

**IN THE
SUPREME COURT OF MISSISSIPPI**

CASE NO. 2006-IA-00675-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
Petitioners/Appellants**

Versus

**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
Respondents/Appellees**

BRIEF OF APPELLANTS

**Appeal from the Declaratory Judgment
of the Circuit Court
of Warren County, Mississippi
Case No. 05,0240-CI**


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MSB # 

ORAL ARGUMENTS REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

1. Alta Klaus, personal representative of the estate of Stacey Kay Klaus and mother and wrongful death beneficiary of Stacey Kay Klaus
2. Sylvan Klaus, father and wrongful death beneficiary of Stacey Kay Klaus
3. Marian Klaus, half-sister and wrongful death beneficiary of Stacey Kay Klaus
4. Jerry Campbell, Esq., attorney for personal representative of the estate of Stacey Kay Klaus and wrongful death beneficiaries of Stacey Kay Klaus
5. Vicksburg Healthcare, LLC, d/b/a River Region Health System
6. River Region Medical Corporation
7. Triad Hospitals, Inc.
8. Stephanie Vanderford, R.N.
9. Dr. Eugene Ferris, III
10. Stuart B. Harmon, Esq. of Page, Kruger and Holland representing all defendants except Dr. Eugene Ferris, III
11. R.E. Parker, Jr. Esq., representing Dr. Eugene Ferris, III
12. Honorable Frank G. Vollor, Circuit Judge, Ninth Judicial District, State of Mississippi

REASON ORAL ARGUMENTS HELPFUL TO COURT

Attorney for plaintiffs/appellants believes that Miss. Code Ann. Section 11-1-60, commonly known as the malpractice capping statute, is ambiguous when construed with Miss. Code Ann. Section 11-7-13, commonly known as the "Wrongful Death Statute". The ambiguity exists because it cannot be determined if the cap of \$500,000.00 on non-economic damages as provided by Section 11-1-60 limits the award to \$500,000.00 for the entire suit or if each wrongful death beneficiary is limited to \$500,000.00. Further a construction of legislative intent applying a \$500,000.00 cap to the entire suit leads to unfair results. This issue affects all wrongful death actions based upon medical malpractice. This writer respectfully submits that his research and personal knowledge of the case would be helpful to the Court.

TABLE OF AUTHORITIES

MISSISSIPPI CASES:

Avery v. Collins, 157 So.696 (Miss. 1934), p.6

Goodyear Yellow Pine Co. v. Anderson, 157 So. 700 (Miss. 1934), p.6

Leaf Hotel Corp. v. City of Hattiesburg, 168 Miss. 304, 150 So. 779 (1935)

Long v. McKinney, 897 So. 2d 160 (Miss. 2005), 9, 10, 13

Mississippi Department of Transportation v. Lori Allred, No. 2005-IA-00418-SCT

Pannell v. Guess, 671 So. 2d. 1130 (Miss.1996) , p15

Thomas v. Mississippi ex rel. Shoemaker, 117 F2d 949, 951 (5th Cir. 1941), p. 7, 10

Wickline v. United States Fidelity & Guaranty Company 530 So.2d 708(Miss. 1988),p.15

OTHER STATE CASES:

St. Mary's Hospital, Inc. et al, v. Phillipe et al, 769 So. 2d 961 (Fla. 2000), p. 14

Timothy J. Sanders et al. v. Gieb, Elston, Frost Professional Association et al, 506 N. W. 2d 107 (S.D. 1993), p. 14

Viltibill v. Johnson, 492 So. 2d 1047, 1050 (Fla. 1986)

MISSISSIPPI STATUTES:

§ 11-1-60, p. 6, 7, 8, 9, 10, 11, 15

§ 11-7-13, p. 7

§ 11-46-15, p. 14

§ 1-3-1, p. 11

§ 1-3-33, p.11

RULES:

M.R.A.P.5, p. 7

STATEMENT OF THE ISSUE

Miss. Code Ann. Section 11-1-60 (2)(a) reads as follows:

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.

Section 11-1-60 (1)(a) defines noneconomic damages as follows:

For the purposes of this section, the following words and phrases shall have the meanings ascribed herein unless the context clearly requires otherwise:

(a) "Noneconomic damages" means subjective, nonpecuniary damages arising from death, pain, suffering, inconvenience, mental anguish, worry, emotional distress, loss of society and companionship, loss of consortium, bystander injury, physical impairment, disfigurement, injury to reputation, humiliation, embarrassment, loss of the enjoyment of life, hedonic damages, other nonpecuniary damages, and any other theory of damages such as fear of loss, illness or injury. The term "noneconomic damages" shall not include punitive or exemplary damages.

In a wrongful death action each beneficiary may recover for the loss of society and companionship resulting from the death of the decedent. *Avery v. Collins*, 157 So. 696 (Miss. 1934); *Goodyear Yellow Pine Co. v. Anderson*, 157 So. 700 (Miss 1934).

Thus, is each beneficiary limited to \$500,000.00 for noneconomic damages or is the entire suit limited to a maximum recovery of \$500,000.00 for noneconomic damages?

INTRODUCTION

On July 18, 2005, Alta Klaus filed a Complaint against Vicksburg Healthcare, LLC d/b/a River Region Health System *et al.* (RE 1) She filed this Complaint as administratrix of the estate of her deceased daughter Stacey Kay Klaus and personal representative of the wrongful death beneficiaries of Stacey Kay Klaus. These beneficiaries are Alta Klaus, mother of Stacey Kay Klaus, Sylvain Klaus, father, and Marian Klaus, half-sister.

Any awards recovered by Alta Klaus are controlled by Miss. Code Ann. Section 11-1-60 (2)(a) which limits the award to the “plaintiff” to \$500,000.00 for noneconomic damages.

However, a wrongful death action may have several plaintiffs. Miss Code Ann. Section 11-7-13; *Thomas v. Mississippi ex rel. Shoemaker*, 117 F2d 949,951 (5th Cir. 1941).

Alta Klaus sued on behalf the estate of Stacey Kay Klaus and as personal representative of each wrongful death beneficiary of Stacey Kay Klaus. Pursuant to M.R.A.P. 5, Alta Klaus filed a Motion for Declaratory Judgment asking the trial court to declare whether each plaintiff’s noneconomic damages are limited to \$500,000.00 or the suit’s total noneconomic damages are limited to \$500,000.00. (RE 10) Alta Klaus alleged in her Memorandum In Support of Plaintiff’s Motion for Declaratory Judgment that Miss. Code Ann. Section 11-1-60 is ambiguous and does not provide an answer concerning the \$500,000.00 cap. (RE 12) Alta Klaus further alleged that since Section 11-1-60 is ambiguous, interpretation of it capping the entire suit at \$500,000.00, as opposed to capping each beneficiary and the estate of \$500,000.00, is unfair. The trial court ordered

that Alta Klaus in her capacity as administratrix and representative of the wrongful death beneficiaries shall not be awarded more than \$500,000.00. (RE ii) From this ruling this Court granted an interlocutory appeal. (RE iii)

STATEMENT OF CASE

HISTORY OF PROCEEDINGS

Stacey Kay Klaus died January 25, 2003. She was survived by her mother, Alta Klaus, her father, Sylvain Klaus, and her half-sister, Marian Klaus. A lawsuit was filed by her mother on behalf of Stacey's wrongful death beneficiaries and her estate against various healthcare providers alleging that medical malpractice caused her death. (RE 1) Each wrongful death beneficiary alleged as part of his/her damages the loss of support, companionship, attention, guidance, care, protection, compassion, affection and love caused by the death of Stacey Kay Klaus. (RE 8) The estate of Stacey Kay Klaus sued as part of its damages the pain and suffering Stacey experienced between the alleged malpractice and her death. (RE 8) These damages would be described as noneconomic by Miss. Code Ann. Section 11-1-60. There are four plaintiffs who suffered noneconomic damages as a result of Stacey's death. Is Section 11-1-60 clear and unambiguous in limiting noneconomic damages to \$500,000.00 for all plaintiffs? Alta Klaus filed a Motion for Declaratory Judgment asking the trial court to declare Section 11-1-60 as ambiguous. (RE 10) She further asked the trial court to declare that an interpretation of Section 11-1-60 limiting an award of \$500,000.00 for noneconomic damages to all wrongful death beneficiaries to be unfair and leading to unjust results. See *Leaf Hotel Corp. v. City of Hattiesburg*, 168 Miss. 304, 150 So. 779 (1935).

ISSUE

Does Miss. Code Ann. Section 11-1-60 limit noneconomic damages to \$500,000.00 for all wrongful death beneficiaries and the estate in an action for medical malpractice?

This writer and appellants contend that Section 11-1-60 is ambiguous and the legislative intent can only be interpreted by following the guidelines of *Leaf Hotel Corp.* *Id.* at 779

Any action for injuries producing death are governed by Miss. Code Ann. Section 11-7-13. Specifically named beneficiaries may sue for the death of a person. Included in this suit are damages for loss of society and companionship with the decedent each beneficiary suffered. This is an action that is brought by a representative for and on behalf of each beneficiary. In other words each beneficiary has his or her claim and each is in effect the “plaintiff”. *Thomas v. Mississippi ex rel. Shoemaker*, 117 F2d 949, 951 (5th Cir. 1941).

The estate may also be a plaintiff in a wrongful death case. *Long v. McKinney*, 897 So. 2d 160 (Miss. 2005).

Thus in this case there are four “plaintiffs” – the mother, the father, the half-sister, and the estate. Each has suffered a loss as a result of the death Stacey Kay Klaus. Each has an individual claim. *Id.* at 168.

Is it the intention of the Legislature to limit the noneconomic damages in the entire case to \$500,000.00? Does Section 11-1-60 provide a clear answer? This writer and these appellants say “No!”

This statute is ambiguous when construed with Section 11-7-13, the Wrongful Death Statute.

Section 11-1-60 limits the noneconomic damages \$500,000.00 for the plaintiff. However as aforesaid, in a wrongful death case numerous “plaintiffs” exist. Is it fair and is it correct to answer this question by simply applying the logic and quoting from *Mississippi Department of Transportation v. Lori Allred*, No. 2005-IA-00418-SCT, which states:

Miss. Code Ann. Section 1-3-1, states, “this chapter is applicable to every statute unless its general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required by this chapter.” Specifically pertinent in this case is Miss. Code Ann. Section 1-3-33 which states, “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 where a contrary intention is manifest.”

The common maxim is that statutes *in pari materia* are to be construed together. When a statute is *in pari materia* with a later one, it is simply part of its context to be considered by the Court in deciding whether the meaning of a provision in the later statute is plain. See Rupert Cross, *Statutory Interpretation* 128, (1976). Applying Miss. Code Ann. Section 1-3-33 to an analysis of the Mississippi Tort Claims Act, it is abundantly clear that the Act fails to manifestly express a contrary intention, as required by Miss. Code Ann. Section 1-3-33. The Legislature had the opportunity to declare that the statute at issue was to be read only in the singular, but did not. Additionally, the Legislature did not manifestly express a contrary intention not to include plural language in its Declaration of Legislative Intent. Miss. Code Ann. § 11-46-3. The Legislature had the opportunity to manifest an intent that the statute should be read only in the singular, however, it is clear the Legislature did not do so. There being no

ambiguity, the Court is bound to simply apply the statutes according to their plain meaning.

The Legislature intended to limit the “plaintiff” to \$500,000.00 for noneconomic damages. To extend this cap to “plaintiffs” in a wrongful death case will defeat the intent of the Legislature to limit each plaintiff’s or person’s loss of society and companionship to \$500,000.00. If a father should die as a result of malpractice leaving only one child that child may receive a maximum of \$500,000.00 for loss of society and companionship. If a father should die as a result of malpractice leaving eight (8) children, is each child to receive a maximum of \$62,500.00 ($\$500,000.00 \div 8$)? It is not fair nor is it the intent of the Legislature to penalize larger families. Applying the logic of *Allred* does not give correct guidance in interpreting Section 11-1-60.

Section 11-1-60 is, at best, ambiguous concerning the \$500,000.00 cap and wrongful death actions.

Leaf Hotel Corp. v. City of Hattiesburg, 168 Miss. 304, 150 So. 779 (1933) gives guidance to interpreting ambiguous statute when it states as follows:

A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous meaning that the rules of construction can have any application. In construing statute, the chief aim of the courts should be to reach the intention of the Legislature. A construction which will bring about manifestly un-thought of and unjust results (emphasis added) will be avoided, of possible, and if necessary to avoid such result the courts will widen or emphasizes the letter of the statute.

Leaf Hotel Corp. at 780.

Again it is “manifestly unthought of and unjust” to cap one child at \$62,500.00 and another child at \$500,000.00 based simply on the number of brothers and sisters each

child has. Did the Legislature intend to tell one child you will be awarded more for loss of society and companionship because you have no brothers and sister? Absolutely Not!

The Florida Supreme Court when faced with this very question stated in *St. Mary's Hospital, Inc. et al v. Phillipe et al*, 769 So. 2d 961 (Fla. 2000) as follows:

If we were to accept St Mary's contention that the Legislature intended to limit noneconomic damages to \$250,000.00 per incident in the aggregate, then the death of a wife who leaves only a surviving spouse to claim the \$250,000.00 is not equal to the death of a wife who leaves a surviving spouse and four minor children, resulting in five claimants to divide \$250,000.00. We fail to see how this classification bears any rational relationship to the Legislature's stated goal of alleviating the financial crisis in the medical liability industry. Such a categorization offends the [**33] fundamental notion of equal justice under the law and can only be described as purely arbitrary and unrelated to any state interest. See *Vildibill v. Johnson*, 492 So. 2d 1047, 1050 (Fla. 1986)

St. Mary's Hospital at 971.

The South Dakota Supreme Court agreed with Florida and stated in *Timothy J. Sanders et al. v. Gieb, Elston, Frost Professional Association et al*, 506 N. W. 2d 107 (S.D. 1993) as follows:

We conclude that [HN37] SDCL 21-3-11 is properly read to place a cap of \$1 million on an injured party's common law personal injury action, and to place a separate \$1 million cap on each wrongful death action brought by each statutory beneficiary entitled to bring such an action.

Sanders at 127.

Appellants would also show that the Mississippi Tort claims act interpreted in *Allred* and specifically Miss. Code Ann. Section 11-46-15 (1) states in pertinent part:

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 all claims arising out of a single occurrence for all damages permitted under this chapter:

- (a) For claims or causes of action arising from acts or omissions occurring on or after July, 1, 1993, but before July 1, 1997, the sum of Fifty Thousand Dollars (\$50,000.00).

The language of “all claims” clearly states legislative intent to place a limit on “all claims”.

Compare the language of Miss. Code Ann. Section 11-1-60 wherein the limitation applies to “the plaintiff”. The Legislature is well aware there may be several plaintiffs in a wrongful death case. If it intended to limit all plaintiffs to a cap of \$500,000.00, why did it not use the same language as used in Section 11-46-15 (1)? Because the Legislature is well aware that each plaintiff has a claim for loss of companionship.

The trial court in its Declaratory Judgment stated as follows:

This is a derivative action by the beneficiaries and those beneficiaries stand in the position of their decedent. *Wickline v. United States Fidelity & Guaranty Company*, 530 So. 2d. 708 (Miss 1988). The non-economic damages are not severable between the various beneficiaries – no one receiving larger or smaller portion than the other. *Pannell v. Guess*, 671 So. 2d. 1130 (Miss. 1996). (RE ii)

The wrongful death beneficiaries do stand in the position of their decedent for some damages. However their loss of society and companionship with the decedent is not a damage occasioned by standing in the position of the decedent. This is damage unique to each beneficiary. The Legislative intent was to cap each beneficiary’s loss of society and companionship at \$500,000.00. To construe it any other way would lead the unjust

result of a monetary cap for each beneficiary to be based upon how many other similarly situated beneficiaries exist.

The Legislature in enacting a cap on medical malpractice suits was, as pointed out by Appellees, protecting physicians. (RE 17) Appellees further state that it is clear the Legislature enacted these laws in response to what it perceived to be a problem with the size of non-economic awards in malpractice cases. (RE 17) This problem is still addressed by construing the statute as capping each wrongful death beneficiary's claim for loss of society and companionship at \$500,000.00, Mississippi is a state comprised of many large families. This construction will be fair to the people of Mississippi and ensure adequate awards for children and other wrongful death beneficiaries.

RELIEF SOUGHT

Appellants ask this Court to reverse the Declaratory Judgment of the Trial Court and declare that Miss. Code Ann. Section 11-1-60 is ambiguous as regards to wrongful death beneficiaries and the estate of the decedent being capped at \$500,000.00 each for noneconomic damages in a wrongful death action. Further appellants asks this Court to declare the wrongful death beneficiaries and the estate are each capped at \$500,000.00 for noneconomic damages pursuant to Miss. Code Ann. Section 11-1-60.

Respectfully submitted,



JERRY CAMPBELL, Attorney for
Appellants

CERTIFICATE OF SERVICE

I, Jerry Campbell, Attorney for Appellants, do hereby certify I have this day delivered copies by U.S. Mail or hand delivery of this Brief and Record Excerpts to the following persons:


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Honorable Frank G. Vollar
Circuit Judge
Ninth Judicial District
Vicksburg, Mississippi

SO CERTIFIED this the 20th day of December, 2006.


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