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DISSENTING OPINION OF JANET W. ADAMS, ESQUIRE

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STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

HENRY R. MOGLER and  
DONNA L. MOGLER,

Petitioners,

vs. CASE NO. 95-5199MA

DIRK FRANZEN, M.D.,

Respondent.

\_\_\_\_\_ /

DISSENTING OPINION OF JANET W. ADAMS, ESQUIRE

Dissent re: application of the statutory cap on noneconomic damages in a wrongful death case and dissent re: applicability to the Wrongful Death Statute in determining the types of economic damages which are allowable.

Arbitrator Adams dissents in regard to the decision to award Henry and Donna Mogler a total of \$500,000.00 in noneconomic damages and would instead have awarded a single \$250,000.00 for noneconomic damages to the Estate of Michael Glen Mogler based on the following reasoning:

Florida Statutes 766.207 unequivocally provides that in medical malpractice actions which are submitted for binding arbitration, the "noneconomic damages shall be limited to a maximum of \$250,000.00 per incident..."(emphasis added). Florida Statutes 766.207(7)(b). This language is unambiguous and clearly mandates that the maximum which can be awarded as a result of any incident is \$250,000.00 regardless of the number of claimants who are seeking compensation. In order to award more than a total of \$250,000.00 in the instant case, it would be necessary to re-write the language of the involved statute by changing the word "incident" to the word "claimant." Clearly, such a revision of the statutory language is not and should not be within the scope of authority granted to arbitrators.

In the instant case, the facts which were elicited at arbitration clearly indicate that the claims for noneconomic damages which were being pursued by Donna Mogler and by Henry Mogler were claims which arose from the same incident or occurrence as defined by the Fifth District Court of Appeals in American Indemnity Company v. McQuaig, 435 So.2d 414 (Fla. 5th DCA 1983). Consequently, the noneconomic damages in the instant case should have been limited to a maximum of \$250,000.00 pursuant to Florida Statutes 766.207(7)(b). Because of the nature of the claim being pursued on behalf of the Estate of Michael Glen Mogler, it is the opinion of the undersigned dissenting arbitrator that noneconomic damages in the amount of \$250,000.00 should be awarded to the Estate

of Michael Glen Mogler and that no noneconomic damages should be specifically awarded to either Henry or Donna Mogler.

Arbitrator Adams also dissents in regard to the decision to award noneconomic damages to Henry Mogler, Donna Mogler, and the Estate of Michael Glen Mogler which are not the type of damages allowable pursuant to the Wrongful Death Statute, Florida Statutes 768.21, and would have instead awarded noneconomic damages only to the Estate of Michael Glen Mogler in the amount of \$8,162.00 based on the following reasoning:

It is well settled under Florida law that an action for wrongful death was not authorized at common law but instead is solely a creation of statute and the Legislature. *White v. Clayton*, 323 So.2d 573 (Fla. 1975). Consequently, in the instant case it is clear that in the absence of the Wrongful Death Act, no cause of action would exist. It is therefore clear that since the instant case is dependent upon the Wrongful Death Act for its very existence, the damages which can be awarded are only those damages which would be allowable under Florida Statutes 768.21.

Since the Wrongful Death Statute is applicable in the instant action, both Donna and Henry Mogler's claims for past and future medical expenses in regard to the psychiatric treatment received by them as a result of Michael Mogler's death are specifically prohibited pursuant to the Fourth District Court of Appeal's opinion in *Wade v. Alamo Rent A Car, Inc.*, 510 So.2d 642 (Fla. 4th DCA 1987). Additionally, the damages claimed by Petitioners for Donna Mogler's past and future lost wages are not cognizable under 768.21 and therefore are damages that should not be awarded in the instant case.

Similarly, Petitioners' claim for the lost wages of Michael Mogler, the decedent, are damages which are not awardable under the Wrongful Death Statute. Indeed, the arbitrators' award of \$388,272.00 to the Estate of Michael Mogler for the alleged loss of wages creates a windfall to the Estate of Michael Mogler in two respects. First of all, these damages are clearly not damages allowable under the Wrongful Death Act. Secondly, in reaching the figure awarded for these lost wages, the arbitrators did not reduce the amount of lost earnings by the amount of support and services Michael Mogler would have consumed in providing himself the basic physical necessities of surviving throughout his lifetime. Consequently, the Estate of Michael Mogler, under the current arbitration award, received a tremendous windfall. It is precisely this sort of windfall that the Legislature sought to avoid in creating the Wrongful Death Statute. Consequently, no award of damages for the wage loss of Michael Mogler should have been contained within the arbitration award.

Additionally, the arbitration award, in awarding past and future loss of support and services to both Henry and Donna Mogler is contrary to the requirements set forth in the Florida Supreme Court decision of *U.S. v. Dempsey* for the award of such damages. *U.S. v. Dempsey*, 635 So.2d 961 (Fla. 1994). According to the Dempsey decision, in order to be entitled to an award of loss of support and services for a minor child, a parent must show some extraordinary income producing ability for the child prior to the injury. *Id.* at 965. In the instant case, Petitioners made absolutely no showing that Michael Mogler had any such extraordinary income producing ability. Instead, the sole testimony in regard to these elements of damages were that Michael Mogler would have contributed to the family by doing such routine things as taking out the trash. Consequently, the award of past and future loss of support and services is directly contrary to both the Wrongful Death Statute and the Supreme Court's prior precedent.

For all of the preceding reasons, I dissent from the arbitration award rendered in the instant case and instead would have awarded the following damages in the instant case:

A. Noneconomic damages to the Estate of Michael Mogler -	
	\$250,000.00;
B. Funeral bills to the Estate of Michael Mogler -	
	\$1,756.00;
C. Cemetery lot to the Estate of Michael Mogler -	\$250.00;
D. Funeral home to the Estate of Michael Mogler -	\$1,072.00;
E. Medical bills to the Estate of Michael Mogler -	
	\$5,084.00.
Total	\$258,162.00
F. Attorneys' fees and costs -	\$38,724.30.
Total Arbitration Award	\$296,886.30
DATED: 06/17/96	

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Orlando, Florida 32803  
(407) 896-0425  
FAX-896-9236

By: \_\_\_\_\_  
JANET W. ADAMS  
Arbitrator  
FLORIDA BAR No. 398845

JWA/ps

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FINAL ARBITRATION AWARD

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STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

HENRY E. MOGLER and	)	
DONNA L. MOGLER,	)	
	)	
Claimants,	)	
	)	
vs.	)	CASE NO. 95-5199MA
	)	
DIRK FRANZEN, M.D.,	)	
	)	
Respondent.	)	
_____	)	

FINAL ARBITRATION AWARD

The final arbitration hearing in this case was held before Richard Hixson, Chief Arbitrator, Janet Adams, Arbitrator, and Christian D. Searcy, Arbitrator, on June 3rd and 4th, 1996 in West Palm Beach, Florida.

APPEARANCES

For Claimants: Lake Lytal, Jr., Esquire  
Post Office Box 4056  
West Palm Beach, Florida 33402

For Respondents: Eugene L. Ciotoli, Esquire  
Armando T. Lauritano, Esquire  
Esperante, Sixth Floor  
222 Lakeview Avenue  
West Palm Beach, Florida 33401

AWARD

At the conclusion of the arbitration hearing, the following award was agreed to by the undersigned arbitrators and announced pursuant to Section 766.207, Florida Statutes.

1. HENRY E. MOGLER
  - a. for non-economic damages (past and future): \$250,000.00
  - b. past medical expenses: \$ 9,125.00
  - c. future medical expenses: \$ 29,750.00
  - d. past wage loss: \$ 0
  - e. loss of services: \$ 2,521.00 (past)
  - \$ 5,429.00 (future)
  
2. DONNA L. MOGLER
  - a. for non-economic damages (past and future): \$250,000.00
  - b. past medical expenses: \$ 46,593.00
  - c. future medical expenses: \$ 46,000.00
  - d. past wage loss: \$ 57,636.00
  - e. future wage loss: \$304,189.00
  - f. loss of services: \$ 2,521.00 (past)
  - \$ 5,429.00 (future)
  
3. ESTATE OF MICHAEL GLENN MOGLER
  - a. for non-economic damages (past and future): \$ 0
  - b. funeral bills: \$ 1,756.00
  - c. cemetery lot: \$ 250.00
  - d. funeral home: \$ 1,072.00
  - e. medical bills: \$ 5,084.00
  - f. wage loss of Michael Mogler: \$388,272.00
  - TOTAL \$1,405,627.00
  
4. HENRY E. MOGLER and DONNA L. MOGLER:
  - a. for attorneys' fees and costs: \$210,844.05

In addition to the foregoing, Defendant is to pay the costs associated with the arbitration proceeding: the fees of the arbitrators, other than the Chief Arbitrator, and the cost of the court reporter.

The arbitration award was announced at the conclusion of the arbitration hearing. The award of future economic damages shall be paid in ten (10) equal installments over ten (10) years.

The arbitration award was agreed to by the Chief Arbitrator and Arbitrator Christian Searcy. Arbitrator Janet Adams did not concur with the arbitration award, and has filed a dissent.

DONE and ORDERED this 27th day of June, 1996, in Tallahassee, Florida.

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RICHARD HIXSON, Chief Arbitrator  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904) 488-9675

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CHRISTIAN D. SEARCY  
Arbitrator  
Post Office Box 3626  
West Palm Beach, Florida 33402

(unsigned)

---

JANET ADAMS  
Arbitrator  
1417 East Concord Street, Suite 101  
Orlando, Florida 32803-5456

COPIES FURNISHED:

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=====  
MOTION FOR CLARIFICATION AND TO CORRECT CLERICAL  
MISTAKE IN FINAL ARBITRATION AWARD  
=====

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

HENRY E. MOGLER and DONNA L.  
MOGLER,

Petitioners,

vs

Case No. 95-5199MA

DIRK FRANZEN, M.D.,

Respondent.  
\_\_\_\_\_ /

MOTION FOR CLARIFICATION AND TO CORRECT CLERICAL  
MISTAKE IN FINAL ARBITRATION AWARD

COME NOW the Petitioners, HENRY E. MOGLER and DONNA L. MOGLER, and move the arbitrators to clarify their Final Arbitration Award by correcting an apparent clerical mistake contained in the Award and as grounds therefor state as follows:

1. The Final Arbitration Award was entered on June 27, 1996. Pursuant to 60Q-3.024(7), the Award is not yet a final agency action.

2. Petitioners' economist, Bernard Pettingill, testified as to Petitioners' future economic damages. Dr. Pettingill provided the arbitrators with the present money value of each future economic loss as of the date of the hearing, June 3, 1996. Present money value represents the amount of money Petitioners would have to receive and prudently invest to compensate them for their future economic losses. Additionally, Dr. Pettingill provided the

Arbitrators with the amounts of future economic losses as they would occur in future years.

3. Section 766.207(7)(c), Florida Statutes, requires future economic losses to be paid by periodic payments. Damages awarded which are to be paid in the future should not be reduced to present money value because the Respondent, rather than the Petitioners, have the money to invest until the payment is made.

4. At the conclusion of the arbitration hearing, the arbitrators announced that a majority of the arbitrators were going to award the Petitioners all of the future economic damages claimed during the course of the hearing. In the Final Arbitration Award, claimants were awarded the present money value of the future economic damages as of June 3, 1996. However, Respondent was given ten (10) years to pay these damages in equal annual installments. By using the present money value of the future economic damages as a basis of the award and giving the Respondent ten (10) years to pay the damages, the arbitrators significantly reduced Petitioners' award.

5. It is believed the above represents a clerical error and that the arbitration majority had no intention of, in effect, awarding Petitioners less than the present money value of Petitioners' future economic damages. Absent a stipulation from Respondent to accept an award based upon present money value, the Arbitration Award should have reflected the full value of future economic damages for each future year rather than reducing the future damages to present money value.

6. Petitioners have attached as Exhibit "A" an Affidavit from Bernard Pettingill verifying the Final Arbitration Award reduces Petitioners recovery below present money value and sets forth the correct amounts which should have been awarded Petitioners for future economic damages to be paid in ten equal installments over ten years.

WHEREFORE, Petitioners request that the Arbitrators clarify their award and correct the clerical mistake made by reducing the future economic damages to present money value and then providing Respondent ten years to pay the damages which constitutes a double reduction of Petitioners' damages.

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing was mailed to Richard Hixson, Hearing Officer, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-1550; EUGENE L. CIOTOLI, ESQUIRE, Bobo, Spicer, Ciotoli, Fulford, Bocchino, DeBevoise & LeClainche, Esperante, Sixth Floor, 222 Lakeview Avenue, West Palm Beach, Florida 33401; Christian D. Searcy, Esquire, Searcy, Denney, Scarola, Barnhart

& Shipley, P.A., P.O. Box 3626, West Palm Beach, FL, 33402, Janet Adams, Esquire, Adams, Hill, Reis, Adams, Hall & Schieffelin, 1417 East Concord Street, Suite 101, Orlando, Florida 31803; Jay Cohen, Esquire, 4000 Hollywood Boulevard, Suite 602N, Hollywood, Florida 33021, and JEFFREY M. LIGGIO, ESQUIRE, 213 Southern Boulevard, West Palm Beach, Florida 33405; and MARK HICKS, ESQUIRE, Anderson & Blum, 100 North Biscayne Blvd., Suite 2402, Miami, Florida 33132-2306 this 19th day of July, 1996.

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LAKE LYTAL, JR. ESQUIRE  
LYTAL, REITER, CLARK, SHARPE,  
ROCA, FOUNTAIN & WILLIAMS  
Post Office Box 4056  
West Palm Beach, Florida 33402  
(407) 655-1990  
Attorneys for Petitioners

G: \JJR\MOGLER\MTN-CLAR

Exhibit A

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

HENRY E. MOGLER and DONNA L.  
MOGLER,

Petitioners,

vs

Case No. 95-5199MA

DIRK FRANZEN, M.D.,

Respondent.

\_\_\_\_\_/

AFFIDAVIT

STATE OF FLORIDA     )  
COUNTY OF PALM BEACH)

BEFORE ME, personally appeared BERNARD F. PETTINGILL, JR., PH.D., who, duly sworn under oath, deposes and states:

1. I am an economist and provided economic testimony at the final hearing in the above matter.

2. I have reviewed the Final Arbitration Award dated June 27, 1996.

3. Each of the awards for future economic damages contained in the Final Arbitration Award represents the present money value of the respective survivors' claims for future economic damages as of June 3, 1996.



4. The present money value of the future economic losses represents the amount of money necessary to award each survivor so the survivor could invest the award and have sufficient funds to compensate the survivor for future economic losses.

5. By awarding Petitioners the present money value of the future economic damages, but allowing the respondent to pay the damages in ten equal, annual installments over ten years, the Respondents, rather than the Petitioners, will have the use of the money. The effect of this award is to further reduce the present money value of Petitioners' future economic damages. The present money value of the award of future economic damages to be paid over ten years as stated in the Final Arbitration Award is \$564,001.00. Receipt of the award over ten years will not provide Petitioners with sufficient funds to compensate them for the future economic damages intended to be awarded by the arbitrators.

6. An award for future economic damages to be paid by periodic damages should not be reduced to present money value since the Respondent, rather than the Petitioners, has use of the money. An award of future periodic payments should be for the full value of the future damage on the date it is to be paid by Respondent. To award Petitioners all of the claimed future economic damages as announced at the conclusion of the final hearing over a ten-year period, the Final Arbitration Award for future economic damages should have been as follows:

A. HENRY E. MOGLER - (future medical expenses and future loss of services)

1.	Payable 6/27/1997	\$ 3,517.00
2.	Payable 6/27/1998	\$ 3,851.00
3.	Payable 6/27/1999	\$ 4,217.00
4.	Payable 6/27/2000	\$ 4,618.00
5.	Payable 6/27/2001	\$ 5,056.00
6.	Payable 6/27/2002	\$ 5,537.00
7.	Payable 6/27/2003	\$ 6,063.00
8.	Payable 6/27/2004	\$ 6,639.00
9.	Payable 6/27/2005	\$ 7,269.00
10.	Payable 6/27/2006	\$ 7,989.00

B. DONNA L. MOGLER - (future medical expenses, future wage loss and future loss of services)

1.	Payable 6/27/1997	\$ 30,961.00
2.	Payable 6/27/1998	\$ 35,903.00
3.	Payable 6/27/1999	\$ 37,124.00
4.	Payable 6/27/2000	\$ 40,652.00
5.	Payable 6/27/2001	\$ 44,515.00
6.	Payable 6/27/2002	\$ 48,744.00
7.	Payable 6/27/2003	\$ 53,876.00
8.	Payable 6/27/2004	\$ 58,448.00
9.	Payable 6/27/2005	\$ 64,002.00
10.	Payable 6/27/2006	\$ 70,124.00

C. ESTATE OF

MICHAEL GLENN MOGLER - (future wage loss of Michael Mogler)

1. Payable 6/27/1997	\$ 38,827.00
2. Payable 6/27/1998	\$ 42,516.00
3. Payable 6/27/1999	\$ 46,556.00
4. Payable 6/27/2000	\$ 50,980.00
5. Payable 6/27/2001	\$ 55,824.00
6. Payable 6/27/2002	\$ 61,128.00
7. Payable 6/27/2003	\$ 66,937.00
8. Payable 6/27/2004	\$ 73,297.00
9. Payable 6/27/2005	\$ 80,262.00
10. Payable 6/27/2006	\$ 87,923.00

7. The Final Arbitration Award correctly stated the present money value of the total future economic damages was \$1,405,627.00 as of June 3, 1996. The only purpose served by the present money value under 766.207, F.S., is to determine the award of attorneys' fees and costs which have been correctly calculated in the Final Arbitration Award.

FURTHER AFFIANT SAYETH NAUGHT.

\_\_\_\_\_  
BERNARD F. PETTINGILL, JR., PH.D.

Sworn to and subscribed before  
me this 19th day of July, 1996

\_\_\_\_\_  
Notary Public, State of Florida  
at Large

My Commission Expires: KENNETH O. DISHMAN  
MY COMMISSION # CC 502092  
EXPIRES: October 16, 1999  
Bonded Thru Notary Public Underwriters

=====  
CHIEF ARBITRATOR'S ORDER DENYING MOTION FOR CLARIFICATION  
AND TO CORRECT CLERICAL ERROR IN FINAL ARBITRATION AWARD  
=====

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

HENRY E. MOGLER and DONNA L.  
MOGLER,

Petitioners

vs.

CASE NO. 95-5199MA

DIRK FRANZEN, M.D.,

Respondent.

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ORDER DENYING MOTION FOR  
CLARIFICATION AND TO CORRECT  
CLERICAL ERROR IN FINAL ARBITRATION AWARD

THIS CAUSE came before the undersigned Chief Arbitrator on Petitioners' motion filed July 23, 1996, to clarify and correct the Final Arbitration Award entered on June 27, 1996. The Notice of Appeal of the Final Arbitration Award was filed on July 11, 1996. Accordingly, jurisdiction of the matters raised in Petitioners' motion is vested with the District Court of Appeal. Kelly v. Staff Builders, 603 So.2d 1, (Fla. DCA 1992); M. A. D. v. State, 647 So.2d 260 (Fla. 1st DCA 1994); Amlan, Inc. v. Detroit Diesel Corp., 651 So.2d 701 (Fla. 4th DCA 1995). Upon consideration, Petitioners' Motion for Clarification and to Correct the Final Arbitration Award is DENIED.

DONE AND ORDERED this 8th day of August, 1996, in Tallahassee, Florida.

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RICHARD HIXSON  
Chief Arbitrator  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 8th day of August, 1996.

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