IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

vs.

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

Respondents.
_____/

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,

Petitioners,

vs.

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

Respondents.
_____/

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

RESPONDENTS'/CROSS-PETITIONERS' REPLY BRIEF ON CROSS-APPEAL OF CERTIFIED QUESTION

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ARGUMENT

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.

The per incident cap on noneconomic damages in section 766.207(7)(b) clearly applies to each claimant. Section 766.202(1) defines claimant as "any person who has a cause of action arising from medical negligence." Certainly, parents of a deceased minor child are claimants as that term is defined in the Medical Malpractice Act, in the Wrongful Death Act, and by common sense.

The Fourth District's interpretation of the cap on noneconomic damages in section 766.207(7)(b) minimizes recoveries in cases with multiple survivors. This reading contravenes the Wrongful Death Act and the reason why the legislature rewrote the Act in 1972. As this Court stated in McKibben v. Mallory, 293 So. 2d 48, 55 (Fla. 1974), quoting from the Florida Law Revision Commissions' "Recommendations and Report on Florida Wrongful Death Statutes":

> "There are several things wrong with the wrongful death situation in Florida, but suffice it to say here that Florida's current position seems to be to minimize recoveries when there are many dependents left by the deceased and to maximize recoveries when no one is left dependent on the deceased. It takes no expert in the law to realize that this policy is diametrically opposed to what

> one would expect to be the objective in this area. ..."

Id.

The Fourth District ignored that the decedent's estate and the survivors are claimants under the Medical Malpractice and Wrongful Death Acts. The title of the Wrongful Death Act, Chapter 72-35, Laws of Florida, unequivocally described it as an "act providing for a right of action on behalf of the survivors and the estate by the personal representative." (emphasis added). See Bermudez v. Florida Power & Light Co., 433 So. 2d 565, 568 (Fla. 3d DCA 1983), rev. denied, 444 So. 2d 416 (Fla. 1984).

Standing to bring a wrongful death action is not the issue here. The issue is whether the survivors and the estate have separate and independent causes of action, which they clearly do. The Wrongful Death Act clearly and unequivocally creates independent claims for the survivors and the estate. See Variety Childrens Hosp. v. Perkins, 445 So. 2d 1010, 1013 (Fla. 1983); Ding v. Jones, 667 So. 2d 894, 898 (Fla. 2d DCA 1996). The survivors and the estate are the real parties in interest and the personal representative is the nominal plaintiff who recovers for their benefit, to avoid multiplicity of suits. See Continental Nat. Bank v. Brill, 636 So. 2d 782, 784 (Fla. 3d DCA 1994); Funchess v. Gulf

Stream Apartments of Broward County, Inc., 611 So. 2d 43, 45 (Fla. 4th DCA 1992); Morgan v. American Bankers Life Assur. Co. of Florida, 605 So. 2d 104 (Fla. 3d DCA 1992).

The Fourth District's reasoning and defendants' argument fall apart when it is recognized that there can be, and frequently are, co-personal representatives. It would be ludicrous to allow each of four children appointed as co-representatives of an estate noneconomic damages of $250,000, yet limit the noneconomic damages to $250,000 where only one of them was named as personal representative.

Department of Rehabilitative Servs. v. McDougall, 359 So. 2d 528 (Fla. 1st DCA), cert. denied, 365 So. 2d 711 (Fla. 1978), expressly rejected the interpretation defendants advance here -- that there is only one claimant in a wrongful death action because only the personal representative can file suit. McDougall held in the context of section 768.28(5), the sovereign immunity statute, that the claims of a widow and children in a wrongful death action are separate for purposes of calculating the final judgment under the sovereign immunity statute. See also State, Dep't. of Corrections v. Parker, 553 So. 2d 289 (Fla. 4th DCA 1989)(holding that a loss of consortium claim is a separate claim under the sovereign immunity statute); State, Dep't. of Transp. v. Knowles,

388 So. 2d 1045 (Fla. 2d DCA 1980)(holding that claims of different individuals in one lawsuit are separate claims under the sovereign immunity statute), aff'd, 402 So. 2d 1155 (Fla. 1981); State, Bd. of Regents v. Yant, 360 So. 2d 99, 100 (Fla. 1st DCA)(holding that an injured minor child's claim is separate from the parents' claim for damages arising out of the same injury, even though the claims are derivative), cert. denied, 364 So. 2d 892 (Fla. 1978).

Besides demonstrating the separateness of the survivors' and the estate's claims in wrongful death actions, McDougall and its progeny (applying section 768.28(5)), demonstrate that the legislature knows how to write a statute when it intends for a cap to apply in the aggregate rather than per claimant. (See RIB 23-24,[1] quoting section 768.28(5)). Had the legislature intended to place a maximum cap on noneconomic damages and not to establish a ceiling on what any claimant can recover, it could have easily written section 766.207(7)(b) to limit noneconomic damages "per patient," like Colorado and Louisiana did. Cases interpreting Louisiana's statute emphasize that it uses the words, "total," "all claims" and "a patient" to evidence the legislature's intent to apply the cap in the aggregate and not per claimant or per plaintiff. See, e.g., Todd v. Sauls, 647 So. 2d 1366, 1381 (La. Ct.

[1]RIB = Respondents'/Plaintiffs' Initial Brief on Cross-Appeal

App. 1994), writ denied, 651 So. 2d 289 (La. 1995). Conversely, Florida's Statute 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."

The legislature desired that the arbitration provisions of the Medical Malpractice Act provide a rational basis for determining damages for noneconomic losses and sought to fairly compensate those persons sustaining such losses. See University of Miami v. Echarte, 618 So. 2d 189, 192 (Fla.), cert. denied, 510 U.S. 915 (1993). The cap on noneconomic damages, as interpreted by the Fourth District, discriminates significantly against wrongful death medical malpractice claimants as opposed to other kinds of medical malpractice claimants, with no rational basis for the distinction. This discrimination is arbitrary and irrational in the extreme, requiring that this Court declare the medical malpractice arbitration statute unconstitutional. 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). In addition, if the Fourth District is correct and only the personal representative has a claim, the statute is unconstitutional because it leaves the survivors with no recovery for noneconomic damages. See, e.g.,

Smith v. Department of Ins., 507 So. 2d 1080, 1088-1089 (Fla. 1987).

Interpreting the cap on noneconomic damages in medical malpractice arbitration cases as applied per claimant per incident comports with the legislature's intent to limit damages awards, obtain predictability of outcome, and encourage prompt resolution of claims. See § 766.201(2)(b)(3), Fla. Stat. A limitation of $250,000 per claimant in a wrongful death case involving a deceased child is significantly less than the average wrongful death verdict for such damages. See Grayson v. United States, 748 F.Supp. 854 (S.D. Fla. 1990), aff'd in part, vacated in part on other grounds, 953 F.2d 650 (11th Cir. 1992). Grayson compiled Florida verdicts for wrongful death actions involving deceased minor children and determined that the average award to each parent for mental pain and suffering was about $900,000. See id. at 862-863. Obviously, a limitation of $250,000 to each parent for the same damages is a significant reduction.

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 arbitration award.

CONCLUSION

The 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 opinion 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.

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