IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-M00675-SCT

THE ESTATE OF STACEY KAY KLAUS BY ALTA KLAUS, ADMINISTRATRIX, AND ALTA KLAUS AS PERSONAL REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF STACEY KAY KLAUS — APPELLANT

VS.

VICKSBURG HEALTHCARE, LLC d/b/a RIVER REGION HEALTH SYSTEMS, RIVER REGION MEDICAL CORPORATION, TRIAD HOSPITALS, INC., STEPHANIE VANDERFORD, R.N., JOHN DOES 1 THROUGH 10 AND UNIDENTIFIED ENTITIES 1 THROUGH 10 AND DR. EUGENE FERRIS, III — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI

BRIEF OF APPELLEES

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Stephanie Vanderford, R.N.

COUNSEL FOR APPELLEE:

Eugene Ferris, III, M.D.

CERTIFICATE OF INTERESTED PERSONS

In order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

a. Vicksburg Healthcare, LLC d/b/a River Region Health Systems, River Region Medical Corporation, Triad Hospitals, Inc. and Stephanie Vanderford, R.N., Appellees

b. Stuart B. Harmon and Kristopher A. Graham, Page, Kruger & Holland, P.A., Counsel for Vicksburg Healthcare, LLC d/b/a River Region Health Systems, River Region Medical Corporation, Triad Hospitals, Inc. and Stephanie Vanderford, R.N., Appellees;

c. R.E. Parker, Jr. and Clifford C. Whitney III, Counsel for Dr. Eugene Ferris, III, Appellee;

d. The Estate Of Stacey Kay Klaus By Alta Klaus, Administratrix, and Alta Klaus as Personal Representative of The Wrongful Death Beneficiaries of Stacey Kay Klaus, Appellants;

e. Jerry W. Campbell, Counsel for The Estate Of Stacey Kay Klaus By Alta Klaus, Administratrix, and Alta Klaus as Personal Representative of The Wrongful Death Beneficiaries of Stacey Kay Klaus, Appellants

f. Honorable Frank G. Vollor, Trial Judge.

THIS, the 23rd day of March, 2007.

STUART B. HARMON
KRISTOPHER A. GRAHAM

R.E. PARKER, JR.
CLIFFORD C. WHITNEY III

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STATEMENT OF THE ISSUE

Is $500,000.00 the total amount of non-economic damages recoverable in a wrongful death cause of action against a provider of health care?

I. STATEMENT OF THE CASE

1. FACTUAL SUMMARY

Stacy Klaus was initially admitted to River Region Hospital on August 22, 2002, for removal of a diseased portion of the descending colon and creation of a sigmoid colostomy. (R. 6) The surgery went well and Ms. Klaus was discharged home on August 29, 2002. She was followed on an outpatient basis, and returned to River Region Hospital for a reversal of the colostomy on January 8, 2003. (R. 6)

Ms. Klaus's surgery was performed without complication. Postoperatively, Ms. Klaus was stable. Unfortunately, her status declined, and on January 11, 2003, she suffered an arrest. (R. 6) Ms. Klaus did not regain consciousness following her arrest and, on January 19, 2003, was transferred to University of Mississippi Medical Center where she expired on January 25, 2003. (R. 8)

2. PROCEDURAL HISTORY

A Complaint for medical negligence was filed on July 18, 2005, in the Circuit Court of Warren County styled, "*The Estate of Stacy Kay Klaus by Alta Klaus, Administratrix, and Alta Klaus as Personal Representative of the Wrongful Death Beneficiaries of Stacy Kay Klaus v. Vicksburg Healthcare, L.L.C. d/b/a River Region Health Systems, River Region Medical Corporation, Triad Hospitals, Inc., Stephanie Vanderford, R.N., John Does 1-10 and Unidentified Entities 1-10 and Dr. Eugene Ferris, III.*" (R. 4) All Defendants timely filed their Answer and Defenses. (R. 33, 42, 52, 65, 80)

On November 1, 2005, Plaintiff filed her Motion for Declaratory Judgment, asserting that each wrongful death beneficiary and the Estate of Stacy Klaus was a

"plaintiff" under *Miss Code Ann.* §11-1-60, and that each was, therefore, entitled to a separate $500,000.00 cap on any non-economic damage award. (R. 88, 97)

Defendants responded, maintaining the position that the suit's total non-economic damages award was limited to $500,000.00. (R. 90, 110)

On April 4, 2006, the Circuit Court of Warren County entered its Declaratory Judgment, affirming Defendants' position. (R. 118) Plaintiff sought leave to appeal the Circuit Court's ruling on April 25, 2006, and, on May 25, 2006, this Court accepted the appeal. (R. 120)

II. LEGAL ARGUMENT

1. §11-1-60 Is Not Ambiguous

a. §11-1-60 Clearly Applies to Wrongful Death Causes of Action

This Court has repeatedly held that "the first question a court should decide is whether the statute is ambiguous. If it is not ambiguous, the court should simply apply the statute according to its plain meaning and should not use principles of statutory construction." City of Natchez v. Sullivan, 612 So.2d 1087 (Miss. 1993) (citing Pinkton v. State, 481 So.2d 306 (Miss. 1985); Miss CAL 204 Ltd. v. Upchurch, 465 So.2d 326 (Miss. 1985); Mississippi Power Co. v. Jones, 369 So.2d 1381 (Miss. 1979)). Put another way, plain meaning is to be applied, and there will be no resort to statutory construction, where "a common sense reading of the statute adequately provides an individual of common intelligence an understanding and notice of [the $500,000 cap on non-economic damages]." Richmond v. City of Corinth, 816 So.2d 373 (Miss. 2002).

It is clear from the plain meaning of §11-1-60 that a $500,000.00 cap applies to the total amount of non-economic damages which may be awarded in wrongful death

actions against health care providers, and any perceived ambiguity is the result of a misapplication of the wrongful death statute. §11-1-60 states:

> In any cause of action filed on or after September 1, 2004, for injury based on malpractice or breach of standard of care against a provider of health care, including institutions for the aged or infirm, in the event the trier of fact finds the defendant liable, they shall not award the plaintiff more than Five Hundred Thousand Dollars ($500,000.00) for noneconomic damages.

Miss. Code Ann. §11-1-60 (2)(a).

From the plain language of the statue, it is obvious the legislature recognized the cap on non-economic damages would apply in wrongful death actions. The very first definition found in the statue states that non-economic damages are "...subjective, nonpecuniary damages **arising from death**...". §11-1-60 (1)(a) (emphasis added). Under Section 1(b), "**burial costs**" are included in the definition of "actual economic damages," and in Section 2(a), the statute states that there is a $500,000 limit for non-economic damages "in any cause of action." (emphasis added). Viewed in light of the wrongful death statute, the plain language of §11-1-60 establishes that the cap applies to the total amount of recoverable damages and that it is not multiplied by the number of parties involved.

b. The Wrongful Death Statute Does Not Create Ambiguity in §11-1-60

There is but one cause of action for wrongful death. Any confusion in applying the cap in the instant case is a result of misinterpreting the rights created by our wrongful death statute and the nature of damages recoverable in wrongful death causes of action. Wrongful death causes of action are, inherently, derivative. Each stems from "the death of any person ... caused by any real, wrongful or negligent act or omission, ... [which] would, if death had not ensued, have entitled the party injured or damaged

thereby to maintain an action and recover damages in respect thereof...". Miss. Code Ann. §11-7-13. By statute, each beneficiary stands in the position of the decedent. Wickline v. United States Fidelity & Guaranty Co., 530 So.2d 708 (Miss. 1998); Webb v. DeSoto Co., 843 So.2d 682 (Miss. 2003). There is only one cause of action, and any recovery obtained is divided equally among all beneficiaries, regardless of any individual claims. Pannell v. Guess, 671 So.2d 1130 (Miss. 1966). Therefore, §11-1-60's use of the singular "plaintiff" creates no ambiguity in the context of a wrongful death action because, regardless of their numbers, each "plaintiff" stands in the place of the decedent.

c. §11-1-60 Applies to Wrongful Death Beneficiaries Just as It Would Have Against Decedent

Additionally, even if every wrongful death beneficiary were to be considered a "plaintiff", §11-1-60 would still operate to cap the total recoverable noneconomic damages to $500,000. Because of the derivative nature of wrongful death actions, any defense which would have been available against the deceased, is available against the wrongful death beneficiaries. Lee v. Thompson, 859 So.2d 981, 987 (Miss. 2003); *see also* Choctaw, Inc. v. Wichner, 521 So.2d 878, 882 (Miss. 1988) (wrongful death and loss of consortium treated as derivative actions, subject to all defenses available against injured person); *see also* Rest. 2d Torts §925, ("Although the death statutes create a new cause of action, both they and the survival statutes are dependant on the rights of the deceased"). Had the decedent in this case lived and filed suit, her non-economic damages would have been capped at $500,000.00. Non-economic damages in this derivative action are, therefore, also capped at $500,000.00.

The wrongful death statue did not create separate, divisible and individual causes of action for each wrongful death beneficiary, so that each becomes a "stand

alone" plaintiff. Their rights are, first and foremost, derivative, but they are also dependant and collective. No wrongful death beneficiary could collect only on his own behalf, and there could be no recovery which did not accrue to the benefit of all other beneficiaries. Additionally, any recovery would have to be divided equally among the beneficiaries, regardless of the respective strength or weakness of their individual claims. In fact, a beneficiary who put on absolutely no proof would still be entitled to recover. The wrongful death statute does not create multiple, individual plaintiffs. It creates only one, and all defenses which would have been available against the decedent are available against the plaintiff.

d. The Number of Plaintiffs (or Defendants) Is Irrelevant to an Application of §11-1-60

Even if this Court were to find that each wrongful death beneficiary should be considered an individual plaintiff under §11-1-60, the statute would still operate to cap the total, recoverable non-economic damages for this suit at $500,000.00. This is because §11-1-60, when read *in pari materia* with §§1-3-1 and 1-3-33, applies regardless of the number of plaintiffs. Sections 1-3-1 and 1-3-33 state:

> This chapter is applicable to every statue unless its general object, or context of language construed, or other provisions of law indicate that a different meaning or application was intended from that required by this chapter.

§1-3-1, Miss. Code Ann.

> Words used in the singular number only, either as descriptive of persons or things, shall extend to and embrace the plural number; and words used in the plural number shall extend to and embrace the singular number, except for when a contrary intention is manifest.

§1-3-33, Miss. Code Ann.

This Court recently addressed this issue as it relates to the Mississippi Tort Claims Act. Mississippi Department of Transportation v. Allred, 928 So.2d 152 (Miss. 2006). In *Allred*, the Court was asked to interpret a provision of the Mississippi Tort Claims Act, Section 11-46-15(1) , which states:

> In any claim or suit for damages against *a* ***governmental entity or its employee*** brought under the provisions of this chapter, the liability shall not exceed the following for all claims arising out of a single occurrence for all damages permitted under this chapter.

Miss. Code Ann. §11-46-15(1)(emphasis added)

This Court was asked to decide whether Section 11-46-15(1) precluded recovery against multiple governmental entity defendants, in excess of the maximum dollar amount of liability. The plaintiff argued the Court should interpret the phrase "a governmental entity or its employee" to be read only in the singular, and that there should be a $50,000 cap for each defendant.[1] This Court ruled that, in light of Miss. Code Ann. §1-3-33, Section 11-46-15(1) should be interpreted by using singular or plural language, the effect being that the phrase "governmental entity or its employee" could be read to mean "governmental entities or their employees".

The argument made by *Allred* is the same argument which was made by the current plaintiff in the lower court.[2] While the *Allred* decision refers to a cap on *all* damages, and the medical malpractice cap only refers to damages on *non-economic damages*, the *Allred* decision makes it very clear that the cap on non-economic damages found in §11-1-60 applies whether there is only one plaintiff, or multiple plaintiffs. Therefore, even if each wrongful death beneficiary were to be considered a

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[1] This Court, in Allred v. Yarborough, 843 So.2d 727 (Miss. 2003) had already ruled that the $50,000 cap had to be divided among the plaintiffs and could not be multiplied depending on the number of plaintiffs.

[2] Please see Memorandum in Support of Plaintiff's Motion for Declaratory Judgment at ¶ 2. (R. 97)

"plaintiff" for the purposes of §11-1-60, §1-3-33 makes it clear that the total cap is $500,000.00.

2. IN THE ALTERNATIVE, IF §11-1-60 IS FOUND AMBIGUOUS, IT IS CLEAR THE LEGISLATURE INTENDED THE CAP TO APPLY TO THE TOTAL AMOUNT OF NON-ECONOMIC DAMAGES TO BE RECOVERED

a. Legislative Purpose of the Cap Was to Protect the Healthcare System

Should this Court rule §11-1-60 is ambiguous, there can be no doubt as to the intent of the Legislature in enacting these caps. "Whether the statute is ambiguous, or not, the ultimate goal of this court in interpreting a statute is to discern and give effect to the Legislative intent." City of Natchez v. Sullivan, 612 So.2d 1087 (Miss. 1993)(citing Anderson v. Lambert, 494 So.2d 370, 372 (Miss. 1986); Clark v. State *ex rel* Mississippi State Medical Assoc., 381 So.2d 1046 (Miss. 1980)). *See also*, Allred v. Webb, 641 So.2d 1218, 1221 (Miss. 1994) ("statutes must be read and considered in conjunction with the legislative intent, and then be liberally construed with the object and view of affecting such an intent"); Claypool v. Maldineo, 724 So.2d 373 (Miss. 1988) ("in the construction of a statute, the goal is to get at its spirit and meaning, - its design and scope; and that construction will be justified which evidently embraces the meaning and carries out the object of the law, although it is against the letter and the grammatical construction of the act."); Aikerson v. State, 274 So.2d 124 (Miss. 1973) ("it is the general rule in construing statutes that this court will not only interpret the words used, but will consider the purpose and policy which the Legislature had in view of enacting the law. The court will then give effect to the intent of the Legislature."); Jones v. Mississippi Employment Security Commission, 648 So.2d 1138 (Miss. 1995)("the court attempts to give a statute 'that reading which best fits the legislative language and is most consistent with the best statement of policies and principles justifying that

language.'"); Mississippi Gaming Commission v. Imperial Palace of Mississippi, Inc., 751 So.2d 1025, 1030 (Miss. 1999) ("the polestar consideration for this court is legislative intent.")

There can be no doubt as to the intent of the Legislature in enacting caps on non-economic damages, specifically as they relate to actions for malpractice against physicians. The caps were enacted in response to dwindling availability of malpractice insurance to Mississippi physicians due to unpredictable and unreasonable damage awards being awarded by juries. The purpose of the caps was to limit awards which are not based on objective, economic figures and to make the maximum non-economic damage awards reasonable, predictable and, therefore, insurable. The caps sought to establish a predictable value for non-economic damages "in any cause of action...based on malpractice." The caps, and many other provisions of the same act, are aimed at protecting Mississippi's healthcare system. Plaintiff's reading of this provision negates this benefit and, consequently, the intent of the Legislature.

b. Plaintiff's Interpretation of §11-1-60 Leads to Absurd, Unjust Results Which Would Render the Statute Invalid

The Plaintiff is correct in asserting the Court's duty is to "support a construction which would purge the legislative purpose of any invalidity, absurdity, or unjust equality...". Anderson v. Lambert, 494 So.2d 370 (Miss. 1986) (citing Quitman County v. Turner, 18 So.2d 122 (Miss. 1944)). However, the Plaintiff's interpretation of the statute would lead to absurd and unjust results. The intent of the Legislature was to cap non-economic damage awards at $500,000.00 in medical malpractice actions. It was not to cap non-economic damages at an amount to be determined later, based on the number of offspring someone had. It was to provide certainty to defendant doctors, nurses and other healthcare providers and to limit their liability to a set, maximum

amount which the Legislature determined to be reasonable. It was, quite simply, to set a limit for non-economic damages at $500,000.00 "in any cause of action."

According to the Plaintiff, "in this case there are four 'plaintiffs'" and each "plaintiff" is entitled to a separate $500,000.00 cap. Appellant's Brief, p. 10. But one cannot stop there, however. If Plaintiff's interpretation is correct, and if there is a separate $500,000.00 cap for each "plaintiff" under §11-1-60, then there must also be a separate $500,000.00 cap for each "defendant" under the statute. Since there are five (5) Defendants in this suit, and each Plaintiff is entitled to the full amount of the cap against each Defendant, the **Plaintiff's interpretation of the statute means that there is a $10,000,000.00 cap on non-economic damages in this suit.** Using Plaintiff's hypothetical, if this was a suit with eight (8) wrongful death beneficiaries (a number which experience suggests is entirely reasonable), the cap on non-economic damages would be $20,000,000.00. Appellant's Brief, p. 12.

Defendants would submit that this interpretation of the statute effectively nullifies the cap on non-economic damages and leads to "absurd results" when one considers the legislative purpose behind this statute, specifically, and the legislative intent behind enacting caps, generally. Adopting Plaintiff's interpretation of §11-1-60 not only thwarts the original intent of the Legislature, but actually moves the ball in the other direction.

III. CONCLUSION

Section 11-1-60 operates to set a $500,000.00 cap for non-economic damages for any cause of action against a healthcare provider. A wrongful death cause of action against a healthcare provider is derivative in nature, and the estate and beneficiaries stand in the place of the decedent. They are only afforded that remedy which would have been available to the decedent. Had Stacey Klaus survived, she would have been

limited to $500,000.00 in non-economic damages. The "plaintiffs" in the present case are, similarly, constrained.

Additionally, determining the number of "plaintiffs" in a wrongful death action is irrelevant. When §11-1-60 is read in conjunction with §§1-3-1 and 1-3-33, it is clear the cap is not multiplied by the number of plaintiffs (or the number of defendants) and that it applies to fix the total recoverable amount of non-economic damages in a medical malpractice suit at $500,000.00.

Finally, the Legislature's purpose in enacting this law is very clear and very well-publicized. The preservation of Mississippi's healthcare system is of paramount importance for the public good and welfare. This cap was aimed at protecting Mississippi's healthcare system by setting a reasonable, predictable and insurable maximum recovery for non-economic damage awards. Plaintiff's interpretation of §11-1-60 completely subverts all three, effectively rendering the statute null and void.

In determining legislative intent, a court should review all **"facts and circumstances leading up to the new enactment, the developments in the history of the times and the particular characteristics of the specific evil which the new and supplemental statute was designed to curb, and to apply the new statute to that particular evil with its classifying characteristics...".** Fortenberry v. State, 190 Miss. 729, 1 So.2d 585 (Miss. 1941). Here, there is no doubt what the purpose of the statute was – to protect Mississippi's healthcare system, and Plaintiff's proposed interpretation of the statute does not further this purpose. To the contrary, Plaintiff's interpretation completely deprives the statute of its intended purpose. The learned trial court was imminently correct in rejecting Plaintiff's attempt at misconstruction of the statute.

THIS, the 23rd day of March, 2007.

Respectfully submitted,

VICKSBURG HEALTHCARE, LLC D/B/A
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CERTIFICATE OF SERVICE

I, KRISTOPHER A. GRAHAM, of counsel for Respondents, Vicksburg Healthcare, LLC d/b/a River Region Health Systems, River Region Medical Corporation, Triad Hospitals, Inc. and Stephanie Vanderford, R.N., do hereby certify that I have this day mailed, by United States Mail, a true and correct copy of the above and foregoing to:

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THIS, the 23rd day of March, 2007.

KRISTOPHER A. GRAHAM