IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,894
CASE NO. 91,934
4 DCA No. 96-02356

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

Petitioners,

v.

HENRY E. MOGLER and DONNA MOGLER, etc.,

Respondents.

REPLY/CROSS-ANSWER BRIEF OF PETITIONERS, DIRK FRANZEN, M.D. and DIRK FRANZEN, M.D., P.A.

BOBO, SPICER, CIOTOLI, FULFORD BOCCHINO,
DEBEVOISE and LE CLAINCHE
Esperante, Sixth Floor
222 Lakeview Avenue
West Palm Beach, FL 33401

- and -

HICKS & ANDERSON, P.A.
New World Tower - Suite 2402
100 North Biscayne Blvd.
Miami, FL 33132
Tel: (305) 374-8171
Fax: (305) 372-8038

By: Ila J. Klion
Fla. Bar No. 928038

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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.

REPLY ARGUMENT

I. STANDARD AND SCOPE OF REVIEW

The Moglers' contention that this Court should refrain from substantively addressing the issues in this case because the Fourth District "exceeded the statutory scope of review," is wrong. Section 766.212(1), Florida Statutes (1995) provides that:

> (1) An arbitration award and an allocation of financial responsibility are final agency action for purposes of s. 120.68. Any appeal shall be taken to the district court of appeal for the district in which the arbitration took place, shall be limited to review of the record, and shall otherwise proceed in accordance with s. 120.68. The amount of an arbitration award or an order allocating financial responsibility, the evidence in support of either, and the procedure by which either is determined are subject to judicial scrutiny only in a proceeding instituted pursuant to this subsection.

The Moglers appear to be arguing that in a proceeding instituted pursuant to subsection 766.212(1) review is limited solely to the "amount of the award." Read in its entirety, however, section 766.212(1) does not so limit a court's review power. Rather, it merely clarifies that the only avenue of judicial review of an arbitration award is through an appeal filed in accordance with section 120.68.

To this end, the Fourth District in St. Mary's Hosp., Inc. v. Phillipe, 699 So. 2d 1017, 1021, (Fla. 4th DCA 1997) stated that:

> Section 120.68, Florida Statutes (1995), which is a part of the Administrative Procedures

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Act, empowered the reviewing court as follows:

> (8) The court shall remand the case for further agency action if it finds that either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure....
>
> (9) If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall: (a) set aside or modify the agency action, or (b) remand the case to the agency for further action under a correct interpretation of the provision of law.
>
> (10) If the agency's action depends on any fact found by the agency in a proceeding meeting the requirements of s. 120.57, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record. (footnote omitted).[1]

Other statutory arbitrations which follow the section 120.68 appeal process have applied this precise "hybrid" standard of review. See, e.g., Cone Corp. v. State Dept. of Transp., 556 So. 2d 530, 531 (Fla. 2d DCA 1990) (reversing state arbitration board's findings based on the following standard of review: "where substantial competent evidence supports the findings and conclusions of the administrative agency and the record discloses neither an abuse of discretion nor a violation of law by the agency, this court should not overturn the agency's determination."); Dept. of Transp. v. MacAsphalt, Inc., 429 So. 2d 1281 (Fla. 1st DCA 1983) (State Road Arbitration Board reversed

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[1]All emphasis is supplied by counsel unless otherwise noted.

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because the Board had misinterpreted the contract).[2]

Accordingly, respondent's reliance on University of Miami v. Echarte, 618 So. 2d 189 (Fla.), cert. denied, 510 U.S. 915 (1993), for the proposition that a court's review of an arbitration award entered pursuant to section 766.207 is limited, is misleading. In Echarte the issue before this Court was the constitutionality of section 766.207 as a whole, not the standard by which an award entered under that section must be reviewed. Moreover, even if the Echarte dicta employing a "manifest injustice" standard were controlling, the standard certainly would be satisfied here. See DeMartire v. State, 647 So. 2d 900, 902 (Fla. 4th DCA 1994), dismissed, 657 So. 2d 1162 (Fla. 1995) ("manifest injustice" is equivalent to a showing of clear prejudice). Undoubtedly, Dr. Franzen was clearly prejudiced in this case when the Respondents were awarded almost one million dollars in damages which are not allowable under Florida law.

The Moglers claim that there would be no advantage for plaintiffs in agreeing to arbitration under the Fourth District's standard of review. This argument ignores the very compelling fact that liability is admitted for purposes of arbitration. Regardless of the appellate court's findings as to legally supportable items of damages, the appellate court cannot take away this admission of liability. What's more, a plaintiff who agrees to arbitrate

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[2]See also University of Miami v. Zepeda by Zepeda, 674 So. 2d 765, 766 (Fla. 3d DA 1996) (affirming order of Division of Administrative Hearings finding that birth-related injuries were not compensable under "NICA" because "review of the record reflects that there was substantial competent evidence to support the hearing officer's determination ... and discloses neither an abuse of discretion nor a violation of law by the agency.").

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receives many other benefits not ordinarily obtained in litigation, not the least of which is the payment of his or her attorney's fees. Fla. Stat. § 766.207(7)(f). Thus, the Moglers' argument is without merit.

The legislature made an express choice to allow broader appellate review for section 766.207 arbitration awards than for other arbitrations, and specifically provided for these awards to "proceed in accordance with s. 120.68." The full appellate review provided by section 120.68 was properly utilized by the Fourth District, and the court's ruling on this point accordingly should be affirmed.

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

The Moglers confuse the issue here by focusing on the term "remedy." A remedy is "[t]he means by which ... the violation of a right is ... redressed, or compensated." BLACK'S LAW DICTIONARY, 5th Ed. 1979. In this case, the means by which the Moglers sought compensation was section 766.207 arbitration. They could have, however, also sought compensation by rejecting arbitration and litigating their claim. Having chosen their remedy, they should not now be heard to complain.

If the Moglers had rejected arbitration the following principles would apply: the sole plaintiff would be the personal representative of the decedent's estate; the plaintiff would be required to comply with the Medical Malpractice Act's presuit screening provisions; the plaintiff would have to file suit within the time provided for medical malpractice claims; and the damage

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recovery would be limited to those damages statutorily prescribed in the Wrongful Death Act.[3] Clearly, the result should be no different simply because the Moglers pursued their damages at arbitration rather than trial.

The cases relied on by the Moglers in support of their argument that section 766.207 provides a new scheme of damages are inapposite to the case here and illustrate the misdirection of their argument. In Beverly Enterprises-Florida, Inc. v. Spilman, 661 So. 2d 867 (Fla. 5th DCA 1995), rev. denied, 668 So. 2d 602 (Fla. 1996), the plaintiff (personal representative of the decedent's estate) brought suit against a nursing home pursuant to Florida Statute 400.023 which provides in pertinent part:

> [a]ny resident whose rights as specified in [Fla. Stat. § 400.022] are deprived or infringed upon shall have a cause of action against any licensee responsible for the violation. The action may be brought by the resident or his guardian, ... or by the personal representative of the estate of the deceased resident when the cause of death resulted from the deprivation or infringement of the decedent's rights. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for any deprivation or infringement on the rights of a resident ... The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a resident and to the agency. (footnote omitted).

Fla. Stat. § 400.023 (1991). The Fifth District, relying on both the plain language of the statute and the Act's legislative

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[3]See Continental Nat'l Bank v. Brill, 636 So. 2d 782 (Fla. 3d DCA 1994); Porter v. Rosenberg, 650 So. 2d 79 (Fla. 4th DCA), rev. denied, 661 So. 2d 825 (Fla. 1995); Ash v. Stella, 457 So. 2d 1377 (Fla. 1984); Wade v. Alamo Rent-A-Car, Inc., 510 So. 2d 642 (Fla. 4th DA 1987).

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history, found that damages in wrongful death suits brought pursuant to section 400.023 were not limited solely to those prescribed by the Wrongful Death Act. Spilman, 661 So. 2d at 869.

Similarly, reliance on University of Miami v. Klein, 603 So. 2d 651 (Fla. 3d DCA), rev. denied, 613 So. 2d 6 (Fla. 1992), a NICA[4] case, is misplaced. The legislature has specifically provided that:

> the rights and remedies granted by [NICA] on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents, and next of kin, at common law or otherwise, against any person or entity directly involved with the labor, delivery, or immediate post delivery resuscitation during which such injury occurs, arising out of or related to a medical malpractice claim with respect to such injury....

Fla. Stat. § 766.303(2) (1993). Accordingly, the Klein court held that NICA provided the exclusive rights and remedies for a medical malpractice suit arising from a birth-related neurological injury which resulted in an infant's death.

In contrast, when the legislature enacted the Medical Malpractice Act, it did not create a new remedy scheme. Rather, it simply provided that plaintiffs who choose to pursue their claim for damages through arbitration cannot pursue a different remedy after arbitration. Since section 766.207 does not contain language similar to either Spilman or Klein, these cases do not contradict Dr. Franzen's argument.

Likewise, neither Ash v. Stella, 457 So. 2d 1377 (Fla. 1984), nor Arthur v. Unicare Health Facilities, Inc., 602 So. 2d 596 (Fla.

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[4]Florida Birth-Related Neurological Injury Compensation Plan.

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2d DCA), rev. denied, 613 So. 2d 4 (Fla. 1992), are controlling. These cases merely hold that actions arising from medical negligence, including those resulting in death, are governed by the medical malpractice statute of limitations. Like Spilman and Klein, this result was mandated by the statutory language. Section 95.11(4)(b) (1991) provides that:

> "An 'action for medical malpractice' is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care.

Fla. Stat. § 95.11(4)(b) (1991). Thus, the statute "clearly expressed the legislature's intent that section 95.11(4)(b) apply to wrongful death actions based on malpractice." Nissan Motor Co. Ltd. v. Phlieger, 508 So. 2d 713 (Fla. 1987).

Despite the Moglers' contention otherwise, Wade v. Alamo Rent-A-Car, Inc., 510 So. 2d 642 (Fla. 4th DCA 1987), is highly instructive in the case at bar. In Wade, a wrongful death case, the appellant (personal representative of minor child's estate) questioned whether a minor decedent's parent could recover damages for the medical expenses and lost wages that the parent incurred as a result of the child's death. The court found that:

> [t]he 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.

Id. at 643. The court, therefore, looked to the plain language of the Wrongful Death Act, and held that "neither the cost of such [medical] treatment nor the lost wages" of the parents were

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compensable.[5] Without question, the Moglers had no cognizable claim at common law. Their claim stems solely from the Wrongful Death Act, and the Wrongful Death Act alone determines the recoverable damages in this case. Id.

The Moglers also contend that the arbitration award was proper because each of the parents, as well as the estate, are separate "claimants." This contention is without merit. The Medical Malpractice Act specifically defines "claimant" as "any person who has a cause of action arising from medical negligence." Fla. Stat. § 766.202(1) (1995). In Florida, it is clear that the only person who has a recognized cause of action for a claim of wrongful death (including death from medical negligence) is the decedent's personal representative. See, e.g., Pearson v. DeLamerens, 656 So. 2d 217 (Fla. 3d DCA 1995) (under Wrongful Death Act it is responsibility of decedent's personal representative to bring wrongful death action on behalf of survivors and decedent's estate); Continental Nat'l Bank v. Brill, 636 So. 2d 782 (Fla. 3d DCA 1994) (under Wrongful Death Act decedent's personal representative is party who seeks recovery of all damages caused by injury resulting in death for benefit of decedent's survivors and for estate); Puig v. Saga Corp., 543 So. 2d 238 (Fla. 3d DCA 1989) (personal representative, who was also surviving spouse of decedent, not proper party to wrongful death action as surviving

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[5]Section 768.21 provides:

> (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.

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spouse personally). See also, Veltman v. Walpole Pharmacy, Inc., 928 F.Supp. 1161 (M.D. Fla. 1996) (under Florida Wrongful Death Act, neither decedent's husband nor her son had standing to bring medical malpractice action and related claims against those involved in prescribing and providing medication absent allegation that either party was bringing suit as personal representative of decedent's estate). Thus, once "claimant" is viewed in its proper light -- the personal representative -- it is clear that the Moglers' individual lost wages and medical expenses are not recoverable.

With regard to Michael's lost wages, the Moglers criticize Dr. Franzen for failing to cite a case supporting the argument that awarding Michael's estate all his lost wages, with no deduction for living expenses, was excessive. To begin with, the law is clear that the estate of a minor decedent with no lineal descendants cannot be awarded lost wages. Fla. Stat. § 768.21 (1990). It follows then, that there would be no case deducting living expenses from such lost wages since the lost wages were not awardable in the first place. In any event, common sense dictates that an award of lost wages without a deduction for consumption results in a tremendous windfall for an estate.

Finally, regarding the award of lost services, the Moglers have completely ignored the clear holding in U.S. v. Dempsey, 635 So. 2d 961 (Fla. 1994). In Dempsey, this Court held that a child's day-to-day services were to be considered solely as part of the non-economic damage award for filial consortium.

> To recover for loss of services as part of the consortium interest, no showing of extra-

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> ordinary abilities is necessary ... In contrast, in order for a parent to recover a separate award for the loss of ... services above that recoverable as a general component of loss of filial consortium, the parent must establish that the child had extraordinary income-producing ability prior to the injury.

Dempsey, 635 So. 2d at 965. Thus, the ordinary household chores that Michael performed could be considered only in awarding non-economic damages. The separate award for lost support and services, on the other hand, was completely lacking in **any** evidentiary proof of extraordinary income-producing abilities. This award therefore fails even the purported "competent substantial evidence" test.

As shown in both Dr. Franzen's initial brief, and the argument above, the Moglers and the Estate were not entitled to damages in arbitration that they would have been prohibited from recovering at trial. The economic damage awards had to be limited solely to those damages awardable under the Wrongful Death Act. Accordingly, this Court should quash the economic damages portion of the Fourth District's opinion.

POINT ON CROSS-APPEAL AND CERTIFIED QUESTION

SUMMARY OF ARGUMENT

The Fourth District's determination that the Medical Malpractice Act limits noneconomic damages in voluntary arbitration proceedings to $250,000 per incident, regardless of whether the underlying negligence resulted in injury or death, must be affirmed. The clear and unambiguous language of the statute does not provide for a recovery of $250,000 per incident per claimant, and even if it did, there is only one claimant in this case: the

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personal representative. Furthermore, to construe the Act as urged by the Moglers would severely undermine the legislative intent behind the Medical Malpractice Act.

ARGUMENT

THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE MEDICAL MALPRACTICE ACT MANDATES THAT A SINGLE CAP ON NONECONOMIC DAMAGES APPLIES TO THIS ONE INCIDENT OF MALPRACTICE.

On rehearing, the Fourth District certified to this Court the following question as one of great public importance:

> When the alleged medical negligence results in the death of the 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 beneficiaries?

Franzen v. Mogler, 22 Fla. L. Wkly. D 2451 (Fla. 4th DCA Oct. 22, 1997). Respectfully, the answer to this question is found in the Medical Malpractice Act itself.

The Medical Malpractice Act provides that where arbitration is accepted:

> 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 claimant's 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.

Fla. Stat. § 766.207(7)(b) (1991). This statute states clearly and in unequivocal terms that noneconomic damages are limited "per incident." This Court is thus required to give the statute its plain and obvious meaning. See Streeter v. Sullivan, 509 So. 2d 268, 271 (Fla. 1987) ("[I]nquiry into legislative intent may begin

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only where the statute is ambiguous on its face."). See also Opperman v. Nationwide Mut. Fire Ins. Co., 515 So. 2d 263, 266 n. 4 (Fla. 5th DCA 1987) ("When the language of a statute is clear and unambiguous and conveys a clear and definitive meaning, there is no occasion for resorting to the rules of statutory construction; the statute must be given its plain and obvious meaning. (citation omitted)"), rev. denied, 523 So. 2d 578 (Fla. 1988). Thus, this section can only mean that a single noneconomic damage cap of $250,000 applies to any and all survivors, claimants, or potential plaintiffs in an arbitration proceeding, provided that only a single "incident" is involved. See Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implication"), citing American Bankers of Life Assur. Co. of Fla. v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968). Here, it is uncontested that there was only one incident of medical negligence which resulted in the unfortunate death of Michael Mogler. Thus, the Fourth District correctly found that only one $250,000 noneconomic damage cap was available at arbitration in this case.[6]

The Moglers' argument to the contrary ignores the "per incident" language of section 766.207(7)(b), and instead relies almost exclusively on the fact that other portions of the Medical

[6]Dr. Franzen adopts and incorporates the amicus curiae brief filed by the Florida Defense Lawyers Association as further support for his argument.

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Malpractice Act use the term "claimant."[7] This argument misses the point. In the first place, the legislature's decision to limit noneconomic damages "per incident" makes it abundantly clear that a total of $250,000 noneconomic damages is available for all claims, as long as they relate to the same incident. Secondly, the Moglers' argument that this statute should be applied "per incident per claimant", even if accepted, still results in the application of one cap in this case. Florida law recognizes only one action for damages in wrongful death and that action may be brought only by the personal representative of the decedent's estate. As discussed above, the personal representative is the sole claimant who recovers all damages on behalf of the estate and the decedent's survivors. Thus, even if the Medical Malpractice Act allowed a cap "per incident per claimant," (which is denied) a maximum of $250,000 would still have had to be applied here because under Florida law there was only one "claimant."[8]

"Claimant" is defined in the Medical Malpractice Act as "any person who has a cause of action arising from medical negligence."

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[7]The amicus brief filed by the Academy of Florida Trial Lawyers ("the Academy") refers to the use of the term "incident" as "unfortunate." Dr. Franzen submits that the term has been characterized by the Academy as "unfortunate" because it makes clear that regardless of the number of claimants, all noneconomic damages related to the one incident of malpractice are limited to $250,000.

[8]In the analogous context of insurance coverage, Florida courts have likewise acknowledged that both the estate's and survivors' claims in a wrongful death action are derivative from the deceased person and do not constitute separate claims. See Jones v. Zagrodnik, 600 So. 2d 1265, 1266 (Fla. 5th DCA 1992). See also Skroh v. Travelers Ins. Co., 227 So. 2d 328 (Fla. 1st DCA 1969) (policy which limited liability to each person for bodily injuries did not entitle estate, parent and survivor to recover separate limits of liability). Thus, even under a "per claimant" analysis, the Moglers still would have been entitled to only one cap.

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Fla. Stat. § 766.202(1) (1995). As previously discussed, under Florida law, the only person who has a cause of action for wrongful death arising from medical negligence is the decedent's personal representative. Thus, the Fourth District was correct when it found that:

> a claimant under [the Medical Malpractice Act] must state a cause of action arising from medical negligence. §766.202(1). When the patient survives the negligence, it is usually only the patient who has the cause of action for medical negligence. (footnote omitted). When that patient has suffered the ultimate damage of death, however, [the Wrongful Death Act] extinguishes any survival action of the patient and replaces it with a derivative cause of action reposed solely in the patient's personal representative .... Hence it is only the personal representative who, it seems to us, qualifies as a claimant within the meaning of [the Medical Malpractice Act] section 766.202; for it is the personal representative alone who derives a cause of action from the alleged medical negligence of the provider.

Franzen v. Mogler, supra.

Despite the Moglers' contention otherwise, Variety Children's Hosp. v. Perkins, 445 So. 2d 1010 (Fla. 1983), supports the Fourth District's analysis. In Perkins, this Court stated:

> [a]t common law a person's right to sue for personal injuries terminated with his death. This created the anomaly that a tortfeasor who would normally be liable for damages caused by his tortious conduct would not be liable in situations where the damages were so severe as to result in death. This paradox was remedied by creating **an** independent cause of action for the decedent's survivors.

Perkins, 445 So. 2d at 1012. Consequently, this Court has recognized that a single cause of action for wrongful death exists for the benefit of all of a decedent's survivors. Similarly, the Second District's opinion in Ding v. Jones, 667 So. 2d 894 (Fla. 2d

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DCA 1996), provides further support for the Fourth District's ruling on this point.

> It is also clear that the purpose of ... the Wrongful Death Act enacted in 1972 was to eliminate the multiplicity of suits that resulted from each survivor bringing an independent action under the predecessor act.

667 So. 2d at 897. The Moglers' argument that each survivor and the estate have separate causes of action, thereby making each a "claimant" under the statute, is clearly wrong.

The Moglers' reliance on Atkins v. Strayhorn, 223 Cal. App. 3d 1380 (Cal. App. 4th Dist. 1990), is misplaced because that case is both factually distinguishable from this one and legally consistent with Dr. Franzen's argument. In Atkins, the court allowed separate caps for an injured husband and for his wife's consortium claim under a statute limiting the injured plaintiff's damages against a health care provier to $250,000. However, the case involved a personal injury claim as opposed to a wrongful death claim. Indeed, the Atkins court expressly found that the application of the statutory cap to these two types of claims are completely different.

> [T]he cause of action for loss of consortium does not resemble wrongful death because it has no statutory foundation but is entirely of judicial origin.... While a wrongful death action is a joint, single and indivisible one, loss of consortium is a separate and independent claim from a spouse's claim for personal injury.

Atkins, 273 Cal. Rptr. at 239 (citations omitted). Thus, this Court should reject the Moglers' invitation to equate a wrongful death action to an action for lost consortium.

Further misplaced is the Academy's reliance on Bombalier v.

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Lifemark Hosp. of Florida, 661 So. 2d 849 (Fla. 3d DCA 1995), rev. denied, 666 So. 2d 901 (Fla. 1996). In Bombalier, a mother and father filed a notice of intent alleging that medical malpractice caused the premature birth and ultimate death of their twins. When the defense offered arbitration, the parents accepted on behalf of the mother's personal injury claim and the father's derivative consortium claim. However, the parents, as personal representative of the twins' estate, rejected the offer to arbitrate the wrongful death claim. The Third District held this proper, finding that the personal injury and wrongful death claims were separate and distinct. Bombalier, however, does not address the question of the number of noneconomic damages caps available once arbitration is accepted or rejected.

Instead, the factually similar case of Yates v. Pollock, 239 Cal. Rptr. 383 (Cal. App. 2d 1987), is instructive here. In Yates, the court found California's noneconomic damage cap (similar to Florida's section 766.207(7)(b)) to be unambiguous and that the cap was the maximum amount awardable for any single medical malpractice action.[9] The spouse and adult children of the decedent brought a wrongful death action based upon medical malpractice. The trial court refused to reduce the $1,500,000 jury verdict to $250,000, the amount of their noneconomic damage cap.

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[9]The statute in Yates, provided that:

> (a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses....
> (b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000).

Id. at 384.

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On appeal, the court found that the statute unambiguously expressed the legislative intent to place a $250,000 cap on awards for noneconomic damages in all medical malpractice actions, whether recovery is sought in a personal injury or a wrongful death action. Id. at 385. The court rejected outright the contention that the $250,000 cap should apply to each survivor individually, finding that the "terms of the statute" made it "evident" that the cap was the "maximum recovery permitted in any single medical malpractice action" regardless of the number of survivors. Id. at 386 (emphasis in original).

The Academy's attempt to distinguish Yates is unpersuasive. The Academy incorrectly implies that the Yates jury had awarded a sum close to the amount of the cap. To the contrary, the opinion makes clear that the total noneconomic damages awarded by the jury were $1,500,000 and were reduced to $250,000 because of the statutory cap. Yates, 239 Cal. Rptr. at 384, n. 1; 386. In addition, it is irrelevant that Yates involved adult children beneficiaries, who may not have been entitled to recover under Florida law. The point is that the adult children apparently did otherwise have a right under California law to recover damages for the death of a parent. Despite their legal right to damages, the court nevertheless held that all potential beneficiaries were entitled to only one statutory cap. Id. at 386.

The terms of the Florida Statute, which limit noneconomic damages "per incident," is comparable to the statute construed in Yates. This Court should therefore reach the same conclusion and find that the statutory cap applies only once, provided there is

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only one incident, regardless of the number of survivors.

Florida's arbitration cap was clearly intended to limit damage awards in medical malpractice cases, to obtain predictability of the amounts of such awards, and to encourage prompt resolution of claims. Fla. Stat. § 766.201(2)(b)3. Previously, arbitration of medical malpractice claims had been pursuant to Fla. Stat. § 766.106(10)-(12) (1985). Experience showed, however, that these arbitration provisions were ineffective, that medical malpractice insurance premiums were skyrocketing, and that a "medical malpractice insurance crisis" existed. Fla. Stat. § 766.201(1); University of Miami v. Echarte, 618 So. 2d 189, 191 (Fla.), cert. denied, 114 S. Ct. 304 (1993). In response, the legislature established an Academic Task Force for Review of the Insurance and Tort Systems and searched for a constitutional manner in which to limit damages in medical malpractice cases. Echarte, 618 So. 2d at 191. This Task Force recommended the voluntary arbitration provisions found in Sections 766.207 to 766.212 (enacted in 1988), which limit noneconomic damages as an incentive to arbitration. Section 766.201 expressly states that the legislature intended arbitration to provide:

> Limitations on the noneconomic damages components of large awards to provide increased predictability of outcome of the claims resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims.

Fla. Stat. § 766.201(b)(3) (1988)[10]. Thus, the express legislative

[10]The legislature found that the substantial increase in loss payments to claimants was the primary cause of increased medical malpractice liability insurance premiums; that it was imperative to control medical malpractice defense costs in the interests of the

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goals of this arbitration scheme were to limit noneconomic damage awards, to assure predictability for insurers of anticipated losses, and to obtain early settlements.[11] The legislature expressly found that a damages cap on each incident would foster these goals. The arbitrator's award in this case completely undermined the legislative intent behind this arbitration scheme. The Fourth District's instruction to reduce the noneconomic damage award to the cap's limitation therefore was proper.

This Court should also reject the Academy's argument that other out-of-state cases applying only one statutory cap to all persons seeking damages applied "larger" caps than the one in Florida. For one, the California statute applied in Yates contained the identical cap amount -- $250,000. Moreover, although the stated cap "amounts" were facially "larger" in each of the other cases relied on, each of those states' caps applied to all damages, not just noneconomic damages.[12] Thus, the Florida statute

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public need for quality medical services; and that the high cost of medical malpractice claims could be substantially alleviated by providing for early arbitration of claims and by imposing reasonable limitations on damages. Fla. Stat. § 766.20(1)(b); Echarte, 618 So. 2d at 191.

[11]In Echarte, the Court found that the damages limitations were constitutional in light of the benefits plaintiffs received from arbitration and the overpowering public necessity for damages reform. 618 So. 2d at 196. See also HCA Health Service of Fla., Inc. v. Branchesi, 620 So. 2d 176 (Fla. 1993) (adopting Echarte in the context of a wrongful death case).

[12]The Louisiana statute at issue in LaMark v. NME Hospitals, Inc., 542 So. 2d 753 (La. Ct. App.), cert. denied, 551 So. 2d 1334 (La. 1980) excepted medical care expenses from the cap which otherwise limited "all damages." See Atkins v. Strayhorn, 273 Cal. Rptr. 231, 237 (Cal. App. 4 Dist. 1990) (California's cap provides: "In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000)."); Telewicz v. S.E. Pa. Transp. Auth., 606 A.2d 427, 430 (Pa. 1992) (Pennsyl-

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may indeed be far more generous, for example where high economic damages are involved. In addition, the question of whether the Florida cap should be increased from its present size is one clearly reserved for the legislature.

Furthermore, this Court should not entertain any constitutional complaints about application of the cap since it has already found that the Medical Malpractice Act's limitations were constitutional and did not violate equal protection, in light of the benefits plaintiffs received from arbitration and the overpowering public necessity for damages reform. See University of Miami v. Echarte, 618 So. 2d at 196, and HCA Health Serv. of Fla., Inc. v. Branchesi, 620 So. 2d 176 (Fla. 1993). In fact, in Branchesi, a wrongdul death case, this Court again found the statutory cap at issue constitutional.[13] This Court should refrain from revisiting its prior opinions.

Finally, the Moglers have waived or are estopped from raising

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vania's cap provides: "Amount Recoverable. Damages arising from the same cause of action or transaction or occurrences shall not exceed $250,000.00 in favor of any plaintiff or $1 million in the aggregate."); Bulala v. Boyd, 389 S.E.2d 670, 674 (Va. 1990) (Virginia's cap provides: "... the total amount recoverable for any injury to, or death of, a patient shall not exceed seven hundred fifty thousand dollars."); Rose v. Doctors Hosp., 801 S.W.2d 841, 846 (Tx. 1900) (Texas' cap provides: "In an action on a health care liability claim ... the limit of civil liability for damages of the physician or health care provider shall be limited to an amount not to exceed $500,000."); Sander v. Geib, Elston, Frost Prof. Assoc., 506 N.W.2d 107, 123 (S.D. 1993) (South Dakota's cap provides: "In any action for damages for personal injury or death alleging malpractice ... the total damages which may be awarded may not exceed the sum of one million dollars.").

[13]Even though the opinion does not fully discuss the constitutional arguments, this does not mean that these arguments were not considered. See Bowles v. Mitchell Investments, Inc., 365 So. 2d 1028 (Fla. 3d DCA 1978) (failure to discuss a particular argument does not mean that argument was not considered in the opinion).

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an argument as to the constitutionality of this statute by not adequately preserving it below and by having agreed to arbitrate. See Santelli v. Arean, 616 So. 2d 1154, 1155 (Fla. 2d DCA), rev. denied, 624 So. 2d 268 (Fla. 1993) (by requesting arbitration, plaintiffs were estopped from attacking the limitation provisions they challenged on appeal).

The Moglers agreed to arbitration in this case. They received an expedited disposition, in which liability was admitted and all they had to prove was damages. Their attorney fees and costs are to be paid by Dr. Franzen. Thus, having received the benefits of the Medical Malpractice Act's voluntary arbitration provision, the Moglers must also be bound by its express limitations.

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 gone to trial. The economic damage awards therefore should be limited solely to those damages recoverable under the Wrongful Death Act. Furthermore, noneconomic damages in this should be limited to $250,000 per incident, as the Fourth District held.

Dr. Franzen respectfully requests that this Court quash the economic damage portion of the Fourth District's decision with instructions that the economic damages be limited to those set forth in the Wrongful Death Act. In addition, this Court should affirm the Fourth District's determination that only one cap of $250,000 for noneconomic damages is recoverable in this case. Dr.

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Franzen further requests, pursuant to Section 766.207(7)(f)[14], that the Fourth District be directed to reduce the combined award of attorney's fees and costs to 15% of the amended arbitration award.

Respectfully submitted,

BOBO, SPICER, CIOTOLI, FULFORD BOCCHINO, DEBEVOISE and LE CLAINCHE
Esperante, Sixth Floor
222 Lakeview Avenue
West Palm Beach, FL 33401

HICKS & ANDERSON, P.A.
New World Tower - Suite 2402
100 North Biscayne Blvd.
Miami, FL 33132
Tel: 305/374-8171
Fax: 305/372-8038

By: _____ for
RALPH O. ANDERSON
Fla. Bar No. 503207

By: _____
ILA J. KLION
Fla. Bar No. 928038

[14]Section 766.207(7)(f) provides:

> The defendant shall pay the claimant's reasonable attorney's fees and costs, as determined by the arbitration panel, but in no event more than 15 percent of the award, reduced to present value.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 23rd day of April, 1998 to all counsel on the attached list.

HICKS & ANDERSON P.A.
SUITE 2402 - NEW WORLD TOWER, 100 NORTH BISCAYNE BOULEVARD, MIAMI, FL 33132 • TEL. 305/374-8171 • FAX 305/372-8038

Lake Lytal, Jr., Esq.
LYTAL and REITER
P.O. Box 4056
West Palm Beach, FL 33402-4056
561/655-1990
561/832-2932 FAX
Attorneys for Appellees, Henry E. Mogler and Donna Mogler

Jane Kreusler-Walsh, Esq.
501 S. Flagler Drive, #503
West Palm Beach, FL 33401
561/659-5455
561/820-8762
Co-counsel for Appellees, Henry E. Mogler and Donna Mogler

Jane Kreusler-Walsh, Esq.
501 S. Flagler Drive, #503
West Palm Beach, FL 33401
561/659-5455
Co-counsel for Appellees, Charles Phillipe, et al.

Theodore Babbitt, Esq.
Joseph R. Johnson, Esq.
P.O. Box 24426
West Palm Beach, FL 33402
Trial Counsel for Charles Phillipe, et al.

Jeffrey Fulford, Esq.
Bobo, Spicer, Ciotoli, et al.
222 Lakeview Ave., Sixth Floor
West Palm Beach, FL 33401
Attorney for St. Mary's Hospital, Inc.

Joseph H. Lowe, Esq.
Winitz, Minkin & Lowe
9350 South Dixie Hwy. PH I
Miami, FL 33156
305/670-9944
Attorneys for Appellants, St. Mary's Hospital, Inc. and Women's Health Services, Inc.

Kristy C. Brown, Esq.
Fisher Rushmer Werrenrath et al
20 North Orange Ave., #1500
P.O. Box 712
Orlando, FL 32802-0712
407/843-2111
Attorneys for Amicus Curiae Florida Defense Lawyers Assn.

Gail Leverett Parenti, Esq.
Parenti Falk & Waas, P.A.
113 Almeria Avenue
Coral Gables, FL 33134
305/447-6500
FAX: 447-1777
Attorneys for Amicus Curiae Florida Defense Lawyers Assn.