IN THE SUPREME COURT OF FLORIDA

ST. MARY'S HOSPITAL, INC.,
et. al.,
Petitioners/Cross Respondents,

v. CASE NO.: 91,895

CHARLES PHILLIPE, etc.,
Respondent/Cross Petitioner.
_____/

CHARLES PHILLIPE, etc.,
Petitioner/Cross Respondent,

v. CASE NO.: 91,896

ST. MARY'S HOSPITAL, INC.,
et. al.,
Respondents/Cross Petitioners.
_____/

On Petition for Review from the District Court of Appeal
Fourth District

Case Nos.: 96-2321, 96-2971, 96-3320

AMICUS CURIAE BRIEF
OF
FLORIDA ACADEMY OF TRIAL LAWYERS

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INTRODUCTION

The Academy of Florida Trial Lawyers files this Brief in support of the position of the Respondents.

This Brief will present the Academy's position on these three issues: (1) whether claimants, who are the survivors and the estate of a decedent, who was the victim of medical malpractice, are entitled to the full range of economic damages provided under the Medical Malpractice Arbitration Act, or, the itemized damages under the Wrongful Death Act, when the parties have agreed to binding arbitration; (2) whether or not each survivor and the estate are entitled to a separate cap of $250,000 in noneconomic damages, or, are limited to a total cap of $250,000; (3) whether the Florida Medical Malpractice Arbitration Statute, as applied in this case impermissibly and unconstitutionally discriminates between personal injury plaintiffs and wrongful death plaintiffs.

STATEMENT OF THE CASE AND FACTS

The Academy adopts the Statement of the Case and Facts set forth in the Respondents' Brief.

SUMMARY OF ARGUMENT

If the parties elect arbitration under the Medical Malpractice Arbitration Act, then the parties are afforded both the benefits and detriments with respect to recoverable damages spelled out in the act. Because the Medical Malpractice Act exclusively covers damages when the parties agree to arbitrate, the parties may not choose to accept certain benefits of the Act, on the one hand, but reject provisions which they feel are detrimental. The Legislature intended that the limits on recoverable noneconomic damages were the *quid pro quo* for the defendant's admission of liability in order to avoid what the defendants feared most: a runaway jury verdict. Health care providers were successful in obtaining their objective. The Legislature enacted a statute to effect the goals of the health care providers. Now, however, as we can see from the Petitioner's Brief, defendants are refusing to accept the *quid pro quo*. They also want to limit economic damages.

The claimants are entitled to their full measure of economic damages as provided by the Medical Malpractice Arbitration Act and not the more limited damages provided by the Florida Wrongful Death Act. The legislature clearly and unambiguously defined economic damages in a distinctly different manner from the wording of the Wrongful Death Act. The Fourth District correctly held that the Medical Malpractice Act exclusively governs such damages when the parties have elected to arbitrate under the Act.

On the other hand, the Fourth District erred when it reached the conclusion that the $250,000 limit on noneconomic damages under the Medical Malpractice Arbitration Act applies as a total cap to all of the separate claims of the survivors of the decedent. The Medical Malpractice Statute is unique. Neither cases construing the language of insurance policies, nor the Florida Sovereign Immunity Statute should be applied to this Court's interpretation of the cap. Each survivor is a

claimant with a separate claim for damages arising out of the decedent's death as a result of medical malpractice. The personal representative brings a cause of action as a procedural mechanism to avoid multiple suits. But, this does not preclude separate damage caps for each survivor who has sustained separate and distinct damages. Cases from other jurisdictions either support this construction, or, if not distinguishable on their facts, or statutory language, certainly are distinguishable because of the generosity of the caps as compared to the Florida cap.

Alternatively, if the Medical Malpractice Arbitration Act cannot be consistently and equally applied to personal injury plaintiffs who are victims of medical malpractice, on the one hand, and wrongful death plaintiffs, on the other, then the statute is unconstitutional. It denies equal protection to the extent that it obviously discriminates significantly against wrongful death medical malpractice claimants as opposed to all other kinds of medical malpractice claimants. There is no legislative justification for this distinction. Therefore, in the context of this wrongful death case, the statute is clearly unconstitutional.

ARGUMENT

I. THE FOURTH DISTRICT CORRECTLY HELD THAT THE MEDICAL MALPRACTICE ACT EXCLUSIVELY GOVERNS THE PLAINTIFF'S ECONOMIC DAMAGES WHEN THE PARTIES HAVE ELECTED TO ARBITRATE UNDER THE ACT

The Academy supports the Respondents' position that the Medical Malpractice Act exclusively controls the type and quality of a claimant's economic damages when the parties have elected arbitration. Fortunately, the Medical Malpractice Act is quite unambiguous with respect to recoverable economic damages. Various provisions are illustrative. First, medical malpractice

claims are claims arising out of the rendering of, or the failure to render medical care or services. Fla. Stat. 766.106(a). No distinction is made between claims which result from malpractice causing death, or malpractice which does not result in death. In either event, such claims are subjected to the presuit screening process. Fla. Stat. 766.106 (1997). Presuit investigation of medical negligence claims applies to *all medical negligence.*

Similarly, Fla. Stat. 766.107 provides that in an action for recovery of damages *based on the death or personal injury of any person* in which it is alleged that such death or injury resulted from the negligence of a health care provider, the claim may be submitted to nonbinding arbitration if the court so requires. Fla. Stat. 766.108 provides that in any actions for damages based on *personal injury or wrongful death arising out of medical malpractice*, the court shall require a settlement conference. Again, there is no distinction in either provision between death or personal injury which results from medical malpractice.

The Legislature expressly included rights of action under Section 768.19, the death of a person caused by negligence, and, rights of action against a governmental entity pursuant to Fla. Stat. 768.28. Fla. Stat. 766.203(1)(a)(b). Fla. Stat. 768.19, of course, created a statutory right of action in *the person injured* to maintain an action and recover damages against the negligent party in the same way that the negligent party would have been responsible even if death had not ensued. But, the right of action which was reposed in the injured person was to be brought by the decedent's personal representative, pursuant to Fla. Stat. 768.20.

When arbitration is not chosen, and the defendant chooses to fight out its liability and damages before a jury in death cases, Fla. Stat. 768.21 would control damages. But, when the defendant decides to throw in the towel and all the parties elect to arbitrate, then, even though the

Wrongful Death Statute confers a right of action on account of the negligence which resulted in death, the recoverable damages would no longer be controlled by the Wrongful Death Statute. Instead, Fla. Stat. 766.207 controls both the economic and noneconomic damages. Because the defendant elects to arbitrate, voluntarily, and, elects to be bound by the finding of the arbitrators, the defendant avoids a trial. The defendant's perhaps irrational fear of a runaway jury is eliminated through the exercise of an option to arbitrate and to obtain the benefits of capped noneconomic damages.

At the same time, even though the petitioners, after the fact, do not like the outcome, the petitioners chose to be limited in the same way as to economic damages:

> Net economic damages shall be awardable, including *but not limited to*, past and future medical expenses and 80% of wage loss and loss of earning capacity, offset by any collateral source payments.
>
> . . . Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to s766.202(8) and shall be offset by future collateral source payments.

Fla. Stat. 766.207(7)(a), (c)(1997). *See also* Fla. Stat. 766.202(3) ("economic damages" means financial losses which would not have occurred but for the injury giving rise to the cause of action, including, but not limited to past and future medical expenses and 80% of wages lost and loss of earning capacity. What could be more plain?

Where the language of a statute is clear and unambiguous, as it is here with respect to economic damages, the statute should be given its plain and obvious meaning. *Bombalier v. Lifemark Hospital of Florida*, 661 So.2d 849, 852 (Fla. 3d DCA 1995).

Clearly and unambiguously, the Legislature defined economic damages to include those financial losses which would not have occurred but for the malpractice. Such economic damages

are not limited to or controlled by the Wrongful Death Statute. Instead, the economic damages have been expanded by the Legislature, obviously, as the *quid pro quo* for the capped noneconomic damages. The Academy submits, therefore, that if the health care providers did not envision the potential results of the enactment of this statute, or, if the petitioners themselves did not envision the economic impact on them when they elected to arbitrate, these health care providers are only suffering the consequences of their own choices.

And, because economic damages are capable of specific evidentiary support, the petitioners cannot complain that such awards are unpredictable, speculative, or in the same class of horribles that they envisioned with respect to noneconomic damages.

The statute means what it says. The Fourth District correctly applied it. The decision of the Fourth District and the arbitrators with respect to the award of economic damages should be affirmed.

II. THE CAP ON NONECONOMIC DAMAGES APPLIES SEPARATELY AND NOT AS ONE CAP FOR THE SINGLE INCIDENT OF MEDICAL MALPRACTICE

The Academy supports the Respondents' position that the arbitrators properly interpreted and applied Section 766.207(7)(k) which provides:

> Any offer by a Defendant to arbitrate must be made to each *claimant* who is joined in the Notice of Intent to Initiate Litigation . . . . a *claimant* who rejects a Defendant's offer to arbitrate shall be subject to the provisions of s766.209(4).

[Emphasis added]. The statute defines claimant to mean "any person". Fla. Stat. 766.202(1). Section 766.207(7)(k) of the statute plainly shows that any offer to arbitrate by the Defendant must be made to *each claimant*, meaning each individual claimant who has joined in the Notice of Intent

to Initiate Litigation. *Bombalier v. Lifemark Hospital of Florida*, 661 So.2d 849, 852 (Fla. 3d DCA 1995). Furthermore, a *claimant* means a single claimant. *Id.* A single claimant who rejects a Defendant's offer to arbitrate is limited in the amount of damages he or she may recover at trial by statute. *Id.*

Section 766.209(4)(a) Florida Statutes (1995) provides:

> If the *claimant* rejects a Defendant's offer to enter voluntary binding arbitration: the damages awardable at trial shall be limited to net economic damages, plus noneconomic damages not to exceed $350,000.00 per incident.

[Emphasis supplied] This section refers to *the claimant*, meaning a single claimant. A single claimant who rejects the offer to arbitrate is limited to $350,000.00 for his or her damages. *Id.*

There is no language in the statute that indicates that the joining of more than one claim in a Notice of Intent limits the claimant's ability to obtain the maximum recovery under the statute. The statute speaks throughout to claimant in the singular. If the Legislature contemplated one cap for all claimants it would have said so in plain language. It could have simply done so by asserting an explanatory sentence, or, perhaps by putting an *s* at the end of the word *claimant* in brackets.

The Third District has expressly recognized that the arbitration statute is written in the singular. And, the Third District has stated that this is true even with respect to derivative claims for loss of consortium. *Bombalier*, 661 So.2d at 851. Consequently, each survivor has a separate claim. Each of them is entitled to a separate cap.

Pursuant to Section 766.207(7)(k), the Defendants were statutorily required to extend any offer to arbitrate to all *claimants* who had joined in the notice of intent to initiate medical malpractice. In this case the medical malpractice has given rise to more than one claim for

noneconomic damages: the claims of the Estate and survivors.

It is axiomatic that where the language of a statute is clear and unambiguous and conveys a clear and definite meaning, courts should not resort to rules of statutory interpretation and construction. The statute should be given its plain and obvious meaning. Construction of a statute which would lead to an absurd result should not be employed. *Bombalier*, 661 So.2d at 852.

Clearly and unambiguously, "a claimant" means a single claimant. The Defendants made an offer to arbitrate to each claimant, and in this case, with respect to noneconomic damages, there are multiple claimants. *See generally, University of Miami v. Echarte*, 618 So.2d 189, 193 (Fla. 1993) (a *claimant's* noneconomic damages are limited to a maximum of $250,000.00 per incident, calculated on a percentage basis; Section 766.211 provides for the prompt payment of the award to the *claimant*; if a *claimant* rejects the Defendant's offer to arbitrate, then noneconomic damages are capped at $350,000.00 and the *claimant* proceeds to trial). *See generally, Auto Owner's Insurance Company v. Conquest*, 658 So.2d 928, 929 (Fla.1995) ("any person" unambiguously means what it says).

The Academy submits, therefore, that the caps under the arbitration statute should apply per claimant for each claimant's damages arising out of the incident of the wrongful death. This reasonable interpretation would comport with the legislative intent. The fact that the Legislature used the unfortunate term "incident" to refer to the cap is misleading. Incident is simply an occurrence or happening; an action likely to lead to grave consequences. *The New Merriam-Webster Dictionary,* 1989. But, there is more than one claimant that has been affected by the incident, the medical negligence which resulted in death.

Section 766.202(1) defines a claimant as "any person who has a cause of action arising from

medical negligence." It is true that under the Wrongful Death Act, the Personal Representative is the party who seeks recovery of all damages caused by the injury resulting in death *for the benefit of a decedent's survivors and for the Estate. Continental National Bank v. Brill*, 636 So.2d 782 (Fla. 3d DCA 1994). But, the Personal Representative who brings the cause of action is not the claimant who has been injured by the malpractice. It is the survivors themselves who have been injured: it is the claimant/survivor who experiences the actual pain and suffering, on account of the wrongful death for which the action has been brought. It would make no sense to say that the Personal Representative is the claimant because the Personal Representative is merely the procedural mechanism by which to bring the action. The Personal Representative does not sustain damages for pain and suffering at the loss of a loved one.

Much has been made about a comparison between insurance coverage and the language in the Medical Malpractice Arbitration Statute. A similar analogy has been attempted with the Sovereign Immunity Statute. The Medical Malpractice Statute, however, is unique. Neither the sovereign immunity statute nor an insurance policy is equivalent to the Medical Malpractice Arbitration Statute. As the Court stated in *Florida Insurance Guaranty Association, Inc. v. Cole*, 573 So.2d 868, 870 (Fla. 2d DCA 1991) sovereign immunity is not equivalent to insurance. There may be problems in extending its concepts into insurance law. By the same token, neither sovereign immunity nor an insurance policy is equivalent to the Medical Malpractice Arbitration Statute. There are, obviously, problems in extending such concepts to the Medical Malpractice Arbitration Statutes.

Whether or not an insurance policy provides certain stated maximum limits per person, individually, or in the aggregate, depends on the wording of the insurance policy itself. Statutory construction is different. In insurance policy analysis, the critical issue is not the limit of a statutory

"covered claim" such as under the FIGA statute, but rather the limit of the coverage under the policy itself. *Cole*, 573 So.2d at 870. The court rejected the argument that the interpretation of the FIGA statutorily covered claim should be analogized to the interpretation of "claim" under the Sovereign Immunity Statute, Fla. Stat. 768.28(5).

The Florida Insurance Guaranty Act was intended to be interpreted under common insurance concepts. *See also Mackoul v. Fidelity and Casualty Company of New York*, 402 So.2d 1259, 1260 (Fla. 1st DCA 1981) (the express provisions of the policy clearly limited the total recovery for all damages that could be recovered by all persons for the bodily injury to one person to $100,000.00); *see also Boston Investment, Inc. v. Lubow*, 227 So.2d 330 (Fla. 3d DCA 1969) (Only one maximum payment for one bodily injury to the one injured).

The Medical Malpractice Arbitration Statute does not contain language which parrots the language of insurance policies such as those addressed in *Mackoul*, or *Cole*, or statutes such as the FIGA statute or the Florida Sovereign Immunity Statute. We submit, most respectfully, that this Court should not jump to the conclusion that the Medical Malpractice Arbitration Statute is equivalent to either insurance policies, insurance statutes, or the Sovereign Immunity Statute. It should stand on its own and should be interpreted in a way which supports the legislative intent.

It is true that the Academic Task Force for Review of the Insurance and Torts Systems, Medical Malpractice Recommendations recommended the implementation of a medical malpractice plan designed to stabilize and reduce medical liability premiums. The plan included the recommendation that parties should be required to conduct a reasonable investigation in order to eliminate frivolous claims and defenses. Incentives for parties to arbitrate medical malpractice claims were recommended in order to reduce litigation expenses. *University of Miami v. Echarte*,

618 So.2d 189, 191 (Fla. 1993). The arbitration statutes were part of the result of Task Force recommendations. The statutes were enacted to address at least two issues: (1) presuit investigation in order to eliminate frivolous claims; (2) a voluntary arbitration process to encourage settlement of claims. *Echarte*, 618 So.2d at 192.

But, the Legislature also desired to provide a rational basis for determining damages for noneconomic losses. The Legislature sought to *fairly compensate* those persons sustaining such losses. The interests of those sustaining noneconomic losses were to be balanced against the interest of society as a whole. *Echarte*, 618 So.2d at 192, n.12.

The Legislature sought to provide for early arbitration in order to reduce delay and attorneys' fees and to impose *reasonable limitations on damages*. 618 So.2d at 192, n.13. One of the considerations with respect to noneconomic damages was to provide increased predictability of the outcome of the claims resolution process for the insurer's anticipated loss planning and to facilitate early resolution of medical negligence claims. 618 So.2d at 192, n.13.

The legislative intent can be easily effectuated by interpreting and applying Section 766.207(7) so that a claimant is *fairly and reasonably* compensated for pain and suffering in the loss of a parent, or spouse. The predictability of the outcome of the claim is not impacted one iota by an interpretation which allows a $250,000.00 cap per claimant/survivor. This is a fixed number and only depends on the number of survivors of a decedent. And, it should be noted that if the noneconomic damages were limited to the $250,000.00 total regardless of the number of survivors, this is not a fair and reasonable application of the statute. Obviously, it may result in a small or minimal award under circumstances where the most severely noneconomically damaged survivors need the most, and will receive the least. For example in a case involving five surviving children

and a spouse, each claimant will recover $41,666, much less for their pain and suffering than the situation where there is only a spouse and no children - $250,000.

Moreover, the Task Force specifically considered and rejected both a no-fault alternative system of compensation such as workers' compensation, and a mandatory insurance pool as a means to control increases in the medical malpractice insurance rates. *Echarte*, 618 So.2d at 194. This court went on to say that the *unique facts* surrounding medical malpractice required the Legislature to tailor a different solution to solve the perceived crisis. *Echarte*, 618 So.2d at 195. It is true that the preamble in Chapter 88-1 sets forth the Legislature's concern that health care providers might be unable to purchase liability insurance to cover them. But, the preamble also sets forth the Legislature's concern that *many injured persons* would therefore be unable to recover damages for either their economic losses or their noneconomic losses. *Echarte*, 618 So.2d at 196. The Task Force stated that these are complex problems with multiple causes. 618 So.2d at 197. The Legislature did not, however, make liability coverage mandatory for physicians. Instead, it simply provided a means by which physicians were to be financially responsible. Fla. Stat. 458.320.

Consequently, to limit recovery to a $250,000.00 cap for all survivors/claimants in this medical malpractice case does not satisfy the stated goals of the Legislature: alleviating the financial crisis in the medical liability insurance industry and providing medical malpractice victims with redress. Hence, analogy to insurance policies, which are not required, or to the sovereign immunity cap, when the medical malpractice situation is complex and unique, is an unreasonable analogy. The Legislature could not have sought to provide the least amount of protection for those who are impacted most severely by medical malpractice which has caused the death of a spouse or parent with multiple survivors.

Under the Medical Malpractice Arbitration Statutes, survivors should receive no less than they would under existing Florida law subject to the application of the cap as properly interpreted. For example, it is clear that all potential beneficiaries of a recovery for death are to be included in a complaint for wrongful death and the relationships to the decedent shall be alleged. Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Fla. Stat. 768.21(4). Each surviving minor child has a similar claim for the loss of a parent. Fla. Stat. 768.21(3).

Moreover, as to the application of insurance principles, an insurance policy is a policy purchased by an insured for a premium and provides specific limits. This does not mean that the insured's liability is capped at those limits. As to the sovereign immunity cap, severely injured claimants may pursue a claims bill before the Legislature. Under the Medical Malpractice Arbitration Statute, multiple surviving children have nowhere else to go: not to the Legislature, and not to the defendant for damages which may be recoverable over and above the policy or sovereign limits.

Perhaps, more importantly, the cases and statutes from other jurisdictions, which purportedly support the position that the Florida cap at $250,000.00 is a cap in the aggregate for all claimants, are cases and statutes involving caps in amounts larger than the very restrictive and limited Florida cap of $250,000.00 [1]

For example, *LaMark v. NME Hospitals, Inc.*, 542 So.2d 753 (La. Ct. App.) *cert. denied*,

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[1] *See e.g. Atkins v. Strayhorn*, 223 Cal. App. 3d 1380, 1395-11 - 1396, 273 Cal. Rptr. 231, 238 - 240 (4th Dist. 1990) and *Tulewicz v. Southeastern Pennsylvania Transportation Authority*, 529 Pa. 588, 606 A. 2d 427 (1992).

551 So.2d 1334 (La. 1989) interpreted a statute which capped medical malpractice recovery at $500,000.00 for all claims. More importantly, that Louisiana statute expressly provided that the *total amount* recoverable *for any injury or death of a patient may not exceed $500,000.00 plus interest and costs.* In fact, the current Louisiana statute now reads:

> The total amount recoverable for all malpractice *claims* for injuries to or death of a patient exclusive of future medical care and related benefits . . . shall not exceed $500,000.00 plus interest and costs.

LaMark, 542 So.2d 753, 755. [emphasis supplied]. Hence, the statute explicitly uses the term claimant and makes clear that all claims arising out of the death of one person are capped at a total of $500,000.00, which is twice the amount the Florida statute awards. *See also Moody v. United National Insurance Company*, 657 So.2d 236 (La. Ct. App.) *cert denied* 663 So.2d 713 (La. 1995).

In *Bulala v. Boyd*, 239 Va. 218, 389 S.E. 2d 670 (1990) the statutory cap which was applied to all claims including derivative claims for medical malpractice was $750,000.00, the total amount recoverable for any injury to, or death of a patient. *See also Starns v. United States*, 923 F.2d 34 (4th Cir. 1991), *cert denied,* 502 U.S. 809 (1991) (applying the Virginia medical malpractice statute to Federal Tort Claims Act and using a $750,000.00 damage cap); *Rose v. Doctors' Hospital*, 801 S.W. 2d 841 (Tex. 1990) ($500,000.00 cap on Final Judgment against a physician or health care provider where the statute expressly provides that the limit of civil liability for damages of the physician or health care provider are limited to an amount not to exceed $500,000.00; the statute was construed as a damage cap to be calculated on a per defendant basis where the language of the statute expressly states that the damages should be calculated on a "per defendant" basis and not as an award to an individual plaintiff; plaintiffs who recover against more than one defendant may therefore obtain a judgment in excess of the cap as long as the combined statutory liability of all defendants is not

exceeded; hence the damage cap of $500,000.00 would be multiplied by two where there are two culpable defendants).

Yates v. Pollock, 239 Cal. Rptr. 383 (2d Dist. Ct. App. 1987) involved a patient's widow and five *adult* children. The court found that the *jury's assessment* of noneconomic damages was eminently reasonable for the claim of the spouse who had been married for thirty-five years at the time of the death. *Yates*, is clearly inapplicable, because under Florida law, there would be no recovery for adult children. Fla. Stat. 768.21(8) (1995). And, in any event, *Atkins v. Strayhorn*, 273 Cal Rptr. 231 (4th Dist. Ct. App. 1990) construed the same statute, and distinguished *Yates* to protect the consortium claim of the spouse. Clearly there was a policy consideration in *Yates* which is similar to the Florida Legislature's policy when it enacted Fla. Stat. 768.21(8) to exclude claims by surviving adult children in medical malpractice actions.

On the other hand, in *Sander v. Geib, Elston, Frost Professional Association*, 506 N.W.2d 107 (S.D. 1993), the Supreme Court of South Dakota construed its statutory cap in a medical malpractice, wrongful death action which involved a thirty-four year old deceased mother who left a husband and three minor children, and which limited medical malpractice damages to $1,000,000.00, applied the cap, separately, to each statutory beneficiary.

In sum, the plain language of Chapter 766 supports the conclusion that the $250,000.00 limit of noneconomic damages applies separately to the claim of each survivor. The Medical Malpractice Statute is unique. Neither cases construing the language of insurance policies, nor the Florida Sovereign Immunity Statute should be applied to this Court's interpretation of the cap. The Third District's decision in *Bombalier* clearly supports the conclusion that each survivor is a claimant with a separate claim for damages arising out of the decedent's death as a result of medical malpractice.

Cases from other jurisdictions either support this construction, or, if not distinguishable on their facts, or statutory language, certainly are distinguishable because of the generosity of the caps as compared to the Florida cap. It is important to keep in mind also that the personal representative brings a cause of action as a procedural mechanism to avoid multiple suits. But, this does not preclude separate damage caps for each survivor who has sustained separate and distinct damages.

III. ALTERNATIVELY, THE MEDICAL MALPRACTICE ARBITRATION STATUTE IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE BECAUSE THE STATUTE DISCRIMINATES SIGNIFICANTLY AGAINST WRONGFUL DEATH MEDICAL MALPRACTICE CLAIMANTS AS OPPOSED TO ALL OTHER KINDS OF MEDICAL MALPRACTICE CLAIMANTS

It is well settled under Florida and Federal law that all similarly situated persons are equal under the law. Without exception, all statutory classifications that treat one person or group differently than another must appear to be based at a minimum on a rational distinction with a just and reasonable relation to a legitimate state objective. *Palm Harbor Special Fire Control District v. Kelly*, 516 So.2d 249, 251 (Fla. 1987). The test to be applied here is the "rational relationship" test. *Shriners Hospital for Crippled Children v. Zrillic*, 563 So.2d 64, 69-70 (Fla. 1990). And, a statutory classification cannot be wholly arbitrary. *Vildibill v. Johnson*, 492 So.2d 1047, 1050 (Fla. 1986).

University of Miami v. Echarte, 618 So.2d 189 (Fla. 1993) and *HCA Health Services of Florida, Inc. v. Branchesi*, 620 So.2d 176 (Fla. 1993) are not controlling on the issues in this case. *Echarte* involved a minor's personal injury claim. Wrongful death damages were never considered. Even in *Branchesi,* which was admittedly a wrongful death case, the issues we address today were not addressed by this Court then.

This Court, therefore, may still consider the question of the practical operation and effect of the Medical Malpractice Arbitration Statute in the context of a wrongful death case. The Court may consider the applicability, inapplicability, or unconstitutionality of the Arbitration Statute. *Aldana v. Holub*, 381 So.2d 231, 237 (Fla. 1980).

The practical operation, not the form of the statute, is the criterion by which to judge its constitutionality. *Jacksonville Port Authority v. State*, 161 So.2d 85 (Fla. 1964). Thus, even if this Court found that the statute was facially valid in *Echarte*, it may now subsequently determine that the practical operation and effect of this statute has rendered it unconstitutional. *Aldana*, 381 So.2d at 237.

This statute is unconstitutional as applied. In this wrongful death case, the statute plainly makes an impermissible invidious distinction which discriminates between personal injury plaintiffs, on the one hand, and wrongful death plaintiffs on the other. It should be obvious by now to all of us that even a cursory review of the arbitration statutes shows that the Legislature, or at least the proponents of this discriminatory legislation, such as the petitioners, never envisioned how the draconian application of the arbitration statute in wrongful death cases would impact on plaintiffs and defendants alike.

Section 766.207(7)(b) calls for calculation of noneconomic damages on a percentage basis with respect to the capacity to enjoy life. But, it does not go far enough to more specifically explain the applicability of such language in wrongful death cases. At the same time, nevertheless, the statute expressly and clearly was intended to apply to wrongful death cases. Fla. Stat. 766.106(a). Section 766.207(7)(b) certainly does provide that the "claimant" is limited to a recovery of $250,000 per incident. Section 766.209(4), similarly, says that the "claimant" is limited to $350,000 per

incident when the claimant refuses to accept arbitration.

In personal injury cases which result from medical malpractice, the claimant is the injured plaintiff. Under Section 768.20, a wrongful death claim brought by the personal representative who shall recover for the benefit of the decedent's survivors and estates. Consequently, from the petitioners' point of view, and as the Fourth District held, even if the personal representative brings claims on behalf of several beneficiaries, or survivors, the total damages are limited to either $350,000 if arbitration is declined or $250,000 if arbitration is accepted.

In a personal injury action, however, each injured person is entitled to those separate caps. If the Fourth District's interpretation is correct, therefore, as written and as applied in this case, the statute appears to discriminate significantly against wrongful death medical malpractice claimants as opposed to all other kinds of medical malpractice claimants. There is certainly no rational basis for such a distinction. In the particular context of this wrongful death case, the statute is clearly unconstitutional. Two classes of medical malpractice victims have been created. And, perhaps more insidiously, the most deserving plaintiffs are deprived for the benefit of the least deserving health care providers.

The arbitration provisions discriminate against those victims of medical malpractice who suffer the greatest injuries: the decedents who leave the largest number of survivors. Those victims suffer the greatest noneconomic damages. There also may be great economic damages. If the statute is construed as the petitioner proposes, the victims of malpractice would not even have the benefit of the expanded damages under the Medical Malpractice Act in exchange for having given up a jury trial and larger noneconomic damages.

This statute also gives unilateral power to defendants, who have admitted committing

medical malpractice, to choose which decedents' families will be included in the class through an offer to arbitrate and those who will be excluded. It should be pretty obvious that a health care provider would not admit liability unless it recognizes that it has been so clearly negligent that its defense attorney could not pass the straight face test in front of a jury. The victim of this indefensible negligence, therefore, would be further victimized by being subjected to an irrational limitation of noneconomic damages. Even worse, if the petitioners' interpretation is correct, the claimants could not at least be compensated through the vehicle of expanded economic damages.

The discrimination in this case is so arbitrary and irrational in the extreme that this Court should declare the Medical Malpractice Arbitration Statute unconstitutional. *See Vildibill*, 492 So.2d at 1050; *De Ayala v. Florida Farm Bureau Casualty Insurance Company*, 543 So.2d 204 (Fla. 1989).

CONCLUSION

The Fourth District's decision should be affirmed in part and reversed in part. The Arbitrator's award should be reinstated. Alternatively, this Court should find the statute unconstitutional as applied.

CERTIFICATE OF SERVICE

I Hereby Certify that a true and correct copy of the foregoing was mailed this 2ND day of March, 1998 to: Joseph H. Lowe, Esq., Winitz, Minkin & Lowe, 9350 South Dixie Highway, Penthouse One, Miami, FL 33156; Jane Kreusler-Walsh, Esq., Jane Kreusler-Walsh, P.A., 501 South Flagler Drive, Suite 503, West Palm Beach, FL 33401; Diana Lewis, Esq., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Post Office Box 150, West Palm Beach, FL 33402; Theodore Babbitt, Esq., Babbitt & Johnson, P.O. Box 024426, West Palm Beach, FL 33042-34426; Ralph Anderson, Esq., Hicks, Anderson & Blum, 100 North Biscayne Blvd., Suite 2402, Miami, FL 33132; Kristy C. Brown, Esq., Fisher, Rushmer, et al., 20 N. Orange Avenue, Ste. 1500, P.O. Box 712, Orlando, FL 32802-0712; William A. Bell, Esq., 120 South Monroe Street, Tallahassee, FL 32302; Neil H. Butler, Esq., P.O. Box 839, Tallahassee, FL 32302 and to Shelley H. Leinicke, Esq., Wicker, Smith, Tutan, O'Hara, McCoy, Graham & Ford, P.A., Post Office Box 14460, Ft. Lauderdale, FL 33302.

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