SUPREME COURT OF FLORIDA

ST. MARY'S HOSPITAL, INC., and
WOMEN'S HEALTH SERVICES, INC.,

Petitioner,

vs. CASE NO. 91,895

CHARLES PHILLIPE, Individually and as statutory survivor and as Personal Representative of JUSLIN PHILLIPE, deceased, and all statutory survivors of JUSLIN PHILLIPE, deceased,

Respondent.
_____/

CHARLES PHILLIPE, Individually and as statutory survivor and as Personal Representative of JUSLIN PHILLIPE, deceased, and all statutory survivors of JUSLIN PHILLIPE, deceased,

Petitioner,

vs. CASE NO. 91,896

ST. MARY'S HOSPITAL, INC., and
WOMEN'S HEALTH SERVICES, INC.,

Cross-Respondents.
_____/

AMENDED REPLY BRIEF AND ANSWER BRIEF OF PETITIONERS AND CROSS RESPONDENTS ST. MARY'S HOSPITAL, INC. and WOMEN'S HEALTH SERVICES, INC.

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SUMMARY OF THE ARGUMENT

Respondent attempts to avoid a merits resolution by improperly relying on case law interpreting the authority of the court to review arbitration proceedings conducted pursuant to the Arbitration Code, Chapter 682 of the Fla.Stat. §766.212(1) controls and provides that an appeal proceed in accordance with Section 120.68. The lower court correctly determined the standard of review and that decision should be ratified.

This Court's opinion in *University of Miami v. Echarte*, 618 So.2d 189 (Fla. 1993) does not stand for the proposition that in a binding arbitration proceeding pursuant to Section 766.207 the legislature can infringe on the exclusive rulemaking authority of this Court and limit the right to post a supersedeas while appealing an adverse award. To add insult to injury the lower court erroneously held that the automatic stay provisions set forth in Fla. R. App. R. 9.130(b) is not applicable to a judgment entered by a circuit court in accordance with an arbitration panel award.

Unlike other statutes providing that the personal representative can recover damages under both the Wrongful Death Act and another statute, there is no such enabling language in the Medical Malpractice Act to permit the personal representative on

behalf of the estate and the survivors to recover damages not permitted under the Wrongful Death Act. There is no statutory basis to permit recovery of future lost earning capacity of the deceased. Economic damages are limited to recovery of loss of support and services from date of death.

As to the issue raised in the cross appeal, the lower court correctly determined that the language in Fla. Stat. §766.207(7)(b) is clear and unambiguous and limits non-economic damages to $250,000 **per incident**. The district court correctly rejected Phillipe's attempt to read the words "per claimant" into the statute. Other Florida statutes provide for a limitation of damages per incident, and have been interpreted to mean what they say, and not be interpreted to apply a damage limit to each claimant. *See* Fla. Stat. §766.28(5).

Applying settled principals of statutory construction the lower court correctly held that the survivors are not claimants under the Malpractice Act or Wrongful Death Act and that the only claimant is the personal representative of the estate. Case law is legion that only the personal representative can maintain a law suit and therefore the cause of action provided by the Medical

Malpractice Act rests solely in the personal representative and he is the only claimant.

ARGUMENT

STANDARD AND SCOPE OF REVIEW

Attempting to avoid a merit resolution of the issues before the Court, Respondents Phillipe challenges the authority of this court to consider the two certified questions. Respondent attempts to categorize the arbitration proceeding conducted pursuant to Fla. Stat. §766.207 as being subject to the Arbitration Code, Fla. Stat. Chap. §682 et.seq. and hence not reviewable. This argument was rejected by the Fourth District and should likewise be rejected by this court.

Judicial review and vacating of an arbitration award is customarily governed by the Arbitration Code, Fla. Stat. 682.01 et.seq. Case law interpreting these statutes limit the grounds for vacating an award to one of five factors enumerated in Fla. Stat. §682.13(1)(a)-(e). Therefore courts have refused to set aside an arbitration award even when the arbitrators have made an error of law in interpreting a statute, or an error as to the facts. *See, Schnurmacher Holding, Inc. v. Noriega,* 542 So.2d 1327 (Fla. 1989). There is no provision in the arbitration code that authorizes judges to act as reviewing courts to review an arbitrators' decision for legal and factual accuracy, *J.F. of Palm Beach, Inc.*

v. State Farm Fire and Casualty Co., 634 So.2d 1089 (Fla. 4th DCA, 1994).

However, Fla. Stat. §766.212(1) establishes that an arbitration proceeding pursuant to that chapter is considered final agency action for purposes of §120.68. The section further provides, "Any appeal shall ... be limited to review of the record, and **shall otherwise proceed in accordance with §120.68."** The final sentence of the statute provides that:

> **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 institute pursuant to this subsection.**

Section 120.68, entitled Judicial Review sets out in a number of sub-sections the extent of the district court's review:

> (7) The reviewing court shall deal separately with disputed issues of agency procedure, interpretations of law, determinations of fact, or policy within the agency's exercise of delegated discretion.
>
> **(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 Sec. 120.57 of the act, 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.**

(12) The court shall remand the case to the agency if it finds the agency's exercise of discretion to be:

(a) Outside the range of discretion delegated to the agency by law;

.....

(d) Otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

Pursuant to the above provisions of Section 120.68 the district court is directed to review the arbitration award as if it were reviewing any agency action, and not be constrained by the limitations imposed by the Arbitration Code.

The lower court in its opinion analyzed at great length the issue of the standard of review. Recognizing that there are two different statutes providing for arbitration of medical malpractice claims, Fla. Stat. §766.106, which references the Florida Arbitration Code, and Section 766.207 which does not, the district

court concluded that the applicable standard of review is set forth in Fla. Stat. §120.68, which is part of the Administrative Procedures Act, and not the Arbitration Code. The lower court determined that the clear language of Section 766.212(1) provides a court with "slightly more review" than provided for in the Arbitration Code. The last sentence of Section 766.207(1) provides that **the amount of an arbitration award ...[is] subject to judicial scrutiny**." That was the precise issue presented to the court below.

Respondent engages in semantic contortions when he claims that the arbitrator's error was in their interpretation of the statute and not the amount of the award. The purpose of Section 766.212(1) is to review damages awarded, and if improper, because of a misinterpretation of the law, overturn the award. Under Phillipe's construction of the statute, any misinterpretation can go unchallenged - thus a rogue panel could award punitive damages to a claimant even though Fla. Stat. §766.207(7)(d) prohibits such an award and the health care provider could not seek redress to the appellate court. This strained construction of the statute would vitiate the clear language of Section 766.212, rendering the right to appeal illusory and meaningless.

The lower court correctly determined the standard of review. The court's analysis should be affirmed. Respondent's suggestion that the opinion below be reversed should be rejected.

POINT I

FLORIDA STATUTE §766.212(2) VIOLATES THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION AS IT IMPROPERLY PROVIDES A PROCEDURE TO STAY A MONETARY AWARD DURING THE PENDENCY OF AN APPEAL.

A. THE STATUTE IS UNCONSTITUTIONAL AS IT USURPS THE RULEMAKING AUTHORITY OF THIS COURT.

Respondent has chosen not to address the body of case law cited in Petitioner's initial brief regarding this Court's sole authority to promulgate rules relating to the practice and procedure of all courts as found in Section 766.212(2)(see Petitioner's Initial Brief, pages 12-15). Instead he chooses to cherry-pick certain language from this Court's opinion in *University of Miami v. Echarte,* 618 So.2d 189 (Fla. 1993)("Echarte") to justify the legislature's improper infringement of this Court's sole authority to regulate practice and procedures.

Echarte upheld the limitation on non-economic damages as not being unconstitutional. The threshold issue before the court was whether the statute provided a claimant with a "commensurate benefit" for the loss of the right to fully recover non-economic damages. The court set forth the benefits that the claimant receives by agreeing to arbitrate:

> The claimant benefits from the requirement that a defendant quickly determine the merit of any defenses and the extent of its liability. The claimant also saves the costs of attorney and expert witness fees which would be required to prove liability. Further, a claimant who accepts a defendant's offer to have damages determined by an arbitration panel receives the additional benefits of: 1) the relaxed evidentiary standard for arbitration proceedings as set out by Section 120.58, Florida Statutes (1989); 2) joint and several liability of multiple defendants in arbitration; 3) prompt payment of damages after the determination by the arbitration panel; 4) interest penalties against the defendant for failure to promptly pay the arbitration award; and 5) limited appellate review of the arbitration award requiring a showing of "manifest injustice."

618 So.2d 194.

Latching on to the last benefit noted by the *Echarte* court, Respondent argues that the legislature has the right to limit the ability to stay a money award. The fallacy of this argument is that Section 766.212(1) directs that the appeal from a medical malpractice arbitration proceed in accordance with Section 120.68. Subsection 120.68(3) provides:

> (3) The filing of a notice or petition does not stay enforcement of the agency decision. The agency may grant a stay upon appropriate terms, but a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas. Subject to the Florida Rules of Appellate Procedure, no stay or supersedeas shall be in effect until the party seeking relief files a petition for stay and the agency or court enters an order granting such relief. The order shall specify the conditions, if any, upon which the stay or supersedeas is granted.

> Where the agency decision has the effect of suspending or revoking a license, a stay shall be granted as a matter of right upon such conditions as are reasonable, unless the agency demonstrates that a stay would constitute a probable danger to the public health, safety, or welfare.

This subsection provides an aggrieved party the choice of seeking a stay from the agency or petitioning the court for a supersedeas. It references the Florida Rules of Appellate Procedure. Compare this section to Subsection 766.212(2) which prohibits any arbitration panel, arbitration panel member or circuit court from staying the award. Any request for a stay must be directed to the district court who can order a stay to prevent manifest injustice. Nowhere in the statutory scheme is there a right to post a supersedeas bond. By precluding the defendant from posting a supersedeas for the monetary award during the appeal, the statute clearly violates the separation of powers provision of the Florida Constitution as it infringes on the rulemaking authority of this Court. Therefore, Subsection 766.212(2) should be declared unconstitutional.[1]

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[1] The concerns expressed by Petitioners when it sought to stay the award have come to pass. Though the district court mandate was issued October 22, 1997 the parties have been unable to agree on the wording of a revised judgment. On April 17, 1998, Petitioners recovered a token amount of the overpayments due them after having been threatened by Respondent's counsel in September, 1996 that he

B. THE STATUTE IS UNCONSTITUTIONAL TO THE EXTENT IT PRECLUDES A DEFENDANT FROM OBTAINING AN AUTOMATIC STAY OF A MONEY JUDGMENT AS PROVIDED FOR IN FLA. R. APP. P. 9.310.

Petitioners do not question that the statute permits a circuit court judge to enter a judgment based upon the arbitration award. The issue is whether that judgment is subject to the provisions of Florida Rule of Appellate Procedure 9.310(b) which provides an automatic stay of a money judgment. The judgment entered by the trial judge was solely for the payment of money. Therefore pursuant to the Rule, Respondent had the right to stay the judgment by complying with the Rule and posting a bond. Rule 9.310(a) makes clear that the conditions for obtaining a stay by filing a motion with the lower tribunal is not necessary when the judgment is for the payment of money. Once Phillipe decided to obtain a judgment from the circuit court, the limitation to stay the award contained in Fla. Stat. §766.212(2) was subject to the Rules of Appellate Procedure. The lower court erred in upholding the trial court's right to enter post judgment orders vitiating the supersedeas bond

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would execute on its CT scanner if the judgment was not paid. It is uncertain if and when all the overpaid funds will be recovered. This could have been avoided by posting of the supersedeas which Petitioners were wiling to do.

that was posted. After the final judgment was entered, Respondent had the right to supersede the judgment. To hold otherwise permits the legislature to direct the practice and procedures of the circuit court and is manifestly unjust to Petitioner in that the funds could be expended with no hope of recovery.

POINT II

THE DISTRICT COURT ERRED IN AFFIRMING THE ARBITRATION PANEL'S AWARD OF CERTAIN ECONOMIC DAMAGES WHICH ARE NOT PERMITTED UNDER THE WRONGFUL DEATH ACT.

The arbitration panel awarded $1,671,424 for loss of support and services to the survivors pursuant to the Wrongful Death Act. The panel also awarded $613,380 for the deceased's loss of future earning capacity pursuant to the Medical Malpractice Act. The Fourth District affirmed these awards. For the reasons that follow, this portion of the lower court's opinion should be reversed.

Though the legislature by enacting Fla. Stat. §§766.201-212 may have adopted a new scheme to expeditiously resolve medical malpractice claims, nowhere in the statute is there any evidence that they intended to permit recovery of economic damages beyond those permitted by the Wrongful Death Act, Fla. Stat. §§768.16-27. Unlike other statutes which express the legislative intent not to

limit damages to those set forth in the Wrongful Death Act, no such expression is found in the Medical Malpractice Act. The fact that the parties agreed to arbitrate the dispute does not mean that in addition to admitting liability the health care provider also agreed to pay economic damages that would not be permitted in a court proceeding.

Respondent's reliance on *Beverly Enterprises-Florida, Inc. v. Spilman*, 661 So.2d 867 (Fla. 5th DCA 1995), *rev. denied*, 668 So.2d 602 (Fla. 1996) is misplaced. The issue in that case was whether or not the personal representative could recover for the deceased's pain and suffering before death. The defendants argued, as the Petitioners here that the damages are controlled solely by the Wrongful Death Act. However, the language in the Nursing Home Act, Fla. Stat. Chap 400, provides for recovery of damages under the two statutes.

> Section 400.023. Civil enforcement, provides:
>
> (1) Any resident whose rights as specified in this part 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 or her guardian, by a person or organization acting on behalf of a resident with the consent of the resident or his or her guardian, or by the personal representative of the estate of a 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. Any plaintiff who prevails in any such action may be entitled to recover reasonable attorney's fees, costs of the action, and damages, unless the court finds that the plaintiff has acted in bad faith, with malicious purpose, and that there was a complete absence of a justiciable issue of either law or fact. Prevailing defendants may be entitled to recover reasonable attorney's fees pursuant to s. 57.105. **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.**

The statute by its clear terms provides the personal representative with authority to sue for the damages that the deceased could have sued for as well as wrongful death damages. There is no comparable language in the medical malpractice statute.

Similarly, the Florida Birth-Related Neurological Injury Compensation Plan, Section 766.301 *et.seq.* provides in Section 766.302(3) that:

> (3) "Claimant" means any person who files a claim pursuant to §766.305 for compensation for a birth-related neurological injury to an infant. **Such a claim may be filed by any legal representative** on behalf of an injured infant; and, **in the case of a deceased infant, the claim may be filed by an administrator, personal representative, or other legal representative thereof.**

Compare this definition of a claimant found in Fla. Stat. §766.302(3) with the definition of claimant found in Fla. Stat. §766.202(1):

> (1) "Claimant" means any person who has a cause of action arising from medical negligence.

There is no indication that the legislature intended that the personal representative be able to recover damages under both the Wrongful Death Act and the Medical Malpractice Act. In deciding whether to arbitrate a defendant looks to which act would govern the potential damages. To allow damages under both acts would allow claimant to recover damages that he would not be entitled to if the case was tried and it would not allow defendants to evaluate their potential exposure with any certainty.

The issue of who is the claimant is addressed at length in the point on cross-appeal, *supra*, and controls resolution of this issue as well as the issue of non-economic damages. Under Respondent's scenario, the claimant is, depending on the type of damages being sought, either the deceased or the personal representative or the statutory survivors. If the claimant is the deceased and damages are controlled by the Medical Malpractice Act, then the $1,671,424 economic damage award for loss of support and services must be set

aside. Those damages are not recoverable under the Medical Malpractice Act, but only under the Wrongful Death Act.

The issue is not whether the Wrongful Death Act applies, but whether the statutory scheme set forth in Fla. Stat. §§766.210-.212 permits recovery under the two acts. As there is no language in the Medical Malpractice Statute expressing such an intent, and language in other statutes indicate that the legislature can, when it wants to, provide for recovery under multiple acts, there is no basis to permit recovery of loss of future earning capacity in an action based upon the Wrongful Death Act. The personal representative should not be able to recover economic damages both under the Wrongful Death Act (for loss of support and services) and the Medical Malpractice Act (for loss of earning capacity).

The lower court erred in affirming the economic damage award and determining that damages are governed by the Medical Malpractice Act. This court should reverse this portion of the lower court's decision and remand with directions that the economic damages be limited to those provided for in the Wrongful Death Act.

POINT ON CROSS-APPEAL AND CERTIFIED QUESTION

THE CAP ON NONECONOMIC DAMAGES AWARDABLE IN VOLUNTARY BINDING ARBITRATION OF MEDICAL MALPRACTICE ACTIONS APPLIES TO THE INCIDENT AND NOT TO EACH STATUTORY SURVIVOR.

Florida Statute §766.207(7)(b) provides in clear and no uncertain terms the maximum amount that can be recovered in a voluntary binding arbitration of a medical negligence claim brought pursuant to the statute:

> (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:
>
> (b) **Noneconomic damages shall be limited to a maximum of $250,000 per incident,** ....

The arbitration panel awarded a total of $1,025,000 in non-economic damages. Their interpretation of the statute, construed the phrase "**per incident**" to somehow mean "per survivor of the deceased." The Fourth District reversed the arbitration panel reasoning as follows:

> The question we face today, however, is whether the statutory text will bear the construction placed on it by the arbitrators in this case. We do not believe that it will. To quote it again, the pertinent text is: "[n]oneconomic damages shall be limited to a maximum of $250,000 *per incident* ...." [court's emphasis] It is a fundamental rule of

statutory construction that if the text is clear, the court may not resort to construction. *Palm Beach Community College Foundation Inc. v. WFTV Inc.*, 611 So.2d 588 (Fla. 4th DCA 1993). We must also read a statutory text to give effect to the plain meaning of its words. *Palm Beach County Health Care Dist. v. Everglades Mem. Hosp. Inc.*, 658 So.2d 577 (Fla. 4th DCA 1995). Both sides agree that this text is clear, even if they do read it differently.

Claimants' argument seeks to add the words per claimant to modify the temper incident. But adding the words per claimant at this point in the statutory text is little more than an extension of the universe built by the legislature. As the supreme court made clear in *Holly v. Auld*, 450 So.2d 217 (Fla.1984), "courts of this state 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 implications. To do so would be an abrogation of legislative power."450 So.2d at 219. Hence, using only the text given us by the legislature--however many individual claimants there may be from a single incident of malpractice on a patient--there is only one incident of malpractice in this case. It follows that there can be no more than $250,000 in non-economic damages awarded by the arbitrators under Section 766.207, no matter how many different people may have a direct benefit in the award, or the source of their entitlement to share in the award. If $250,000 is too little for multiple beneficiaries of the nominal claimant, their remedy is not to agree to arbitration. After all, Section 766.207 does not require anyone to agree to arbitration.

The district court then certified the following question to this Court:

> 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 Act beneficiaries?

For the reasons that follow, this Court should affirm the portion of the district court's opinion limiting non-economic damages to $250,000 in the aggregate for all Wrongful Death Act beneficiaries.

Respondent asks this court to rewrite Section 766.207(7)(b) to read "per incident per claimant." To reach this result he argues that each of the survivors are claimants under the Act. However, the fallacy of the argument is that Respondent improperly changes who the claimant is to suit his purposes. The statute defines claimant to mean "any person who has a cause of action for medical malpractice." Fla. Stat. §766.202(1). Respondent in his argument to justify the award of economic damages for loss of earning capacity and loss of support and services argues that the decedent is the claimant. For the purposes of non-economic damages he contends that the decedent is not the claimant, the survivors are. Clearly Respondent wants to have his cake and to eat it too. He

can not have it both ways. The claimant cannot be different persons depending on the kind of damages being sought. If the survivors are the claimants for non-economic damages, then they must also be the claimants for economic damages - and they suffered no loss of earning capacity, nor are they entitled to recover for loss of support and services. It is submitted that there is only one claimant and that is the Personal Representative of Juslin Phillipe's estate - Charles Phillipe, and not each of the survivors.

Respondent argues that since there are multiple claimants (the survivors), the cap on noneconomic damages applies to each one of them separately. If the legislature intended that the cap apply "per incident" to each claimant, they would have said so. Even assuming that the statute is construed to mean $250,000 per incident per claimant, such an interpretation still does not help the survivors. Mr. Phillipe, as the surviving spouse and his children are not claimants. They are survivors as that term is defined in Fla. Stat. §768.18(1). Case law, including medical malpractice cases, unequivocally establish that only the personal representative can bring a cause of action against the tortfeasor. *See, Veltmann v. Walpole Pharmacy, Inc.*, 928 F.Supp. 1161 (M.D.

Fla. 1966)(neither decedent's husband nor her son had standing to bring medical malpractice claim absent an allegation that they were bringing suit as personal representative. Under Florida Wrongful Death Act the real party in interest is the personal representative); *Puig v. Saga Corp.*, 543 So.2d 238 (Fla. 3d DCA 1989)(personal representative, who was also surviving spouse of decedent was not proper party as surviving spouse personally). The claimant here is the personal representative of the estate. Neither the surviving spouse individually nor his children are claimants as none of them in their individual capacity had the right or ability to bring and maintain a suit, or agree to arbitrate.

The statute discusses claimant in the singular, and here there is only a single claimant. Noneconomic damages are therefore limited to $250,000. Indeed, this argument that each survivor is a claimant flies in the face of the record. On August 21, 1995 Respondent's trial counsel Theodore Babbitt sent a letter to Petitioner's trial counsel that provided as follows:

> Pursuant to the applicable Florida Statutes, please be advised that **Charles Phillipe, as Personal Representative of the Estate of Juslin Phillipe, deceased and all statutory survivors, hereby accepts** St. Mary's Hospital

> and Women's Health Services, Inc.'s offer to admit liability and enter into voluntary binding arbitration.

(R.6).

At the time Appellee agreed to arbitrate he understood that there was only one claimant Charles Phillipe as personal representative of the estate. He accepted the offer to arbitrate on behalf of the estate and all statutory survivors. Only now is there a theory being advanced that each survivor is a separate claimant.

In the companion case of *Franzen v. Mogler,* 699 So.2d 1026, 1997 WL 656303 (Fla. 4th DCA 1997), the lower court on Motion for Rehearing addressed, and rejected the argument Respondent advances here:

> The crux of appellees' motion for rehearing is that each of these WDA [Wrongful Death Act] beneficiaries is a separate claimant within the meaning of MMA [Medical Malpractice Act] Section 766.202. Because each is a separate claimant, they argue, the $250,000 cap on non-economic damages applies only to each beneficiary and not in the aggregate against all beneficiaries. We think from the foregoing statutory language that they are mistaken.
>
> As we have seen, a claimant under MMA 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.
>
> When that patient has suffered the ultimate damage of death, however, WDA extinguishes any survival action of

> the patient and replaces it with a derivative cause of action reposed solely in the patient's personal representative. 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).
>
> Hence it is only the personal representative who, it seems to us, qualifies as a claimant within the meaning of MMA Section 766.202; for it is the personal representative alone who derives a cause of action from the alleged medical negligence of the provider. Nothing in the text of WDA suggests that the beneficiaries, simply because they are WDA beneficiaries, become claimants under MMA Section 766.202 as a result of their entitlement to damages under WDA. At least, there is nothing in either statute that would explicitly transform the status of mere beneficiaries under WDA into claimants with a separate cause of action under MMA.

1997 WL 656303, Franzen v. Mogler, (Fla.App. 4 Dist. 1997).

Once the issue of who is the claimant is resolved, then basic rules of statutory construction apply. In interpreting a statute, the appellate court must first look to the plain and ordinary meaning of the language used in the statute. *Moonlit Waters Apartments, Inc. v. Cauley,* 651 So.2d 1269 (Fla. 4th DCA 1995). The statute must be construed to give effect to the plain meaning of its words. *Palm Beach County Health Care District v. Everglades Memorial Hospital, Inc.*, 658 So.2d 577 (Fla. 4th DCA 1995). If the wording of the statute is not ambiguous, unreasonable, or

illogical, the court should not go beyond the clear wording and plain meaning of the statute to give it a different meaning. *Palm Beach Community College Foundation, Inc. v. WFTV, Inc.*, 611 So.2d 588 (Fla. 4th DCA 1993). If the legislative history is reviewed, the courts will presume that the legislature knows the meaning of the words employed in the statute, and that the words express the legislative intent. *Alexdex Corp. v. Nachon Enterprises, Inc.*, 641 So.2d 858 (Fla. 1994). With these principles as guidelines, it is clear that the legislature knew what it meant when it capped noneconomic damages at $250,000 per incident.

In a related section of Chapter 766, the terms "occurrence" and "per claim" are defined:

> 766.105. Florida Patient's Compensation Fund
>
> (1) Definition - The following definitions apply in the interpretation and enforcement of this section:
>
> (f) The term "occurrence" means an accident or **incident**, including continuous or repeated exposure to conditions, which results in patient injuries not intended from the standpoint of the insured.
>
> (g) The term "per claim" means all claims per patient arising out of an occurrence.

These definitions shows that the legislature considered an incident to be a single event and that the word is synonymous with accident

or occurrence. The limit on noneconomic damages was for the event - the incident - the medical accident that caused injury.

Other statutes containing limitation of damages provisions have been uniformly interpreted to support the legislative intent to limit exposure. Fla. Stat. §768.28, the waiver of sovereign immunity statute, provides in subsection (5) that the state shall not be liable to pay any claim or judgment, which when totaled with all other claims or judgments paid "arising out of the same **incident** or occurrence, exceeds the sum of $200,000." In *Orange County v. Gipson*, 548 So.2d 658 (Fla. 1989), the Supreme Court agreed with the Fifth

District that the statutory limit "per incident" provided for in Fla. Stat. §768.28(5) was the "absolute maximum" limit on the waiver of immunity. Id. at 660. See also, *Department of Health and Rehabilitative Services v. McDougall*, 359 So.2d 528 (Fla. 2d DCA 1979)(judgment for deceased's widow and children limited only by ceiling stated in statute [Fla. Stat. §768.28(5)]).

Case law interpreting the Florida Insurance Guaranty Act's limitation of liability, Fla. Stat. §631.57(1)(a) supports Petitioner's position. This subsection limits FIGA's obligation for a covered claim to $300,000. In *Florida Insurance Guaranty*

Association v. Cole, 573 So.2d 868 (Fla. 2d DCA 1991), the personal representative sought a declaratory decree that each of three survivors of the deceased were entitled to the $300,000 limit. The trial court agreed with the widow and ruled that each beneficiary could recover up to $300,000. The Second District reversed, holding that the statutory limit applied to the claim of any one person injured or killed. Therefore, though there were multiple survivors under the Wrongful Death Act suing for the death of one person, they were only entitled to a single claim to the maximum of the statutory amount.

Earlier, the Second District in *Florida Insurance Guaranty Association v. Cope*, 405 So.2d 292 (Fla. 2d DCA 1981) in interpreting an insurance policy, determined that survivors of the decedent were entitled only to the "per person" coverage rather than the greater "per accident" amount provided for in the policy since a wrongful death claim brought by the personal representative was only one claim. The First District in *Skroh v. Travelers Insurance Company*, 227 So.2d 328 (Fla. 1st DCA 1969) in interpreting a standard automobile policy limiting liability to "per person" held that the estate of a deceased minor and his parents were not each entitled to recover the maximum limit of

liability by bringing an action under the Wrongful Death Act.

Petitioner submits that the language of Fla. Stat. §766.207(7)(b) does not necessitate this Court having to go any further than the plain wording of the statute. If the Court determines that it should ascertain the legislative intent, then it need look no further than Fla. Stat. §766.201, **Legislative findings and intent** and specifically subsection (b) of the section which provides:

> (b) Arbitration shall provide:
>
> 1. Substantial incentives for both claimants and defendants to submit their cases to binding arbitration. Thus reducing attorney's fees, litigation costs and delay.
>
> 2. A conditional limitation on noneconomic damages where the defendant concedes willingness to pay economic damages and reasonable attorney's fees.
>
> 3. **Limitations on the noneconomic damages component 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.**

The intent of the legislature would be frustrated if uncertainty as to the amount of noneconomic damages is permitted to effect arbitration. Loss planning would be speculative at best if an insurer cannot anticipate the maximum exposure for

noneconomic damages. To open up this area of damages so that the exposure is dependant on the number of beneficiaries defeats the intent of the act. Early resolution of a claim would not occur if an insurer has to calculate potential exposure by multiplying the $250,000 cap by the number of beneficiaries of a decedent. The legislative intent was to place a maximum cap on noneconomic damages, not to establish a ceiling for what any one person could recover.

Finally, Respondent's reliance on a Florida case concerning a different issue, and case law from other jurisdictions is misplaced. In *Variety Children's Hospital v. Perkins,* 445 So.2d 1010 (Fla. 1983) this Court quashed the district court's reversal of the trial court's dismissal of a wrongful death claim brought by the personal representative because the decedent, prior to his death sued and recovered from the same defendant. The district court reasoned that Fla. Stat. §768.19 created an independent cause of action in the statutory beneficiaries which could not be barred because the decedent had obtained a prior judgment for his injuries. This Court found that the district court's decision to be contrary to the majority view of other states having similar statutes. *Id.* at 1011-12. Similarly, *Ding v. Jones,* 667 So.2d 894

(Fla. 2d DCA 1996) concerned the statute of limitations and the right of a surviving spouse to sue for his damages by a counterclaim more than two years after the death.

The majority of jurisdictions considering the issue of the cap on non-economic damages have held that it applied in the aggregate and not per claimant. In *Todd v. Sauls*, 647 So.2d 1366 (La. App. 1994) the court held that a single cap applied to the survival claim brought on behalf of the decedent and the wrongful death claim brought by the survivors. In *Yates v. Pollock*, 239 Cal.Rptr. 383 (Cal. App. 1987) the California court applied a single cap to multiple claimants in a Wrongful Death Action. Respondent's reliance on two South Dakota cases is misplaced as that represents a minority view on the issue.[2]

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[2]Petitioner, to avoid unnecessary duplication on this argument adopts the argument found at pages 13-17 of the Amicus Curiae brief filed by the Florida Defense Lawyers Association.

CONCLUSION

It is respectfully submitted that based upon the argument and authority cited herein, the lower court erred in upholding the constitutionality of Fla. Stat. §766.212 and interpreting the statute to prevent a defendant from posting a supersedeas bond while appealing an arbitration award and a judgment entered pursuant thereto. The court further erred in holding that the personal representative can recover economic damages under both the Wrongful Death Act (for loss of support and services) and under the Medical Malpractice Act (for loss of earning capacity of the decedent). This court should quash this portion of the lower court's opinion and remand with directions that a corrected economic damage award be entered pursuant to the Wrongful Death Act.

As to the cross appeal, the language of Fla. Stat. §766.207(7) is clear, unambiguous and can only be interpreted to limit the total amount of non-economic damages to $250,000 irrespective of the number of persons sharing that award. Even assuming arguendo that the survivors are claimants as that term in defined in the statute, there is no basis for this Court to rewrite the statute to add the words "per claimant" so as to abrogate the intent of the

legislature to limit non-economic damages to $250,000 per medical incident. As there was only one medical incident, the district court correctly interpreted the statute and the portion of the opinion limiting non-economic damages to $250,000 should be affirmed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: Theodore Babbitt, Esq., PO Box 24426, West Palm Beach, FL 33402; Jane Kreusler-Walsh, Esq., 501 S. Flagler Drive, Suite 503, West Palm Beach, FL 33401; Diana Lewis, Esq., P.O. Box 150, West Palm Beach, FL 33402; Ralph Anderson, Esq., Alyssa Campbell, Esq., 100 North Biscayne Boulevard, Suite 2402, Miami, FL 33132; Kristy C. Brown, Esq., P.O. Box 712, Orlando, FL 32802; Shelley H. Leinicke, Esq., P.O. Box 14460, Fort Lauderdale, FL 33302; William A. Bell, Esq., 120 South Monroe Street, Tallahassee, FL 32302; Claudia Greenberg, Esq., Grossman & Roth, 2665 South Bayshore Drive, PH.-I, Miami, Florida 33133; Neil H. Butler, Esq., P.O. Box 839, Tallahassee, FL 32302; and to the Honorable Richard Hixson, Division of Administrative Hearings, One DeSoto Building, 1230 Apalachee Parkway, Tallahassee, FL 32399, on April 28, 1998.

Respectfully Submitted,

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