SUPREME COURT OF FLORIDA

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

Petitioners,

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,

Respondents.
_____/

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

Petitioners,

vs. CASE NO. 91,896

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

Respondents.
_____/

INITIAL BRIEF OF PETITIONERS ST. MARY'S HOSPITAL, INC. and WOMEN'S HEALTH SERVICES, INC.

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INTRODUCTION

This brief is submitted by St. Mary's Hospital and Women's Health Services, Inc. who were the appellants below and who are the Petitioners in case number 91,895 and the Respondents in case number 91,896 before this court. The two cases have been consolidated by the court for briefing purposes. St. Mary's and Women's Health Services will be collectively referred to as St. Mary's or Petitioner. Charles Phillipe and the statutory survivors will be referred to collectively as Phillipe or Respondent. This initial brief contains argument on the certified question regarding the stay of the arbitration award and the economic damages recoverable by a personal representative in a medical malpractice arbitration proceeding. Phillipe's answer brief, in addition to responding to the arguments contained in this brief will include an argument on the certified question regarding the statutory cap on non-economic damages as it relates to multiple survivors. Reference to the record on appeal from the arbitration will be by the letter "R". Reference to the record on appeal from the circuit court will be by the letters "RC". Reference to the transcript of the Arbitration hearing will be by the letter "T". Reference to the Appendix that accompanied Petitioner's initial brief to the district court will be by the letters "APP". Unless otherwise noted, all emphasis has been supplied by counsel.

STATEMENT OF THE CASE AND FACTS

This is an appeal by St. Mary's pursuant to Fla. R. App. P. 9.030(a)(2)(A)(v) and 9.120 of a question certified to be of great public importance by the Fourth District Court of Appeal in their opinion in *St. Mary's Hospital v. Phillipe,* 699 So.2d 1017 (Fla. 4th DCA 1997). The district court upheld the constitutionality of F.S. §766.212(2) holding that the statute does not infringe on the rule making authority of this court. The district court also held that a money judgment entered by the circuit court in accordance with the arbitration award could not be stayed pursuant to Fla.R.Civ.P. 9.310 by posting a supersedeas bond. The lower court reversed the arbitration panel's award of over $1,000,000 for non-economic damages finding that Fla.Stat. §766.207 limits such damages to $250,000. The district court affirmed the economic damage award finding that damages permitted by the malpractice act are recoverable in a wrongful death action.

A. The Arbitration Proceedings.

On October 23, 1995, pursuant to Fla.Stat. §766.201 et.seq. the parties filed an Agreement to Initiate Arbitration Proceedings with the State Division of Administrative Hearings (hereinafter "DOAH"). (R-1-3). The incident giving rise to the proceedings occurred on September 6, 1993. The claim was for the wrongful death of Juslin Phillipe.

The arbitration hearing was conducted on May 16, 1996, before a panel of three arbitrators. The chief arbitrator was Richard Hixson, an employee of DOAH. As liability had been admitted, the issues before the panel were solely that of damages. The decedent left a husband, Charles Phillipe, and four minor children - Philene, Wencharles, Marc and Ecclesianne. Ecclesianne was born in September, 1993 during the incident that caused the decedent's death.

Most of the testimony at the hearing concerned Ecclesianne, her medical condition and what services her mother could have provided for her.[1] There was no dispute that Ecclesianne is severely and profoundly brain damaged (T-69, 194). Richard Bonfiglio, one of Phillipe's experts, testified that she has a significant brain injury and because of that, she has an impaired ability to move, think, and interact with her environment. She is dependant on others for all routine day-to-day activities including dressing, bathing and feeding. The child is spastic, quadriplegic, has cerebral palsy and is legally blind. (T-205).

Phillipe's experts testified that the child did not need to be institutionalized, but be cared for at home. (T-46,103,122). The three medical rehabilitative experts called by Respondent all testified that the mother could, with some training and education could provide many nursing services that an LPN could. (T-95-9,108-9,124,127). On cross examination, Maureen Rung, one of Respondent's experts admitted that the mother could never provide services in lieu of an LPN or other health care provider. She further testified that the child would need 24 hour LPN care and that the value of the mother's services to Ecclesianne would not be the same as that of an LPN. (T-1334-35).

Edward Workman, a rehabilitation counselor, testified for St. Mary's. Based on his review of depositions, as well as the medical records of Ecclesianne, he believed that it would be best for the minor and her family for her to be institutionalized. This opinion was premised on the lack of language skills of the immigrant family, as well as the well-being of the other minor children which would be adversely effected by home care for a

[1] Ecclesianne's claim against St. Mary's was pending before the Circuit Court in Palm Beach County at the time of the arbitration and has recently settled.

profoundly impaired child mitigated against home care. (T-234). Further, Dr. Workman did not believe that the decedent could provide care equal to that of an LPN. Juslin Phillipe had a third grade level of education. She was unable to read in her native language, her spoken English was minimal at best, and could not read English. (T-239). Though she could be involved with the child, she would not replace any health care provider and thus have any economic impact. (T-240).

Phillipe's economic expert, Harold Goldstein, testified that the value of lost services to the family, other than Ecclesianne, resulting from the death of Juslin had a value of $13,050 annually. (T-148). The present value of those services totaled $991,589. (T-156).

Dr. Fred Raffa was called by St. Mary's as their expert economist. He accepted Dr. Goldstein's figure of $13,050 per year for loss of services to the family. He calculated the loss over a 40.7 year period, which was Charles Phillipe's remaining life expectancy in September, 1993. As to the value of the mother's services to Ecclesianne, he relied on a publication from the State of Florida Department of Labor and Employment Security entitled, "Florida Occupational Wage Survey." For 1993, in the region encompassing Palm Beach County the average wage for an LPN was $13.39 (which he adjusted to $13.34). The total payments based on this figure would be $1,987,638. At the time of the hearing he had not reduced that figure to present value. (T-260-64).

Neither Dr. Raffa nor Dr. Goldstein testified regarding lost wages of the decedent. However, in various schedules that were prepared by Dr. Raffa and introduced into evidence,[2] he calculated the decedent's lost wages based on her prior earnings. His

[2] Dr. Raffa's schedules are included in the appendix accompanying the initial brief

calculations were based on the life expectancy of the surviving spouse and providing services for Ecclesianne until the decedent was 70.

After hearing all testimony and arguments, the arbitrators deliberated and returned their award. They awarded a total of $1,025,000 in non-economic damages. $250,000 each to the spouse Charles Phillipe, and to Ecclesianne. $175,000 was awarded to each of the other three children. For loss of services to the family they awarded $2,284,000. For Ecclesianne they awarded $943,000. The chief arbitrator announced that this award was not for LPN services but for the kind of services that they believed the mother would provide. (APP-1). These amounts were not reduced to present value. Arbitrator Hixson stated that "we obviously used Dr. Raffa's figures as to household. Those are the figures we've been using as to those." (A.P.-2).

Arbitrator Montgomery, the arbitrator selected by Phillipe, agreed:

> ARBITRATOR MONTGOMERY: Let's get it on the record now so that there won't be any questions about it. The figures that were used by the panel were the figures that are represented in Dr. Raffa's report. It's an exhibit. And if you look at the final page, you will see how he broke them down. They include her earning capacity and reduced them to present value. All right. So those were the figures that you will see in our final award as to those elements of economic damages. Okay? (A.P.-3).

On June 13, 1996 the final arbitration award (R-465-68) was entered, awarding non-economic damages of $1,075,000.00 and economic damages for lost support and services to the family of $2,284,804.

B. Circuit Court Proceedings.

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filed with the lower court.

On July 23, 1996, Phillipe filed a Petition to Enforce Arbitration Award and Entry of Judgment in the 15th Judicial Circuit. (RC.1-6). St. Mary's moved to dismiss contending that the court lacked jurisdiction inasmuch as an appeal of the arbitration award had been perfected to the district court.[3] (APP.23-26). The lower court denied the motion and entered final judgment on August 30, 1996. (RC. 15-20). On September 4, 1996 St. Mary's filed a notice of appeal to the Fourth District Court of Appeal seeking review of the final judgment. (RC. 21-25)(DCA Case No. 96-2971). A supersedeas bond for the present value of the judgment was filed with the circuit court on September 3, 1996. (RC 49-96).

In response to the supersedeas bond, on September 3, 1996 Phillipe filed a Petition for Contempt and Execution Instructions to Sheriff (APP.17-20). The petition contended that inasmuch as the district court had denied St. Mary's motion to stay, Petitioner could not supersede the judgment that the court had entered the previous week. The court heard the petition within 48 hours of its service on St. Mary's and granted the post-judgment relief, entering an order on September 5, 1996, stating that there shall be no stay of execution and that the Sheriff was directed to levy on St. Mary's assets forthwith. It was also ordered that Petitioner appear and show cause why they should not be held in contempt of court for failing to pay the award when ordered to by the circuit court. (APP. 21-22). In the face of imminent levy on its assets, though a supersedeas bond was

[3] The motion is not included in the record as the pleading had an incorrect case number. It is part of the Appendix - pages, APP.23-26.

in place, St. Mary's was compelled to pay over two million dollars, the portion of the award that was due.[4]

C. District Court Proceedings.

On July 12, 1996 Petitioners filed their notice of appeal of the arbitration award pursuant to Fla.Stat. §766.212(1). (R-469-73). St. Mary's then sought a stay of the award from the district court pursuant to Fla.Stat. §766.212(2). (R-478-80). The lower court denied the motion. (R-484). A Motion for Clarification was filed and denied (R-485-88,491).

Subsequently, two appeals from the circuit court were filed with the district court. On September 4, 1996 a notice was filed seeking review of the final judgment. Petitioner also filed a notice of appeal of the post judgment order precluding it from posting a supersedeas bond. The Fourth District consolidated the three appeals.

Seven points were presented to the lower court. They involved three areas: 1) whether the arbitrator's erred in awarding non-economic damages in excess of $250,000, the statutory cap provided in Fla.Stat. §766.207(7)(b); 2) whether the arbitration panel erred in awarding damages not permitted by the Wrongful Death Act; and 3) whether Fla. Stat. §766.212(2), which provides that:

> No appeal shall operate to stay an arbitration award; nor shall any arbitration panel, arbitration panel member, or circuit court stay an arbitration award. The district court of appeal may order a stay to prevent manifest injustice.
>
> . . . .

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[4] Though no written order was entered, at a hearing on a related case the circuit court canceled the show cause hearing.

was unconstitutional as infringing on the Supreme Court of Florida's exclusive authority to prescribe rules of procedure.

In its decision the Fourth District first addressed the stay issue, holding that Fla. Stat. §766.212(2) was not unconstitutional as it did not infringe on this Court's power to regulate appellate proceedings. On the related issue of posting a supersedeas bond to stay the judgment entered by the circuit court, the lower court found that it was "simply an indirect attack on section 766.212's limited form of stay." (4th DCA opin. fn. 3). The district court certified the question of the constitutionality of the statute to this court for a definitive resolution. The lower court found that the arbitration panel erred in awarding non-economic damages in excess of $250,000, the statutory cap. On rehearing it certified to this court as the question of whether the statutory cap applies to each statutory survivor or is limited to a single incident as a matter of great public importance. Finally, the lower court held that the award of economic damages not permitted under the Wrongful Death Act could stand as they were damages recoverable pursuant to the Medical Malpractice Act.

Based upon the two certified questions, both St. Mary's and Phillipe filed notices of appeal to this court pursuant to the Rules of Appellate Procedure. The court in its December 9, 1997 order deferred a decision on jurisdiction and directed the parties to file briefs on the merits.

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 RULE MAKING AUTHORITY OF THIS COURT.

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.

POINT II

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

A. DAMAGES ARE GOVERNED BY THE WRONGFUL DEATH ACT.

B. THE ATTORNEY'S FEE MUST BE REDUCED TO COMPLY WITH THE STATUTE.

SUMMARY OF THE ARGUMENT

Florida Statute §766.212(2) is unconstitutional as it infringes on this court's authority to regulate matters of practice and procedure. The statute provides the only manner in which a party can obtain a stay of a medical malpractice arbitration award. As such, it conflicts with both the Florida Rules of Appellate Procedure and Fla. Stat. §120.68(3), which also provides the method of seeking a stay from final administrative action. Even if this court upholds the constitutionality of the statute, it must find that the district court of appeal erred in denying Petitioner's Motion to Stay finding that having to pay millions of dollars to the claimant while the case was before the appellate court, with no assurance of recovering the money if successful, was not manifest injustice. If that is not prejudicial and manifestly unjust, then St. Mary's cannot fathom what would ever meet that test.

Assuming that this court upholds the constitutionality of the statute and that the district court did not err in denying the stay from the arbitration award, it was error for the lower court to find that Fla.R.App. P. 9.310(b) was not applicable to the money judgment entered by the circuit court following Respondent's Petition to Enforce Arbitration Award. Rule 9.310(b) provides that a party can obtain an "automatic stay of execution pending review ... by posting a good and sufficient bond....." Once Phillipe choose to seek a judgment from the circuit court and the judgment was entered (as compared to the right to seek an order from the court), it was error for the trial court and the district court to hold that Petitioner was not entitled to the protection afforded by Rule 9.310(b).

The arbitration panel awarded economic damages for the loss of services the decedent would have provided to her family - which award Petitioner does not challenge, and over $600,000 in damages for lose of remaining lifetime earning capacity. The lower court affirmed the award finding that the economic damages recoverable are governed by the Medical Malpractice Act and the Wrongful Death Act. Thus, they have permitted a hybrid situation where a personal representative can obtain economic damages which are not permitted by the Wrongful Death Act as well as all economic damages provided by that Act. A review of Fla.Stat. §766.210 *et.seq.* clearly indicates that the legislature, when drafting the statute, did not contemplate that the claimant would not be the patient. The statute does not reference the Wrongful Death Act. The proper interpretation of the interplay of the two Acts is that the recoverable damages are those provided for in the Wrongful Death Act, while the Medical Malpractice Act limits the amount of non-economic damages recoverable and provides the authority for arbitration. Any other interpretation would limit the recovery that a personal representative could receive and emasculate the statute as a defendant would be loath to agree to arbitration if it will be responsible for greater economic damages then would be permitted in court proceeding.

Finally, to the extent that any economic damages are reduced, and/or the lower court's decision limiting non-economic damages is affirmed, the court must direct that the attorney's fee awarded - 15% of the damages - be recalculated. Petitioner has paid over $500,000 to Respondent's counsel and is entitled to recover all overpayments. Counsel received $153,750 for the non-economic damage award (15% of $1,025,000). He is only

entitled to $37,500 (15% of the statutory cap of $250,000). His fee for economic damages must be reduced to no more than 15% of the economic damages ultimately awarded.

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 RULE MAKING AUTHORITY OF THIS COURT.

The Florida Constitution provides in Article V, Section 2(a) that:

> §2. Administration; practice and procedure
>
> (a) The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

Pursuant to the above provision in the Florida Constitution this court is the only body that can regulate matters of practice and procedure. As the court has explained:

> With regard to the constitutionality of section 702.01, we must determine whether the statute concerns matters of substantive law, which is within the legislature's domain, or whether it concerns matters of practice and procedure, which this Court has the exclusive authority to regulate. *Markert v. Johnston*, 367 So.2d 1003 (Fla.1978). Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. *State v. Garcia*, 229 So.2d 236 (Fla.1969). It includes those rules and principles which fix

> and declare the primary rights of individuals with respect towards their persons and property. *Adams v. Wright*, 403 So.2d 391 (Fla.1981). On the other hand, **practice and procedure "encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion.** 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla.1972)(Adkins, J., concurring). It is the method of conducting litigation involving rights and corresponding defenses. *Skinner v. City of Eustis*, 147 Fla. 22, 2 So.2d 116 (1941).
>
> In view of these categorizations of, and distinctions between, procedural and substantive matters, we hold that the severance provision of section 702.01 is procedural in nature. **Where this Court promulgates rules relating to the practice and procedure of all courts and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict.** *School Board v. Surette*, 281 So.2d 481 (Fla.1973), receded from on other grounds, *School Board v. Price*, 362 So.2d 1337 (Fla.1978). Pursuant to rule 1.270(b) the severance of counterclaims is at a trial court's discretion. Section 702.01, however, removes that discretion in mortgage foreclosure cases and mandates severance of all counterclaims. Thus, section 702.01 is unconstitutional to the extent it conflicts with rule 1.270(b).

Haven Federal Savings & Loan Association v. Kirian, 579 So.2d 730,732-33 (Fla. 1991).

Pursuant to its constitutional authority this Court adopted the Florida Rules of Appellate Procedure and specifically Rule 9.010 which provides in pertinent part:

> These rules cited as “Florida Rules of Appellate Procedure,” and abbreviated “Fla.R.App.P.” shall take effect at 12:01 a.m. on March 1, 1978. They shall govern all proceedings commenced on or after that date in the supreme court, the district courts of appeal, and the circuit courts in the exercise of the jurisdiction described by rule 9.030(c)...**[t]hese rules shall supersede all conflicting statutes.**[5]

Florida Statute Sections 766.212 (1) & (2) provide that:

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[5] *See also In Re Amendments to the Florida Rules of Appellate Procedure*, 609 So. 2d 516 (Fla. 1992).

> 766.212. Appeal of arbitration awards and allocations of financial responsibility
>
> (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.
>
> (2) No appeal shall operate to stay an arbitration award; nor shall any arbitration panel, arbitration panel member, or circuit court stay an arbitration award. The district court of appeal may order a stay to prevent manifest injustice, but no court shall abrogate the provisions of s. 766.211(2).

There can be no question that subsection (2) concerns matters of practice and procedure that only this court can regulate. It directs the method and manner of obtaining a stay during the appellate process. The statute effects the "form, manner, means, method, mode, order, process, or steps by which a party enforces substantive rights or obtains redress for their invasion." 579 So.2d at 732. It provides in clear, no uncertain terms the only way in which a party can stay an arbitration award. It ignores, and indeed conflicts with, Fla.R.App.P. 9.310 which provides the authority and mechanism for obtaining a stay and posting a supersedeas bond to stay execution of a money judgment. In *Gator Freightways, Inc. v. Mayo*, 328 So. 2d 444 (Fla. 1976), at issue was whether a Public Service Commission clerk had authority to edit the record on appeal in connection with a review of a Public Service Commission order. In doing so, the clerk relied on Fla.Stat. §120.42(2)(1974). In holding that the clerk did not have the authority to edit the record on appeal, this Court stated:

> "while procedure within administrative agencies is subject to statutory regulation, **procedure in all Florida courts is governed by such rules of procedure as have been adopted by this court**... [t]he present proceedings in this Court are governed by the appellate rules, pursuant to Rule 1.1, Florida Appellate Rules, 1962 Revision, and this is expressly recognized in Fla.Stat. §120.68(2) (1974), which specifies that judicial review of agency action shall be conducted in accordance with the Florida Appellate Rules." Id. at 445.

More recently, in *The Florida Bar Re: Amendment to Rules of Civil Procedure*, *Rule* 1.442 (Offer of Judgment), 550 So.2d 442 (Fla. 1989), the Court adopted a rule change which altered the procedure by which parties would be sanctioned for failure to accept bona fide offers of settlement prior to trial. The rule was amended due to the confusion created by the enactment of sections 768.79 and 45.061 of the Florida Statutes and their relationship/conflict to Rule 1.442. In modifying the rule, the Court incorporated certain provisions taken from sections 768.79 and 45.06. In adopting the new rule, the Court stated:

> We agree with the Committee that sections 768.79 and 45.061 impinge upon this Court's duties in their procedural details. For instance, the time limits for acceptance of an offer in the two statutes are inconsistent; section 768.79 allows only thirty days while section 45.061 permits forty-five days. Accordingly, we address the issue in the present proceeding pursuant to our constitutional duty to adopt uniform rules of procedure governing the courts of this state. Art. V. Sec. 2(a), Fla. Const. We hold the confusion created by the enactment of sections 768.79 and 45.061 and their uncertain relationship to Rule 1.442 require this Court to adopt a new rule...[t]o the extent the procedural aspects of new rule 1.442 are inconsistent with sections 768.79 and 45.061, <u>the rule shall supersede the statutes</u>.

Id. at 443.

The lower court in upholding the statute's constitutionality looked as subsections (1) and (2). The court determined that the right to appeal contained in Fla.Stat. §766.212(1) was a "modified right to judicial review of "arbitration awards pursuant to

chapter 766. Subsection (1) directs that an appeal of the arbitration award shall proceed in accordance with Fla.Stat. §120.68 entitled Judicial Review. The district court then reviewed subsection 120.68(3) and determined that stays from final administrative action are not granted as a substantive right by the legislature. The lower court analyzed the subsection and determined that no stay as of right is provided. Further the court determined that making payment while an appeal is pending with the possibility (probability) that the funds could not be recovered if the award was reversed was not manifestly unjust. For the reasons that follow it is submitted that the court erred in its analysis.

Fla.Stat. §120.68(3) first provides that the filing of a notice does not stay enforcement of the decision. This is similar to judicial proceedings where the mere filing of a notice of appeal does not stay the judgment. The second sentence provides, "[T]he 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." This sentence gives the aggrieved party the choice of either seeking a stay with the agency or asking a court for a supersedeas. Indeed, the next sentence refers and relies on the Florida Rules of Appellate Procedure in granting stays and posting of a supersedeas.

Section 120.68(3) complies with Fla.R.App.P. 9.310(a). It permits the agency to grant a stay similar to the authority of the lower tribunal to do so as provided by Rule 9.310(a). The subsection also provides an alternative method - petitioning the court for a supersedeas.

If Fla.Stat. §120.68 does apply, then the ability to seek a stay or post a supersedeas as provided in subsection 120.68(3) applies as well. Subsection 766.212(2), by providing that only the district court can grant a stay and then only to prevent manifest injustice, ignores and conflicts with Fla.R.App.P. 9.310(b) as it determines and limits the ability to obtain a stay. Therefore, Florida Statute §766.212(2) should be declared unconstitutional since it amounts to an unconstitutional incursion into the exclusive rulemaking power of the supreme court. *See* e.g., *West's F.S.A. Const.Art.V*, Sec.2(a)(1968); *Markert v. Johnston 367 So. 2d 1003* (Fla. 1978).

Even if this court finds that the statute is not unconstitutional, it still must find that the district court erred in holding that payment to the claimant is not manifestly unjust when there is a well grounded concern that the funds can not be recouped. The term "manifest injustice" though appearing frequently in cases and infrequently in the Florida Statutes is not defined. Case law uses the term synonymous with the term "prejudice." *Wuornos v. State,* 676 So.2d 966 (Fla. 1995); *Rodriguez v. State*, 683 So.2d 183 (Fla. 3d DCA 1996). Its common meaning is that there has been an obvious wrong depriving a party of justice and prejudicing the party.

St. Mary's believes that there is an obvious wrong in requiring a defendant to pay $775,000 more than statutorily required while an appeal is pending. It is an obvious wrong to require defendants to pay substantial damages not provided for by the applicable statute governing recoverable damages. The fact that the funds may not be recoverable because the money has either been spent or hidden creates the requisite manifest injustice. Clearly, when the issue on appeal of an arbitration award involves the amount

of the award it is prejudicial to require that payment be made with the hope of being able to recoup the funds at a later date. If having to pay a money award, while appealing an award is not manifest injustice, Petitioner cannot fathom what event would ever meet that standard. St. Mary's was willing to pay the undisputed portions of the award and post a supersedeas bond for the disputed amount. Phillipe would have received $250,000 in non-economic damages plus the corresponding attorney's fee immediately, with the balance protected by a bond. St. Mary's was prejudiced by the denial of its motion for a stay and having to pay the initial award or face immediate execution on its assets. The Fourth District erred in finding that payment of a judgment while the case was on appeal is not manifest injustice.

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.

Even if this court agrees with the lower court on the constitutionality of the statute and that the district court did not err in denying the stay of the arbitration award, their affirmance of the circuit court's order precluding St. Mary's from filing a bond pursuant to Fla.R.App.P. 9.310(b) was error.

Following entry of the arbitrators' award and the district court's denial of a stay, Phillipe petitioned the trial court pursuant to F.S. 766.212, to enforce the arbitration award by entering final judgment. (RC. 1 - 6). The trial court granted Phillipe's motion and entered a final judgment on August 30, 1996. (RC. 15 - 20). On September 3, 1996, Petitioner filed a notice of appeal of the final judgment and also filed a supersedeas bond with the circuit court. (RC. 21 - 25, RC. 494 - 5). On September 5, 1996 the lower court

entered an order stating that there shall be no stay of execution of his August 30, 1996 judgment, notwithstanding the fact that a supersedeas bond had been filed. (APP. 21 - 22).

The circuit court's September 5, 1996 order is in violation of the Florida Rules of Appellate Procedure. The August 30, 1996 final judgment entered by that court was a final judgment solely for the payment of money (RC. 15 - 20). Accordingly, St. Mary's had the absolute right to automatically post a supersedeas bond pursuant to Florida Rule of Appellate Procedure 9.310(b)(1), which provides:

> (b) Exceptions.
>
> (1) Money Judgments. If the order is a judgment solely for the payment of money, a party may obtain an automatic stay of execution pending review, without the necessity of a motion or order, by posting a good and sufficient bond equal to the principal amount of the judgment plus twice the statutory rate of interest on judgments on the total amount on which the party has an obligation to pay interest.

By posting a supersedeas bond in the amount of $5,324,188.00 representing the present value of the arbitration award, Appellants complied with Florida Rule of Appellate Procedure 9.310(b). There is no statutory authority, rule nor case law which permits a circuit court judge, after a notice of appeal had been filed and a supersedeas bond posted, to enter an order for an immediate writ of execution directing the sheriff to execute on the judgment and in effect disregard a rule promulgated by the Supreme Court.

An appellate court's jurisdiction is exclusive with respect to the subject matter of an appeal. Once an appeal is taken the trial court lacks jurisdiction to take any further action in the matter. See, *First Union National Bank of Florida v. Yost*, 622 So.2d 111

(Fla. 1st DCA 1993); *Burris Chemical Inc. v. Whitted*, 485 So.2d 37 (Fla. 4th DCA 1986); *State, DHRS v. South Beach Pharmacy*, 635 So.2d 117 (Fla. 1st DCA 1994). In *Yost*, one party filed a post judgment motion concurrent with a conditional notice of appeal. The district court ruled that the trial court lacked jurisdiction to enter any order on post trial motions because the mere filing of a notice of appeal divested the circuit court of jurisdiction pending the outcome of the appeal. *Id*. at 113.

The rationale behind these decisions is that action taken by the lower court that is neither ancillary, nor incidental to the main adjudication, will interfere with the subject matter of the appeal. *McGurn v. Scott*, 596 So.2d 1042 (Fla. 1992). In the instant matter, the immediate levy of St. Mary's assets is directly related to the appeal, and is not incidental thereto. *Cf. Roberts v. Askew*, 260 So.2d 492 (Fla. 1972)(holding that costs may be adjudicated during the pendency of an appeal); *Cheek v. McGowan Elec. Supply Co.*, 511 So.2d 977 (Fla. 1987)(allowing for proof of attorneys fees after a final judgment is entered). Only at the discretion and direction of the appellate court may the trial court address issues relating to the subject matter of a properly appealed civil action. See, *Florida Rule of Appellate Procedure* 9.600(b); *McGurn v. Scott*, 596 So.2d 1042 (Fla. 1992).

The trial court's September 5, 1996 order is manifestly unjust, and prejudicial to Petitioner. St. Mary's has been forced to pay and has paid over $2,225,000 representing the portion of the judgment due while appealing the arbitration award. Of this sum $1,025,000 was for non-economic damages; $510,000 was for the attorneys fee awarded by the panel at the maximum 15% statutorily permitted rate; and the balance was for

proper and improper economic damages. The protection afforded by Fla.R.App.P. 9.310 was rendered meaningless as Petitioner was required to make payment or face levy on its assets while the appeal was pending, with no certainty of ever recovering the overpayment. Based on the lower court's opinion Petitioner is entitled to recoup $775,000 for non-economic damages, plus the corresponding 15% of the attorney fee paid as well as interest on these moneys. If this Court agrees with Petitioner that recoverable economic damages are governed solely by the Wrongful Death Act, then St. Mary's is entitled to recover those over payments as well.

Phillipe argued below, and the district court agreed, that St. Mary's posting of the supersedeas bond contravenes the exclusive stay provisions of Florida Statute §766.212 and the district court's previous denial of St. Mary's motion to stay, and was an attempt to circumvent the medical malpractice arbitration statute and the lower court's denial of stay. This argument is misplaced. Even if this Court finds that Florida Statute §766.212 sets forth the exclusive method for a stay of an arbitration award, and is constitutional, there is no language in the statute that would preclude posting a supersedeas bond pursuant to Florida Rule of Appellate Procedure 9.310(b) to stay execution of a final judgment entered by a circuit court.

Fla.Stat. §766.212(4) provides the mechanism by what relief can be sought from the circuit court:

> (4) If the petitioner establishes the authenticity of the arbitration award or of the allocation of financial responsibility, shows that the time for appeal has expired, and demonstrates that no stay is in place, the court shall enter such orders and judgments as are required to carry out the terms of the arbitration award or allocation of financial responsibility. Such orders are enforceable

> by the contempt powers of the court; and execution will issue, upon the request of a party, for such judgments.

The statute provides the claimant with two options - he can seek an order or a judgment. If he seeks an order, they are enforceable by the contempt power of the court. Alternatively, if he seeks a final judgment, execution can issue. Phillipe had his choice of remedy and chose to seek a judgment instead of an order. By choosing to seek a money judgment, Rule 9.310 was triggered. Neither the circuit court nor the district court has the authority to abrogate this rule. The lower court rejected this argument in a footnote claiming that this argument is an indirect attack on Section 766.212. Petitioner respectfully disagrees. The arguments presented here, though involving the same statute, are different.

The first argument is that subsection 766.212(2) is unconstitutional, or if constitutional manifest injustice exists. The second argument has nothing to do with subsection (2). It involves Rule 9.310 and the automatic right to post a bond when appealing a money judgment. Once the circuit court entered a money judgment, and an appeal was taken, Rule 9.310 governed Petitioner's right to stay execution. Clearly this procedural rule supersedes a statute that does not even address the issue of bonding a money judgment entered by a circuit court. Accordingly, the trial court and the district court were both in error interpreting Section 766.212 to preclude an aggrieved defendant in a medical malpractice arbitration from posting a bond when the award is reduced to a money judgment.

As this issue will surely arise again in the future, it is requested that the court resolve this issue and reaffirm the preeminence of Rule 9.310 over section 766.212.

POINT II

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

A. DAMAGES ARE GOVERNED BY THE WRONGFUL DEATH ACT.

The arbitration panel awarded a total of $2,284,804 for economic damages. Of this sum $1,671,424.00 represented loss of services and the balance of $613,380.00 was for loss of remaining lifetime earning capacity. (APP.13). On appeal to the district court, St. Mary's argued that the award of damages for loss of remaining lifetime earning capacity was improper. It is Petitioner's position that though the Medical Malpractice Act governs the procedure to be followed in conducting the arbitration, and sets forth elements of damage when there has been an act of malpractice resulting in personal injury, but not death, if death occurs the damages recoverable by the estate are governed solely by the Florida Wrongful Death Act, Fla. Stat. §§768.16-768.27.

The lower court disagreed, holding that the economic damage award was controlled by the Medical Malpractice Act and not the Wrongful Death Act. The court reasoned that since the malpractice act contains at least two provisions awarding damages for lost earning capacity, the panel did not err in awarding damages for this

portion of the claim.[6] Petitioner believes that the lower court erred in its analysis as it improperly commingled two statutes thus permitting the personal representative to recover damages under both acts.

A review of the Fla.Stat. §766.201 *et.seq.* reveals that the legislature in drafting the statute contemplated that the injured claimant would be the party to the arbitration, and not the personal representative. Nowhere is there reference to the Wrongful Death Act, nor is there language in the statute to indicate that the Medical Malpractice Act governs. The logical interpretation of Fla.Stat. §766.207 is that when the claimant is the personal representative, and not the patient, the recoverable damages are those permitted by the Wrongful Death Act as set forth in Section 768.21, which provides in pertinent part:

> All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint, and their relationships to the decedent shall be alleged. Damages may be awarded as follows:

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[6] Fla. Stat § 766.203 (3) provides:

> (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 percent of wage loss and loss of earning capacity.

Fla. Stat. §766.207(7)(a) provides:

> (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:
>
> (a) Net economic damages shall be awardable, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments. 766.207(7)(a).

> (1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered.
>
> (2) The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.
>
> (3) Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury.
>
> *****
>
> (6) The decedent's personal representative may recover for the decedent's estate the following:
>
> (a) Loss of earnings of the decedent from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest. Loss of the prospective net accumulations of an estate, which might reasonably have been expected but for the wrongful death, reduced to present money value, may also be recovered: ....

Pursuant to this statute there is no authority to award economic damages for loss of future earning capacity. The statute permits recovery for non-economic damages - while the Medical Malpractice Act merely limits the amount that can be recovered in arbitration proceeding. Under the lower court's analysis regardless of whether or not the matter is arbitrated or litigated, an action for medical malpractice permits the representative to seek damages permitted under both statutes. This is not the law.

In *Wade v. Alamo Rent A Car,* 510 So.2d 642 (Fla. 4th DCA 1987) the court rejected the argument of the plaintiff that the personal representative could recover for lost wages of the survivors holding that, "The 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." 510 So.2d at 643.

In a medical malpractice setting the courts have relied on the Wrongful Death Act to determine recoverable damages. In *Taylor v. Orlando Clinic,* 555 So.2d 876 (Fla. 5th DCA 1989), the patient filed a medical malpractice action against the provider. After the death of the patient the personal representative filed a wrongful death action. The trial court dismissed both actions and the personal representative appealed. Though affirming the dismissal of the personal injury action, the court reversed the dismissal of the wrongful death action noting that:

> While the original personal injury negligence action was, and the two other actions are, based in part on the same allegations of medical negligence, and the wife's consortium action derives from the husband's injury, the three causes of action are entirely independent and different in many significant ways. The personal injury cause of action for negligence is based on the common law; the cause of action for wrongful death is provided by statute (Sec. 768.19, Fla.Stat.). The negligence action requires a personal injury but not a death; the wrongful death action requires a death but not necessarily a death caused by negligence. The negligence action accrues at the time of the negligent act; the wrongful death action accrues at the time of the death. The negligence action is in favor of the person injured; the wrongful death action is in favor of the decedent's estate and statutorily designated survivors. The measure of damages in a personal injury negligence action is different from the damages provided by section 768.21, Florida Statutes, for a wrongful death. In effect, both causes of action cannot exist at the same time because the cause of action for wrongful death does not accrue until the death which is the very event that

> extinguishes the personal injury cause of action that theretofore existed in favor of the negligently injured person.
>
> At common law real actions, contract actions (actions on express or implied contracts) and actions for wrongs which damaged or diminished the decedent's property, survived the plaintiff's death, but actions for personal wrongs and personal injuries were considered "personal" causes of action and died with the person. The common law rule that personal causes of action die with the person has been generally abrogated by section 46.021, Florida Statutes, which states:
>
> No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted, and defended in the name of the person prescribed by law.
>
> Despite this statute, the decedent-patient's personal injury negligence action did not survive his death because Section 768.20, Florida Statutes, a part of the Wrongful Death Act, specifically provides:
>
> When a personal injury to the decedent results in his death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate.

555 So.2d at 878-79.[7]

In *Roberts v. Holloway,* 581 So.2d 619 (Fla. 4th DCA 1991), the Fourth District affirmed a jury verdict for the personal representative in a medical malpractice wrongful death action. In discussing the applicable law, then Judge Anstead only cited Fla.Stat. §768.21 - the damages statute under the Wrongful Death Act, and not the Malpractice Act.

Accepting Phillipe's argument that the proceeding is governed by the Medical Malpractice Act compels the conclusion that the $1,671,424.00 awarded by the panel representing loss of support and services of the decedent must be set aside as those

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[7] *Taylor* was recently cited with approval by the third district in *AC and S, Inc. v. Redd,* ____ So.2d ____ (Fla. 3d DCA 1997); 22 FLW D2741.

damages are only available under the Wrongful Death Act and not the Medical Malpractice Act. Petitioner believes that the correct analysis is to recognize that Section 766.207 was written without consideration of the fact that the medical incident could result in a wrongful death action. The malpractice statute sets forth the procedure for binding arbitration and limits non-economic damages to $250,000. The wrongful death statute identifies who the survivors are and sets forth the permissible recoverable damages - both economic and non-economic. In instances involving wrongful death the economic damage provision of Fla.Stat. §766.207(7)(a) providing for loss of earning capacity does not apply, while Section 768.21 of the Wrongful Death Act does. Any other interpretation would limit the economic damage claim of the personal representative. And, this interpretation would emasculate the statute's use as health care providers deciding whether to arbitrate a claim will not be able to assess exposure if a hybrid of damages is allowed, permitting the arbitrators to pick and choose at whim which statutory damages to award.

B. THE ATTORNEY'S FEE MUST BE REDUCED TO COMPLY WITH THE STATUTE.

Finally, to the extent that the economic damage award is modified and reduced, and this court affirms the lower court's decision limiting non-economic damages to $250,000 per incident, the attorney's fee awarded by the panel and apparently affirmed by the district court must also be reduced.

Pursuant to Fla.Stat. §766.207(f), the arbitrators can award an attorney's fee to the claimant's counsel of up to 15% of the damage award. The arbitrators awarded a fee of $510,631.70, which was the maximum permitted. Of this sum $153,750 was for the improper non-economic award of $1,025,000. As the award should only have been

$250,000, the maximum attorney's fee for this component of damages is $37,500. Therefore, the fee awarded must be reduced by $116,250.00 (plus statutory interest) as there is no justification in the statutes to permit a fee of this magnitude (62% of the damages awarded). The statute does not authorize the panel to consider reasonable hours expended and hourly rates. It directs that the fee be a percentage up to 15%. Based on the statute, the awarded fee is impermissible and cannot stand.

To the extent the court agrees that the economic damages awarded was error and must be reduced, then the corresponding attorney's fee awarded must also be reduced to no more than 15% of the correct amount of economic damages.

CONCLUSION

Based upon the foregoing reasons and citation of authority it is respectfully submitted that the district court erred in finding Fla. Stat. §766.212(2) constitutional and not an infringement of this court's rulemaking authority. The statute effects the form and manner of practice in the courts and conflicts with the Rules of Appellate Practice. Further, manifest injustice has occurred as Petitioners have been required to pay over $1,000,000 to the claimants that neither Phillipe nor his attorney are not entitled to. As the lower court has reversed the non-economic damage award, Petitioner has paid $775,000 more than it should have plus $116,250 for excessive attorney's fees with no assurance that the funds can be recovered. And, if this court agrees with Petitioner regarding economic damages, then St. Mary's is entitled to recoup additional sums. Clearly the lower court erred in holding that payment of an award during the pendency of an appeal is not manifestly unjust. The entry of a judgment by the circuit court triggered the provisions of Fla. R. App. P. 9.310 and Petitioner had the absolute right to post a supersedeas bond during the appeal.

Regarding economic damages, these damages are governed by the Wrongful Death Act and not the Medical Malpractice Act. Therefore, the panel erred in awarding $613,380.00 for lost future wages, and the district court erred in affirming this portion of the award. The economic damages provision of the malpractice act do not apply when the patient dies. The Wrongful Death Act applies. A claimant cannot recover benefits under both acts. Finally, to the extent there has been an excessive payments, attorney's fees based on those erroneous payments must be recalculated to comply with the statute.

It is requested that the court reverse that part the decision of the district court on the issues of the stay and economic damages and remand to the arbitration panel for entry of a revised award pursuant to this court's opinion.

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 January__, 1998.

Respectfully Submitted,

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By:_____
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