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DIVISION OF ADMINISTRATIVE HEARINGS

Third District Court of Appeal

State of Florida, July Term, A.D. 2008

Opinion filed December 24, 2008.
Not final until disposition of timely filed motion for rehearing.

No. 3D07-1530
Lower Tribunal No. 06-3916 MA

Lifemark Hospitals of Florida, Inc., d/b/a Palmetto General Hospital,
Appellant,

vs.

Mercedes Afonso, as surviving spouse and Personal Representative of the Estate of Alexis Afonso, deceased,
Appellee.

An Appeal from the State of Florida, Division of Administrative Hearings.

Falk, Waas, Hernandez, Cortina, Solomon, & Bonner, and Norman M. Waas; Dresnick & Rodriguez, and Pamela I. Perry, for appellant.

Rossman, Baumberger, Reboso & Spier, and Lincoln J. Connolly, for appellee.

William A. Bell; Parenti & Parenti, and Gail Leverett Parenti, for Florida Hospital Association as amicus curiae.

Burlington & Rockenbach, and Philip M. Burlington, for appellee Mercedes Afonso as amicus curiae.

Before RAMIREZ, and ROTHENBERG, JJ., and SCHWARTZ, Senior Judge.

RAMIREZ, J.

This is an appeal involving an arbitration award which presents a question of statutory construction, namely, whether section 766.207(7), Florida Statutes (2003), limits awardable economic damages in arbitrations to those damages available under the Wrongful Death Act. In other words, the issue presented is whether the 2003 amendments to the Medical Malpractice Act limit economic damages in arbitrations involving a wrongful death to those afforded by the Wrongful Death Act. Our review is de novo. See State v. Rubio, 967 So. 2d 768, 771 (Fla. 2007). We reverse because we conclude that Mercedes Afonso was not entitled to recover loss of earning capacity as part of her award for economic damages.

Afonso, as Personal Representative of the Estate of Alexis Afonso, alleged that Lifemark Hospitals of Florida, Inc., d/b/a Palmetto General Hospital, and others caused the wrongful death of Alexis Afonso on April 10, 2004. He died at age forty seven during his care and treatment for a flesh eating bacteria. Following a pre-suit investigation, the hospital requested, and Afonso agreed, to voluntary binding arbitration pursuant to sections 766.207(2) and (3), Florida Statutes (2003).

The arbitration panel decided that the economic damages recoverable pursuant to sections 766.202(3) and 766.207(7), Florida Statutes (2003), were not limited to the damages available under the Wrongful Death Act, section 768.21,

Florida Statutes. The Hospital argued that under section 768.21, Afonso's economic damages were limited to: (1) medical and funeral expenses; (2) loss of support and services (past and future); and (3) loss of net accumulations of the estate, as defined by section 768.18(5), Florida Statutes. Afonso alleged that she was entitled to a full range of economic damages including loss of earning capacity damages, as well as damages recoverable under the Wrongful Death Act. Non-economic damages were not an issue below and are not at issue in this appeal.

The issue presented in this appeal was resolved against the hospital in St. Mary's Hospital, Inc. v. Phillipe, 769 So. 2d 961 (Fla. 2000), where the Florida Supreme Court "conclude[d] that the arbitration provisions of the Medical Malpractice Act expressly specify the elements of all of the damages available when the parties agree to binding arbitration, regardless of whether the medical malpractice action involves a wrongful death." Id. at 973. After that decision, however, the legislature amended section 766.207(7) in 2003 and added the underlined language as follows:

> 766.207(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 damages shall be awarded as provided by general law, including the Wrongful Death Act, subject to the following limitations:
>
> (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.

The legislature also amended section 766.202(3), adding the underlined language:

> "Economic damages" means financial losses that 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 to the extent the claimant is entitled to recover such damages under general law, including the Wrongful Death Act.

The arbitration panel rejected the hospital's argument that the 2003 amendments to sections 766.202 and 766.207(7) limited Afonso's economic damages to those recoverable in a wrongful death action. The panel concluded that the provisions following the "subject to the following limitations language" in section 766.207(7) did not limit the economic damages that could be awarded to those available pursuant to the Wrongful Death Act, but instead supplemented the damages that could be awarded pursuant to that Act. In her order, the Chief Arbitrator wrote:

> By the language chosen the Legislature has specifically authorized reference to the Wrongful Death Act, where appropriate, but "subject to the following limitations." Thus, provisions in the Wrongful Death Act may be relevant in medical malpractice arbitration but are subject to the provisions in Section 766.207(7).
>
> Accordingly, where a provision of the Wrongful Death Act supplements a provision applicable to a medical malpractice arbitration, such as authorizing a person or entity to sue that might not be so authorized

> under the medical malpractice arbitration statutes, that provision of the Wrongful Death Act controls. However, where a provision of the Wrongful Death Act conflicts with or modifies a provision in the medical malpractice arbitration statute, the medical malpractice arbitration statute controls. This conclusion is dictated by the language of the amendment, which requires that damages are "subject to the following limitations," and those limitations are the items of damages set forth in Section 766.207, Florida Statutes.

Both sides state that the statute is unambiguous. However, we do not agree that section 766.207(7) is unambiguous. Does the "subject to the following limitations" language modify "the Wrongful Death Act," which would support the arbitrators' decision, or does it modify "general law," or does it modify "damages," the latter two of which would support the hospital's position? If it modifies "the Wrongful Death Act," so as to supplement the damages otherwise awardable under the Wrongful Death Act, why would the legislature use the word "limitations"? Whatever clarity is lacking in section 766.207(7) seems to have been resolved in section 766.202(3), where the legislature added the language, "to the extent the claimant is entitled to recover such damages under general law, including the Wrongful Death Act." This new language clearly modifies "wage loss and loss of earning capacity."

Shortly after the 2003 amendments, the Florida Supreme Court decided a case controlled by the old statutes. In Barlow v. North Okaloosa Medical Center, 877 So. 2d 655 (Fla. 2004), the Florida Supreme Court, citing St. Mary's Hospital,

held that the "net accumulations" provision of the Wrongful Death Act did not prohibit the claimant from receiving damages for monthly social security benefits received by her husband prior to his death, because the Medical Malpractice Act did not provide for the application of that provision. Id. at 656-57. Accordingly, the Florida Supreme Court rejected the argument that the legislature's decision to amend sections 766.202(3) and 207(7) indicated that St. Mary's Hospital had been wrongly decided, noting that it did not opine on the effect, "if any," of the 2003 amendments on damages recoverable under the amended statutes. Id. at 659. The Florida Supreme Court also wrote that "[t]here is no indication in the statutory language that the amendments were passed as a result of this Court's decision in St. Mary's Hospital. . . ." Id. Instead, "these amendments were passed three years after this Court's decision in St. Mary's Hospital as part of comprehensive medical malpractice reform that the Legislature concluded was "necessary to alleviate the crisis relating to medical malpractice insurance." Id.

Nevertheless, if the legislature had been in agreement with the decision in St. Mary's Hospital, there would have been no need to amend the two statutes. See Mangold v. Rainforest Golf Sports Ctr., 675 So. 2d 639, 642 (Fla. 1st DCA 1996) ("[W]hen the Legislature makes a substantial and material change in the language of a statute, it is presumed to have intended some specific objective or alteration of law, unless a contrary intent is clear.") We should give meaning to all provisions

of a statute, because "the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of the statute meaningless." State v. Goode, 830 So. 2d 817, 824 (Fla. 2002). The arbitrators' decision would render the language added by the Legislature in 2003 unnecessary and meaningless because St. Mary's Hospital already awarded claimants the loss of wages and earning capacity. See Koile v. State, 934 So. 2d 1226, 1233 (Fla. 2006) ("[C]ourts should avoid readings that would render part of a statute meaningless.")

Contemporaneously enacted amendments should not be construed to negate one another. See American Home Assur. Co. v. Plaza Materials Corp., 908 So. 2d 360, 368 (Fla. 2005). Here, construing the "subject to the following limitations" language added to section 766.207(7) to permit the recovery of loss of earning capacity damages would negate the language simultaneously added to section 766.202(3). That language provides for recovery of economic damages only "to the extent" claimants are entitled to recover them under the Wrongful Death Act.

Section 766.202(3) must be read *in pari materia* with section 766.207(7). See Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189, 199 (Fla. 2007) ("[R]elated statutory provisions must be read together to achieve a consistent whole."). To read the two provisions in a harmonious manner requires that Afonso be awarded

damages for loss of earning capacity only "to the extent" she is entitled to recover those damages pursuant to the Wrongful Death Act.

We conclude that the Arbitrators erred in permitting Afonso to recover loss of earning capacity in the medical malpractice arbitration. Accordingly, we reverse and remand the arbitration award for recalculation of economic damages for loss of support and loss of net accumulations, as loss of services has been determined and is not in dispute.

Reversed and remanded.