. 1, 2). Relying exclusively on its decision in Phillipe, the Fourth District affirmed the arbitration award "on the economic damage issue because we have concluded that such damages are controlled by the Medical Malpractice Act and not by the Wrongful Death Act."[5] (App. 2). Dr. Franzen's motions for rehearing, rehearing en banc and certification of the economic damage issue, were summarily denied. (App. 3).

JURISDICTIONAL STATEMENT

This Court has jurisdiction based on conflict because the Fourth District's ruling that the economic damages at issue are controlled by the Medical Malpractice Act misapplies the law.

The Fourth District's discussion and erroneous finding that the Medical Malpractice Act controls the issue of economic damages in a voluntary arbitration of a wrongful death claim creates an express and direct conflict which has long been recognized as a

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[4]699 So. 2d 1026 (Fla. 4th DCA 1997).

[5]The Fourth District reversed the noneconomic damage award, concluding that "the $250,000 limit does not apply to each claimant but, as the statute itself says, to each incident." Id. at 1026.

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basis for exercising this court's discretionary jurisdiction. See Gibson v. Avis Rent-A-Car System, Inc., 386 So. 2d 520 (Fla. 1980) (Supreme Court has jurisdiction based on conflict where district court misapplies the law).

This Court and other district courts have clearly mandated that "statutes which relate to the same or to a closely related subject or object are regarded as in pari materia and should be construed together and compared with each other." Smith v. Crawford, 645 So. 2d 513, 522 (Fla. 1st DCA 1994), quoting Ferguson v. State, 377 So. 2d 709, 710 (Fla. 1979). The failure of the Fourth District to construe the economic damage provisions of the Medical Malpractice Act in conjunction with Wrongful Death Act clearly ignores the mandates of this Court. Accordingly, conflict is apparent and this court has jurisdiction. See Rinker Materials Corp. v. City of North Miami, 286 So. 2d 552 (Fla. 1973) (misapplication of established rules of statutory construction is clear basis of conflict).

This case also conflicts with the First District's decision in Horton v. Channing, 698 So. 2d 865 (Fla. 1st DCA 1997), which held that damages for wrongful death actions resulting from medical negligence are dictated by section 768.21 of the Wrongful Death Act. To the extent that the Fourth District has held that the Wrongful Death Act does not control claims for economic damages in cases where voluntary arbitration is not involved, then the decision in this case directly conflicts with the First District's opinion in Horton, which applied the Wrongful Death Act and its damages provisions to a medical malpractice case.

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Finally, this issue and case have been consolidated with Case No. 91,934 in which the Fourth District certified the following as an issue of great public importance:

> When the alleged medical negligence results in the death of a patient, does the cap on non-economic 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 include all Wrongful Death Act beneficiaries?

(App. 4). The law is clear that having accepted jurisdiction to answer a certified question, this Court may then review the entire case for error. See Ocean Trail Unit Owners Assoc., Inc. v. Mead, 650 So. 2d 4, 6 (Fla. 1994)("having accepted jurisdiction to answer the certified question, we may review the entire record for error. Lawrence v. Florida E. Coast Ry., 346 So. 2d 102 (Fla. 1977).").

Dr. Franzen submits that the issue at bar should be reviewed for error because the Fourth District's holding that the Medical Malpractice Act -- and not the Wrongful Death Act -- controls on the issue of economic damages in voluntary arbitration has far-reaching implications for alleged victims of medical malpractice, health care providers, professional liability insurers, and both sides of the medical malpractice bar. The Medical Malpractice Act's voluntary arbitration provisions were indisputably enacted to encourage prompt, cost-effective, extra-judicial resolution of malpractice claims because of the legislature's conclusion that the extant "medical malpractice insurance crisis constitutes an 'overpowering public necessity'." University of Miami v. Echarte, 618 So. 2d 189, 198 (Fla. 1993). However, potential malpractice defendants and their insurers will undoubtedly -- and

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understandably -- be reluctant to initiate or accept voluntary arbitration as an alternative to judicial resolution of the incipient dispute where doing so will expose them to liability for elements of damages which heretofore have never been sanctioned by either the courts or the legislature.

In addition, the basis for the Fourth District's holding in Phillipe, that the Wrongful Death Act must yield to the Medical Malpractice Act on the issue of economic damages in voluntary arbitration, is that the Medical Malpractice Act, in two provisions, authorizes an award for lost earning capacity. These provisions and others in the Medical Malpractice Act, however, do not express a specific legislative intent to override or otherwise supplant the Wrongful Death Act or the long line of cases interpreting the same. Consequently, this Court should issue a definitive ruling on whether the Medical Malpractice Act, and not the Wrongful Death Act, controls economic damage awards in voluntary arbitration proceedings involving the death of a patient.

POINT ON REVIEW

WHETHER ECONOMIC DAMAGES AWARDABLE IN VOLUNTARY BINDING ARBITRATIONS OF WRONGFUL DEATH CLAIMS ARISING FROM MEDICAL NEGLIGENCE ARE CONTROLLED BY THE WRONGFUL DEATH ACT

SUMMARY OF ARGUMENT

The economic damage portion of the Fourth District's opinion must be quashed because the court erroneously found that such damages in a voluntary medical malpractice arbitration resulting from a claim for wrongful death are controlled by the Medical Malpractice Act and not by the Wrongful Death Act.

This is a wrongful death case which resulted from negligent

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medical treatment rendered to Michael Mogler. Accordingly, the Medical Malpractice Act and the Wrongful Death Act must be read in conjunction with one another. The Medical Malpractice Act affords the law of the underlying tort, including the statutes and procedures to be followed in maintaining a cause of action; the Wrongful Death Act supplies the proper parties to the cause of action and dictates the law of damages. Thus, the Fourth District's failure to apply these statutes together resulted in an economic damage award never before contemplated, or intended, by the legislature for this type of claim. Its decision therefore should be quashed.

ARGUMENT

ECONOMIC DAMAGES AWARDABLE IN VOLUNTARY BINDING ARBITRATIONS OF WRONGFUL DEATH CLAIMS ARISING FROM MEDICAL NEGLIGENCE ARE CONTROLLED BY THE WRONGFUL DEATH ACT

The Fourth District's affirmance of the arbitrators' economic damage award must be quashed because the court misinterpreted and misapplied the applicable law.

The Fourth District affirmed the arbitrators' economic damages award in this case because two provisions of the Medical Malpractice Act appear to authorize the recovery of such financial losses. Specifically, 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)(a), in turn provides that:

(7) Arbitration pursuant to this Section shall preclude

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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.

Dr. Franzen submits, respectfully, that the Fourth District erred as a matter of law by taking the limitations on damages imposed by Sections 766.202(3) and 766.207(7)(a) and turning them into items of damages to be awarded.

Furthermore, the Medical Malpractice Act's limitations on damages are not only applicable in voluntary arbitration proceedings, but they are applicable at trial as well. Section 766.209(4) provides:

> (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.

This language describing the manner in which economic damages are to be awarded at trial when a claimant rejects an offer to voluntarily arbitrate, is identical to the language used to describe the manner in which economic damages may be awarded at arbitration. Surely, the legislature did not intend, with the passage of the Medical Malpractice Act, to drastically alter the types of economic damages awardable in wrongful death cases where

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a claimant rejects a defendant's offer to voluntarily arbitrate. Thus, the Fourth District's rationale can not be sanctioned by this Court.

A. The Wrongful Death Act, not the Medical Malpractice Act, dictates what damages are applicable to this claim.

Because this case arose out of medical malpractice which caused Michael Mogler's wrongful death, the Wrongful Death Act created the right of action, dictated the proper party to bring the action, and delineated the applicable damages. Wade v. Alamo Rent-A-Car, Inc., 510 So. 2d 642, 643 (Fla. 4th DCA 1987)("we look to the [wrongful death] statute alone to discover *who* can recover and *what* may be recovered.")(emphasis in original). On the other hand, the Medical Malpractice Act supplies the underlying law, statutes and procedures to be followed in maintaining a cause based upon medical malpractice. Dr. Franzen submits that these statutes work hand in hand; the Wrongful Death Act creates a right of action (that in common law perished when the decedent died) and the Medical Malpractice Act supplies the law for the underlying tort which gave rise to the death.

Indeed, even the Fourth District in this case applied these chapters concurrently when explaining its decision on the limit on non-economic damages. On rehearing, the Fourth District stated that:

> The Medical Malpractice Act [MMA] defines claimant as 'any person who has a cause of action arising from medical negligence.' § 766.202(1) Fla. Stat. (1995). Except for the fact of his death, [Michael Mogler] could have stated a cause of action arising from medical negligence. In view of his death, however, it is necessary to turn to the Wrongful Death Act

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> [WDA], which states that '[w]hen a personal injury to the decedent results in his death, no action for the personal injury shall survive.' § 768.20 Fla. Stat. (1995). WDA goes on to provide that:
>
> > 'When the death of a person is caused by the wrongful act, [or] negligence . . . 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 . . ."
>
> § 768.19 Fla. Stat. (1995).
>
> * * *
>
> WDA also specifies the kind of damages recoverable for each beneficiary entitled to damages. § 768.21(1)-(8), Fla. Stat. (1995)
>
> * * *
>
> As we read both acts, the only person with a claim arising from medical negligence in this case was the person who suffered the breach from the prevailing professional standard of care by the doctor. § 766.102(1), Fla. Stat. (1995) (footnotes omitted).

Franzen v. Mogler, 22 Fla. L. Weekly D 2451 (Fla. 4th DCA Oct. 22, 1997).[6] Thus, the Fourth District clearly erred when it changed its position that these statutes work together for purposes of non-economic damages and found that claims for economic damages in cases such as this are controlled by the Medical Malpractice Act and not by the Wrongful Death Act. Franzen v. Mogler, 699 So. 2d at 1026.

This conclusion that these statutory provisions must be

[6]All emphasis has been supplied by counsel unless otherwise noted.

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construed and applied together is based on both the statutes themselves and the case law interpreting the same. The Medical Malpractice Act, throughout its sections, focuses on actions for recovery of damages based on the death or personal injury of a person as a result of the medical negligence of a health care provider.[7] In turn, the Wrongful Death Act acknowledges that a person's death may be caused by a wrongful act, negligence, default, or breach of contract or warranty.[8] The legislature also acknowledged the interplay between the medical malpractice and wrongful death statutes when it excluded specific categories of section 768.21 damages from wrongful death claims resulting from medical negligence. See Fla. Stat. 768.21(8).[9] Abundant case law has also applied the wrongful death and medical malpractice chapters together. See Roberts v. Holloway, 581 So. 2d 619 (Fla. 4th DCA 1991)(court applied section 768.21 damages in wrongful

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[7] See Fla. Stat. § 766.102 (establishing medical negligence standard in death or personal injury actions); Fla. Stat § 766.104 (outlines pleading requirements for personal injury or wrongful death actions arising out of medical negligence); Fla. Stat. § 766.107 (refers to actions based on death or personal injury in connection with court ordered arbitration); Fla. Stat. § 766.108 (refers to personal injury or wrongful death actions in connection with mandatory settlement conferences).

[8] Thus, the wrongful death statute grants a decedent's survivors the opportunity to recover damages for the decedent's death arising out of any underlying breach or tort by a defendant.

[9] This subsection provides that:

> The damages specified in subsection (3) shall not be recoverable by adult children and the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical malpractice as defined by s. 766.106(1).

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death action based on medical malpractice); Horton v. Channing, 698 So. 2d 865 (Fla. 1st DCA 1997)(same).

In this case, both parties agreed to arbitrate the wrongful death claim under Florida Statutes §§ 766.207 to 766.212. Voluntary arbitration, pursuant to the Medical Malpractice Act, is a legislative alternative to a jury trial. See Fla. Stat. 766.209(1)(2). Section 766.207, the voluntary arbitration provision of the Medical Malpractice Act, assumes that a valid cause of action otherwise exists and then limits the damages to be recovered at arbitration for that cause of action. Arbitration is thus simply an alternative forum for a medical malpractice case and not a cause of action in itself. Accordingly, the Fourth District erred in not requiring the arbitrators to award only those damages recoverable in a wrongful death action for medical malpractice, and then limiting those damages within the scheme provided in Section 766.207.

B. The Fourth's District's holding on economic damages ignores the Florida rules of statutory construction.

The Fourth District erroneously failed to apply the rules of statutory construction when interpreting the Medical Malpractice Act and by holding that the Wrongful Death Act's damages provisions were inapplicable as a matter of law. The rules of statutory construction mandate that "statutes which relate to the same or to a closely related subject or object are regarded as in pari materia and **should be construed together** and compared with each other." Smith v. Crawford, 645 So. 2d 513, 522 (Fla. 1st DCA 1994), quoting, Ferguson v. State, 377 So. 2d 709, 710 (Fla. 1979). By

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ignoring that rule and the wrongful death law, the arbitrators and the Fourth District awarded elements of damages not provided for in Florida Statutes and never before sanctioned in Florida for this type of claim. See Higgins v. Johnson, 422 So. 2d 16 (Fla. 2d DCA 1982)(elements of damages for personal injury medical malpractice claims and wrongful death medical malpractice claims are entirely different); McPhail v. Jenkins, 382 So. 2d 1329 (Fla. 1st DCA)(over-sedation of daughter causing her death was a claim for damages resulting from wrongful death, recovery for which was limited by Wrongful Death Act), pet. rev. den., 388 So. 2d 1115 (Fla. 1980). See also Taylor v. Orlando Clinic, 555 So. 2d 876 (Fla. 5th DCA 1989)(patient's personal injury negligence action for medical malpractice did not survive death), rev. den., 567 So. 2d 435 (Fla. 1990).

Additionally, the rules of statutory construction required the presumption that the legislature was aware of the pre-existing Wrongful Death Act when it enacted the Medical Malpractice Act. Hollar v. International Bankers Ins. Co., 572 So. 2d 937, 939 (Fla. 3d DCA 1990), rev. dismissed, 582 So. 2d 624 (Fla. 1991). Indeed, Section 766.203(1)(a) of the Medical Malpractice Act expressly applies the presuit investigation procedures to "[r]ights of action under [the Wrongful Death Act]." Sections 766.201 through 766.212 of the Medical Malpractice Act were enacted at the same time and thus the legislature obviously was aware of the Wrongful Death Act when it passed Section 766.207. Consequently, "when it adopted [the Medical Malpractice Act], the legislature is presumed to have been aware of [the Wrongful Death Act]." Franzen v. Mogler, 22

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Fla. L. Weekly D 2451 (Fla. 4th DCA Oct. 22, 1997). It thus follows that Section 766.207 should have been interpreted in a way that was in harmony with the Wrongful Death Act.

C. The Economic Damages Awarded in this case were never contemplated by the legislature and should be set aside.

Dr. Franzen submits that the applicable damages in this case are those prescribed by the Wrongful Death Act which allows a personal representative to seek damages for the benefit of the surviving parents of a deceased child as follows:

> (1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to his death, with interest, and future loss of support and services from the date of death and reduced to present value.
>
> * * *
>
> (4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.
>
> (5) Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them.
>
> (6) The decedent's personal representative may recover for the decedent's estate the following:
>
> (a) Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest . . .

Fla. Stat. 768.21 (1993). Accordingly, the economic damage award in this case should have gone to the personal representative and been limited to Michael's funeral bills, Michael's lost wages from the date of injury to death (which was $0 here), and Michael's past medical bills.

The economic damages award shows that the Fourth District looked at the terms "claimants," wage loss" and "medical expenses," as used in the Medical Malpractice Act, in isolation, and then

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tried to shoe horn all of the Moglers' alleged damages into these "categories." This blind application of Section 766.207, which was enacted to limit recovery of economic losses, (see Section 766.201(1)(e), Legislative Finding and Intent), resulted in an award of damages never intended or envisioned by the legislature.

The Fourth District not only sanctioned liability for damages that are clearly not recoverable under the Wrongful Death Act but it also erred in affirming the economic damage award because the award treated both parents and the estate as separate claimants. The Fourth District clearly found with regard to noneconomic damages that:

> the only person with a claim arising from medical negligence in this case was the person who suffered the breach from the prevailing professional standard of care by the doctor... Hence, it is only the personal representative who, it seems to us, qualifies as a claimant within the meaning of [the Medical Malpractice Act].

Franzen v. Mogler, supra. Thus, the award of past and future medical expenses to Henry and Donna "as claimants" contravened the Medical Malpractice Act, is inconsistent with the Fourth District's own opinion, and is likewise unsupported in Florida law. Similarly, the award of damages for Donna's past and future wage loss was equally improper.

Further, the proper claimant (the personal representative) could not recover these awards on behalf of the parents since a decedent's survivors' lost wages and medical bills are clearly not recoverable elements of damages under Florida law. Wade v. Alamo Rent-A-Car, Inc., 510 So. 2d 642 (Fla. 4th DCA 1987). In Wade, a wrongful death case, the Court specifically held that:

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> [w]hile 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 [wrongful death] statute.**

Id. at 643. Indeed, the Moglers themselves admitted at arbitration that a decedent's parents cannot recover their own medical expenses in a wrongful death case. (T. 318). Thus, since the Moglers themselves are not "claimants" under the Medical Malpractice Act and because the Wrongful Death Act dictates the applicable damages in this case, the awards for Henry and Donna Mogler's past and future medical expenses, as well as the award for Donna Mogler's past and future lost wages must be set aside by this Court.[10]

The Fourth District also erred in upholding the arbitrators'

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[10]The Fourth District also erred by upholding the damages awarded to both parents for the past and future loss of support and services of Michael Mogler. This ruling ignored United States v. Dempsey, 635 So. 2d 961 (Fla. 1994), which held that in order to be entitled to an award of lost support and services for a minor child:

> the parent must establish that the child had extraordinary income-producing abilities prior to the injury. Accord Gresham v. Courson, 177 So. 2d 33 (Fla. 1st DCA 1965)(recovery for loss of services resulting from the wrongful death of a child not recoverable absent a showing that the deceased child had 'some extraordinary income-producing attributes'); Williams v. United States, 681 F. Supp. 763 (N.D. Fla. 1988)(same).

Dempsey, 635 So. 2d at 965. There was not one shred of evidence in this case that Michael Mogler had any extraordinary income-producing abilities. In fact, the Moglers' own expert economist admitted that this was a normal family situation, that the evidence he had was that Michael had no extraordinary income earning abilities, and that the costs of raising Michael would far exceed any benefit from his services. (T. 145-147). Accordingly, this award was not only legally erroneous but was also unsupported by competent, substantial evidence.

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$388,272 award to the estate for Michael's lost wages. This award for the prospective wages of a deceased minor child is clearly prohibited by Florida law.

Section 768.21(6) of the Wrongful Death Act provides that:

> The decedent's personal representative may recover for the decedent's estate the following:
>
> > (a) Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest.

Michael Mogler had no lost earnings "from the date of injury to the date of death." Since the plain language of the Wrongful Death Act makes it patently obvious that these are the only "wages" an estate is entitled to under the law, the award of lost wages must be set aside.

The only relevance prospective wage loss ordinarily has in a wrongful death action is to help determine what the loss of "net accumulations" would be.[11] The Wrongful Death Act allows a personal representative to recover for the decedent's estate:

> Loss of the prospective net accumulations of an estate, which might reasonably have been expected but for the wrongful death, reduced to present money value, may also be recovered:
>
> 1. **If** the decedent's survivors include a surviving spouse or lineal descendants; or
>
> 2. **If** the decedent is **not a minor child** as defined in s. 768.12(2), there are no lost support and services recoverable under

[11] "Net accumulations" means the part of the decedent's expected net business or salary income, including pension benefits, that the decedent probably would have retained as savings and left as part of his estate if he had lived his normal life expectancy. "Net business or salary income" is the part of the decedent's probable gross income after taxes, excluding income form investments continuing beyond death, that remains after deducting the decedent's personal expenses and support of survivors, excluding contributions in kind. Fla. Stat. 768.18(5)(1993).

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> subsection (1), and there is a surviving parent.

Fla. Stat. 768.21(6) (1995). At the time of his death, Michael Mogler, a minor child, did not have "a surviving spouse or lineal descendants." Thus, the net accumulations provision of the Wrongful Death Act was obviously inapplicable to this case. Marks v. DelCastillo, 386 So. 2d 1259 (Fla. 3d DCA 1980)(where decedents did not have spouses or lineal descendants, award of damages for decedents' loss of net accumulations was fundamental error requiring reversal), rev. den., 397 So. 2d 778 (Fla. 1981).[12] Accordingly, the Fourth District clearly erred when it upheld an award to the estate which the Estate had absolutely no right to recover under Florida law.

CONCLUSION

As shown above, the Moglers and the Estate were not entitled to damages in arbitration that they would have been prohibited from recovering had this case proceeded to trial. The economic damage awards, pursuant to the Medical Malpractice Act, for claims arising from a negligently caused death, had to be limited solely to the categories of damages awardable under the Wrongful Death Act. Accordingly, Dr. Franzen requests that this Court quash the economic damages portion of the Fourth District's opinion with instructions that only the following items of damages should be awarded: the funeral bills for the estate; Michael Mogler's medical bills; and one cap of $250,000 for noneconomic damages to the

[12] See also White v. Clayton, 323 So. 2d 573 (Fla. 1975) (wrongful death act which limited recovery for loss of net accumulations beyond death to surviving spouse or lineal decedents held constitutional).

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personal representative on behalf of the surviving parents. Dr. Franzen further requests, pursuant to Section 766.207(7)(f), that the Fourth District be directed to reduce the combined award of attorney's fees and costs to 15% of the amended arbitration award.

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