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IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

vs.

CHARLES PHILLIPE, individually and
as statutory survivor and as Personal
Representative of the Estate of JUSLIN
PHILLIPE, deceased, and all statutory
survivors of JUSLIN PHILLIPE, deceased,

Respondents.
_____/

CASE NO. 91,895
4DCA CASE NOS. 96-2321
96-2971
96-3320

CHARLES PHILLIPE, individually and
as statutory survivor and as Personal
Representative of the Estate of JUSLIN
PHILLIPE, deceased, and all statutory
survivors of JUSLIN PHILLIPE, deceased,

Petitioners,

vs.

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

Respondents.
_____/

CASE NO. 91,896
4DCA CASE NOS. 96-2321
96-2971
96-3320

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

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POINT ON CROSS-APPEAL AND CERTIFIED QUESTION

THE CAP ON NONECONOMIC DAMAGES AWARDABLE IN VOLUNTARY BINDING ARBITRATIONS OF MEDICAL MALPRACTICE ACTIONS APPLIES SEPARATELY TO EACH CLAIMANT.

Plaintiffs agree that "[o]nce the issue of who is the claimant is resolved, the basic rules of statutory construction apply." (ABR[1] 24). Applying those rules here requires the conclusion that the per incident cap on noneconomic damages in section 766.207(7)(b) clearly applies to each claimant.

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

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

[1]ABR = Petitioners'/Defendants' Answer Brief on Cross-Appeal

> takes no expert in the law to realize that this policy is diametrically opposed to what one would expect to be the objective in this area. ..."

Id.

The Fourth District ignored that the decedent's estate and the survivors are claimants under the Medical Malpractice and Wrongful Death Acts. The title of the Wrongful Death Act, Chapter 72-35, Laws of Florida, unequivocally described it as an "act providing for a right of action on behalf of the survivors and the estate by the personal representative." (emphasis added). See Bermudez v. Florida Power & Light Co., 433 So. 2d 565, 568 (Fla. 3d DCA 1983), rev. denied, 444 So. 2d 416 (Fla. 1984). The Wrongful Death Act clearly and unequivocally creates independent claims for the survivors and the estate. See Variety Childrens Hosp. v. Perkins, 445 So. 2d 1010, 1013 (Fla. 1983); Ding v. Jones, 667 So. 2d 894, 898 (Fla. 2d DCA 1996). Thus, the survivors are the real parties in interest and the personal representative is the nominal plaintiff who recovers for the benefit of the survivors and the estate, to avoid multiplicity of suits. See Continental Nat. Bank v. Brill, 636 So. 2d 782, 784 (Fla. 3d DCA 1994); Funchess v. Gulf Stream Apartments of Broward County, Inc., 611 So. 2d 43, 45 (Fla. 4th DCA 1992); Morgan v. American Bankers Life Assur. Co. of Florida, 605 So. 2d 104 (Fla. 3d DCA 1992).

The cases defendants rely on merely reiterate the procedure for a wrongful death claim -- the personal representative is the entity with standing to bring the wrongful death suit. See Veltmann v. Walpole Pharmacy, Inc., 928 F. Supp. 1161 (M.D. Fla. 1996); Puig v. Saga Corp., 543 So. 2d 238 (Fla. 3d DCA 1989). Standing, however, is not the issue here. The issue is whether the survivors and the estate have separate and independent causes of action, which they clearly do.

In fact, one of defendants' cited cases, Department of Rehabilitative Servs. v. McDougall, 359 So. 2d 528 (Fla. 1st DCA), cert. denied, 365 So. 2d 711 (Fla. 1978), expressly rejected the interpretation defendants advance here -- that there is only one claimant in a wrongful death action because only the personal representative can file suit. McDougall held in the context of section 768.28(5), the sovereign immunity statute, that the claims of a widow and children in a wrongful death action are separate for purposes of calculating the final judgment under the sovereign immunity statute. See also State, Dep't. of Corrections v. Parker, 553 So. 2d 289 (Fla. 4th DCA 1989)(holding that a loss of consortium claim is a separate claim under the sovereign immunity statute); State, Dep't. of Transp. v. Knowles, 388 So. 2d 1045 (Fla. 2d DCA 1980)(holding that claims of different individuals in one lawsuit are separate claims under the sovereign immunity

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

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

Defendants' statement on page 29 of their brief, that "[t]he legislative intent was to place a maximum cap on noneconomic damages, not to establish a ceiling for what any person could recover," is conclusory and ignores the plain language of section 766.207(7)(b). Besides demonstrating the separateness of the survivors' and the estate's claims in wrongful death actions, McDougall and its progeny (applying section 768.28(5)), demonstrate that the legislature knows how to write a statute when it intends for a cap to apply in the aggregate rather than per claimant. (See

RIB[2] 26, quoting section 768.28(5)). Had the legislature intended to place a maximum cap on noneconomic damages and not to establish a ceiling on what any claimant can recover, it could have easily written section 766.207(7)(b) to limit noneconomic damages "per patient," like Colorado and Louisiana did. Cases interpreting Louisiana's statute emphasize that it uses the words, "total," "all claims" and "a patient" to evidence the legislature's intent to apply the cap in the aggregate and not per claimant or plaintiff. See, e.g., Todd v. Sauls, 647 So. 2d 1366, 1381 (La. Ct. App. 1994), writ denied, 651 So. 2d 289 (La. 1995). Conversely, Florida's Statute is a "per claimant" cap, phrased in terms of the maximum amount recoverable by a claimant and not in terms of the maximum amount recoverable from a health care provider "per patient."

Defendants' reliance upon insurance cases is misplaced. The holdings in those cases were based on dissimilar language in insurance contracts. See, e.g., Florida Ins. Guaranty Ass'n v. Cope, 405 So. 2d 292, 293-294 (Fla. 2d DCA 1981). In addition, medical malpractice, like "[s]overeign immunity[,] is not equivalent to insurance, and there may be problems in extending its concepts into insurance law. ..." Id. at 870; Florida Ins. Guar. Ass'n, Inc. v. Cole, 573 So. 2d 868 (Fla. 2d DCA 1990)(refusing to

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

apply the sovereign immunity statute to an insurance question), rev. denied, 584 So. 2d 997 (Fla. 1991).

The definitions of "claimant" and "occurrence" in section 766.105 lend nothing to defendants' construction of 766.207(7)(b). If anything, the separate statutory definitions of these terms in section 766.105 illustrates that the legislature intended to define those terms differently in section 766.105 than in the other portions of the chapter. Otherwise, there was no need to separately define those terms in section 766.105. In addition, it is clear that the definitions in section 766.105 are limited to that statute.

Defendants' statement on pages 22-23, that plaintiffs' counsel understood there to be one claimant and that plaintiffs only now advance the theory that each survivor is a separate claimant, is ridiculous. Plaintiffs' counsel's letter speaks for itself and accepted on behalf of the estate and all statutory survivors (R 001, Ex. A). Defendants also ignore their own pre-arbitration pleadings. From day one, the issues were framed in terms of claimants, separately seeking noneconomic damages (R 172-190, 427-442, 443-454).

Defendants' argument that plaintiffs' interpretation would adversely effect "loss planning" is specious. Defendants can easily estimate noneconomic damages based on the number of claimants, information easily discernable from the claimants' notice of intent.

Defendants have not responded to plaintiffs' argument that if the legislature intended the cap to apply in the aggregate to all wrongful death beneficiaries, the arbitration provisions of the medical malpractice act are unconstitutional as applied. The legislature desired that the arbitration provisions of the Medical Malpractice Act provide a rational basis for determining damages for noneconomic losses and sought to fairly compensate those persons sustaining such losses. See University of Miami v. Echarte, 618 So. 2d 189, 192 (Fla.), cert. denied, 510 U.S. 915 (1993). The cap on noneconomic damages, as interpreted by the Fourth District, discriminates significantly against wrongful death medical malpractice claimants as opposed to other kinds of medical malpractice claimants, with no rational basis for the distinction. The discrimination is arbitrary and irrational in the extreme, requiring that this Court declare the medical malpractice arbitration statute unconstitutional. See Vildibill v. Johnson, 492 So. 2d 1047, 1050 (Fla. 1986); De Ayala v. Florida Farm Bureau Cas. Ins. Co., 543 So. 2d 204 (Fla. 1989). In addition, if the

Fourth District is correct and only the personal representative has a claim, the statute is unconstitutional because it leaves the survivors with no recovery for noneconomic damages. See, e.g., Smith v. Department of Ins., 507 So. 2d 1080, 1088-1089 (Fla. 1987). That result is arbitrary and illogical and violates equal protection, due process and access to the courts.

The arbitrators correctly interpreted section 766.207(7)(b) as affording noneconomic damages to each claimant. Mrs. Phillipe's estate, her husband and their children have separate "causes of action." Each is a claimant entitled to separate damages as enumerated in the Medical Malpractice Act. This court should disapprove the Fourth District's decision and reinstate the arbitration award.

CONCLUSION

The portions of the Fourth District's opinion affirming the measure of economic damages under the Medical Malpractice Act and upholding the constitutionality of section 766.212 should be approved. That portion of the opinion holding that the statutory cap on noneconomic damages applies in the aggregate rather than to each claimant should be disapproved and the case remanded with directions to reinstate the arbitration award.

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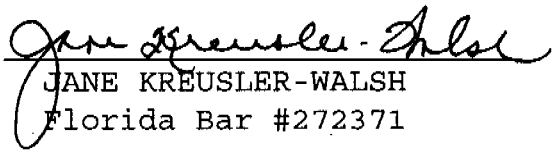
By: 
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