

# Medical Malpractice Law & Litigation Report

*In-depth analysis of today's most significant medical malpractice cases*

June 2005

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## OUR MISSION

*Medical Malpractice Law and Litigation Report* provides up to the minute information and analysis on what works — and what doesn't — in medical malpractice lawsuits. Each month, MDML keeps its readers on the cutting edge of medical malpractice litigation, with everything plaintiffs' lawyers need to know about recent judicial decisions, legislation impacting their practices and trial strategies from colleagues.

## SCOPE OF EMPLOYMENT

# 2-Step Analysis Determines Whether Government Immunity Applies

► *Use this analysis when suing clinical faculty at state universities and hospitals.*

When determining whether a teaching physician at a public university acted within the scope of his employment when he injured your client, focus on whether he was educating a student or resident at the time.

If so, then the doctor was within the scope of his employment. If not, he cannot hide behind the government immunity defense.

To determine whether a physician acted in the scope of his employment under this test, use the following two-step analysis:

1. Identify “the aspect of the course of treatment that [your client] alleges gave rise to damage or injury,” the **Court of Appeals of Ohio** wrote.

2. Determine whether a student or resident was somehow involved with your client’s care during that aspect of the course of treatment.

The degree of the student or residents’ involvement is not significant to the analysis, the appeals court said, so long as the doctor was teaching at the time of the alleged negligence. **Also irrelevant:** how your client viewed his relationship with the defendant physician.

**Example:** In the case before the Ohio appeals court, **Keith Theobald** contended that three physicians, a nurse and the **University of Cincinnati** negligently treated him following a car accident. The negligent care left him blind and with numbness and limited mobility in his arms (to read the opinion, go to pg. 316).

The defendants asserted government immunity defenses, and the case went to the **Ohio Court of**

**Claims.** That court ruled for the defendants and Theobald appealed.

Whether the providers acted within the scope of their employment when they treated Theobald was a tricky issue for the appeals court. In the court’s words, “On one hand, the practitioner is a university faculty member, charged by the university with furthering the education of students and residents in a ‘real-world’ setting. On the other hand, the practitioner is the patient’s caregiver, providing treatment for compensation from a private practice plan.”

The appellate panel rejected the long-used analysis that looks at which employer the doctor had the most significant financial involvement with when the negligence occurred. That analysis created unpredictable results, because the outcomes of cases depended on which factor(s) the courts stressed.

The appeals court remanded the case to the Court of Claims and instructed it to determine whether a student or resident was involved during each aspect of Theobald’s course of treatment that resulted in his injuries and damages.

**Plaintiff’s attorneys:** Douglas Holland; James Sullivan, Sullivan & Sullivan, Cincinnati, OH.

**Defendant’s attorneys:** Jim Petro, Attorney General and Karl Schedler.

*Theobald v. University of Cincinnati*, <[www.sconet.state.oh.us/rod/newpdf/10/2005/2005-ohio-1510.pdf](http://www.sconet.state.oh.us/rod/newpdf/10/2005/2005-ohio-1510.pdf)> (Ohio App. Mar. 31, 2005). ❖

## DOMESTIC PARTNERS

# Your Domestic Partner Client Can Sue For Wrongful Death

► *Key: Pay close attention to the purpose behind your state’s defense of marriage act.*

A law that lets domestic partners sue for their partners’ wrongful death does not run afoul of a defense of marriage statute. So says a California appeals court.

The decision is important because, as more states enact so-called “defense of marriage” laws, you will very likely

face arguments against domestic partner standing in wrongful death suits (to read the opinion, go to pg. 323).

**Facts:** **Connie Armijo** was **Dana Schwartz**’ domestic partner. After Schwartz died, Armijo sued Dr. **Jamie**

*Armijo case continued on page 312*

Comments or Suggestions?

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**VERDICTS & SETTLEMENTS**

**Verdict Amount:** \$8 million

**Location:** Irvine, CA

**Parties:** Plaintiff: Janice Simpson; Defendant: University of California, Irvine, Medical Center

**Facts:** Simpson, 37, suffered respiratory arrest and brain damage 15 hours after surgery to remove a benign cyst from her uterus. She cannot walk and has a gastrostomy tube for medications. She lives in a nursing home.

**Plaintiff's Attorney:** Bruce Fagel, Law Offices of Bruce G. Fagel and Assoc., Beverly Hills, CA

**Settlement Amount:** \$6 million

**Location:** Groton, MA

**Parties:** Plaintiffs: Bobby Babbitt-Gagnon and his parents; Defendants: Drs. Roland Meyer and Alan Kent

**Facts:** An arbitrator found the defendants negligent because they did not give the child's mother antibiotics to treat a Group B Streptococcus infection. Bobby contracted the infection during delivery and, as a result, suffered irreversible brain damage. The arbitrator awarded the plaintiffs \$4 million. The defendants then added \$2 million to the award in exchange for the plaintiffs' promise not to seek a jury trial.

**Plaintiffs' Attorneys:** Ralph Sbrogna and Roger Brunelle, Fletcher Tilton & Whipple, Worcester, MA

**Verdict Amount:** \$2.5 million

**Location:** Waterbury, CT

**Parties:** Plaintiffs: Leslie Aponte and Jodee Viera; Defendant: Dr. Thomas McNamee, Jr.

**Facts:** When Aponte sensed that delivering her fourth child might be difficult, she requested a Cesarean section during the second stage of labor. McNamee refused and told her she was being a "big baby." The baby, Jodee, suffered shoulder dystocia and permanent nerve damage during delivery.

**Plaintiffs' Attorney:** Joshua Koskoff, Koskoff, Koskoff and Bieder, Bridgeport, CT

**Settlement Amount:** \$1.95 million

**Location:** Santa Ana, CA

**Parties:** Plaintiffs: Ramon Mesa and Marlene Olquin; Defendants: Coastal Communities Hospital, Drs Ayoub Khanghani and Kamran Ghodsian

**Facts:** Olquin had an emergency appendectomy when she was 25 weeks pregnant. Hospital nurses believed Olquin was experiencing normal post-operative pain. But she was actually in labor. Nurses told her to walk around to relieve the pain and she spontaneously delivered the child. The baby landed on her head on the floor and suffered brain damage. The plaintiffs settled with the hospital for \$950,000 and the physicians settled for \$1 million.

**Plaintiffs' Attorney:** Federico Sayre, Santa Ana, CA

**Settlement Amount:** \$1.8 million

**Location:** Allentown, PA

**Parties:** Plaintiff: Katie Brewer-Berres; Defendants: St.Luke's Hospital, Drs. Delphy DeFalcis and Matthew Montgomery and Toselli & Brusko Surgical Assoc.

**Facts:** Brewer-Berres alleged her 41-year-old husband Michael Brewer-Berres died from a morphine overdose 12 hours after emergency abdominal surgery. She maintained that due to his history of sleep apnea, doctors should have sent Michael to intensive care following surgery.

**Plaintiff's Attorney:** Andrew Stern, Kline & Specter, Philadelphia, PA

**Settlement Amount:** \$1 million

**Location:** Troy, NY

**Parties:** Plaintiff: Benjamin Pratt; Defendants: Drs. Donald Lombrino and Philip Capriotti

**Facts:** The defendants failed to diagnose compartment syndrome when Pratt presented at the Albany Memorial Hospital emergency department with pain in his left leg. Pratt now suffers from "foot drop" and must wear a brace.

**Plaintiff's Attorney:** John Kelleher. ❖

Armijo case *continued from page 310*

**Miles, Labriute Medical Group Inc. and Sherman Oaks Hospital and Health Center** for wrongful death. The trial court ruled that Armijo lacked standing to sue under the 2002 version of California's wrongful death law. Armijo appealed.

While the case was on appeal, the legislature amended the wrongful death act (Cal. Code Civ. P. § 377.60). The amendment took effect Jan. 1, 2005 and applied retroactively to deaths occurring before Jan. 1, 2002.

The providers argued that the 2005 amendment to the wrongful death statute violated Proposition 22, the California Defense of Marriage Act (Cal. Family Code § 308.5) voters approved in 2000. Prop 22 provides, "Only marriage between a man and a woman is valid or recognized in California."

**Defense arguments:** Prop 22 means that the benefits society affords to those who are married are limited sole-

ly to opposite sex couples. The initiative prohibits the legislature's decision to extend marital benefits to domestic partners.

**Court:** First, the defense overlooked Prop 22's purpose, which was to prohibit California from recognizing as valid same-sex marriages performed in other states, the court determined. Second, the right to sue for wrongful death is not an exclusive benefit of marriage. The wrongful death statute lets children and grandchildren sue for a relative's wrongful death, in addition to surviving spouses and domestic partners. Finally, the 2005 amendment to the wrongful death law has nothing at all to do with marriage.

**Plaintiff's attorneys:** Diane Corwin, San Marino, CA; David Codell, Los Angeles; et al.

**Defendants' attorneys:** David Axelrad, Karen Bray and Jeremy Rosen, Horvitz & Levy, Encino, CA; et al.

*Armijo v. Miles*, <[www.courtinfo.ca.gov/opinions/documents/B166050.PDF](http://www.courtinfo.ca.gov/opinions/documents/B166050.PDF)> (Cal. App. Mar. 30, 2005). ❖

## JURY CONSULTANTS

### 3 Tips For Using A Jury Consultant

#### ► **Bonus: Caution your consultant not to talk to jurors during the trial.**

If you choose to hire a jury consultant to help with your next med mal case, you do not have to reveal the consultant's identity to anyone. The reason: The decision to use a consultant is part of your trial strategy.

The **Supreme Court of Arkansas** issued that rule in a recent decision. In the case before the court the plaintiff lost, but the decision is noteworthy because it applies equally to plaintiffs and defendants.

**Here's what happened:** **Linda Koch**, administrator of **Geraldine Doss'** estate, sued **Northport Health Services of Arkansas, d/b/a Covington Court Health & Rehabilitation Center**, alleging medical malpractice, negligence, wrongful death and violations of Arkansas' Long Term Care Resident's Rights Statute.

The nursing home hired attorney **Kirk Dougherty** as a jury consultant. The jury found for the nursing home on the med mal claim, wrongful death and Resident's Rights claims. The trial judge entered a verdict for the defense on the negligence claim. Koch appealed to the **Supreme Court of Arkansas**.

The next time you use a jury consultant, remember these points.

**1. Jurors have no duty to bring to the court's attention information they do not realize might bear on their impartiality.** Dougherty sat in the courtroom and observed jury selection. Two of the jurors knew Dougherty. Koch argued the jurors had a duty to disclose that information. The supreme court disagreed. In these circumstances, the jurors "could not have known that they were withholding information that might bear on their impartiality," the court ruled.

**2. A conversation between jurors and a jury consultant will not get you a new trial unless you can show actual prejudice.** The two jurors who knew Dougherty were seen talking to him during the trial. Contrary to Koch's assertion, however, that fact did not warrant a new trial. The jurors did not know of Dougherty's association with the trial. He was not a person the court specifically admonished jurors to avoid. Additionally, both jurors and Dougherty established that they did not discuss the case. **Caution:** The Arkansas Supreme Court did note that Dougherty "undoubtedly knew that it was inappropriate for him to converse with a member of the jury he helped choose." **Lesson learned:** Admonish your jury consultant not to talk to jurors during the trial.

**3. The parties have no duty to disclose to each other or to the judge their jury consultant's identity.** Whether and when to reveal the consultant's work is a purely strategic decision left to the attorneys' discretion, the court ruled.

*Koch v. Northport Health Svcs. of Arkansas*, 2005 Ark. Lexis 168 (Mar. 24, 2005). ❖

## SATISFACTION OF JUDGMENT

# You Cannot Hold A Hospital Liable For A Judgment Against A Physician

► **Stay tuned: Until the Florida Supreme Court decides the issue, the split in authority will remain.**

State law says that physicians who want hospital privileges must provide evidence that they can pay a mal judgment. Unfortunately, that law doesn't let you turn to the hospital when the defendant bails on paying the judgment you won against him.

Recognizing a split in authority among Florida appellate courts, the Third District reached that decision in a recent case.

**The law:** Florida law (Fla. Stat. § 458.320(2)(b)) requires that physicians who have staff privileges at Florida hospitals demonstrate they can pay the first \$250,000 of a judgment against them. Options include professional liability insurance coverage, an escrow account or an irrevocable letter of credit. Alternatively, under subsection (5)(g) physicians may opt out of the statute's requirements and agree to be personally responsible for paying the amount.

**Facts:** Dr. **Mario Nanes** had staff privileges at **Parkway Regional Medical Center** and opted to "go bare" — to assume personal responsibility for paying the first \$250,000 of a judgment.

**Josie Miller** obtained a \$1.4 million judgment against Nanes in a med mal suit. Nanes filed for bankruptcy but gave Miller \$20,000 toward the judgment. Miller then demanded that Parkway pay \$250,000 of the outstanding judgment. Parkway refused and Miller sued.

She won a \$230,000 judgment against the hospital after the trial court applied the \$20,000 from Nanes to the \$250,000 the hospital owed.

Parkway appealed to the **Court of Appeal of Florida**. The narrow issue the case raised was whether a staff-privileged physician's decision to opt out of subsection (2)(g) and assume personal financial responsibility under subsection (5)(g) absolves the hospital of any liability.

**Held:** The hospital is entitled to rely on the physician's decision to bear personal responsibility for the first \$250,000 of a judgment.

Nanes fully complied with the statute, the appeals court reasoned. For that reason, the hospital should not be liable for his failure to pay the judgment. "The statute requires hospitals to assure compliance at the granting or renewal of staff privileges; it does not require hospitals to insure or guarantee the outcome in the event a subsection (5)(g) physician does not compensate his injured patient," the court concluded.

**Plaintiff's attorneys:** Lisa Levine, Weston, FL. and Joel Perwin, Miami, FL.

**Defendant's attorney:** Gail Parenti, Parenti Falk Waas Hernandez & Cortina, Miami, FL.

*North Miami Med. Ctr. v. Miller*, 2005 Fla. App. Lexis 2515 (Mar. 2, 2005). ❖

## EXPERT TESTIMONY

# When The Judge Limits The Witnesses You Can Call, Get Your Objections On The Record

► **Be ready to show the appeals court that the trial judge's decisions prejudiced your case.**

Although a trial judge has discretion to limit the number of witnesses you call, the judge cannot set a limit and then let the defense exploit that limit.

Here's how the situation played out in a recent Florida case.

**Facts:** **Isabel Gonzalez** and her husband, Carlos, sued Dr. **Rebecca Martinez** contending Martinez negli-

gently used forceps to deliver the Gonzalez' son. After Martinez won at trial, the Gonzalezes appealed to the **Court of Appeal of Florida**.

At trial, the Gonzalezes sought to present the non-expert witness testimony of 19 treating physicians. The trial judge limited them to three, but allowed the

*Gonzalez case continued on page 315*

## TORT REFORM

# Eight Tort Reform Measures Enacted In Five States

## ► *Partisan fighting over tort reform closed the Illinois Senate.*

Governors in Missouri, Montana, South Carolina, Virginia and Wyoming signed tort reform measures during March and early April, and Maryland's Gov. **Robert Ehrlich** (R) let a med mal insurance bill become law without his signature.

Trends among the various bills include a \$250,000 cap on non-economic damages and provisions making providers' apologies and statements of sympathy inadmissible at trial.

STATE	BILL NO.	SUMMARY	STATUS
FL	SB972	Requires that physicians have med mal insurance or provide evidence they can pay \$250,000 in damages in a single lawsuit or \$750,000 in multiple lawsuits	Pending in Senate committee
IL	SB150	Caps non-economic damages at \$250,000. When Senate Democrats withdrew an offer to vote on the measure, the resulting furor led the Senate President to close the Senate.	Waiting for a vote in the Senate.
MD	SB836	"Maryland Patient's Access to Quality Health Care Act of 2004" — Provides relief to physicians through med mal insurance premium regulation.	Became law without the Governor's signature March 31
MN	HF 1464	Caps non-economic damages at \$250,000 in cases involving obstetric or emergency department care.	Pending in House
MO	HB393	Caps non-economic damages at \$250,000, limits venue and eliminates joint and several liability and collateral source rule	Signed March 29; effective Aug. 28
MT	HB24 HB25 HB26 HB64	Makes providers' apologies inadmissible. Providers are not liable for the acts or omissions of anyone who isn't their employee or agent or within their control. Restricts liability of health care providers for ostensible agency. Sets out qualifications for expert witnesses.	All bills signed March 24 and effective July 1
NH	HB702	Requires that a single judge review med mal suits within 45 days after they're filed to determine if the claim is justified.	Approved by House
SC	S83	Caps non-economic damages at \$250,000, imposes mandatory mediation and sets out expert witness qualifications	Signed April 4; effective July 1
VA	HB2659	Requires certificate of merit; revises definition of med mal; makes providers' expressions of sympathy inadmissible	Signed March 23; effective July 1
WV	HB2011	Provides immunity to providers who prescribe medications or medical devices that have Food and Drug Administration approval.	Approved by House
WY	HB83	Repeals and replaces the prior medical review panel statute.	Signed March 15; effective July 1

Comments or Suggestions?

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Gonzalez case *continued from page 313*

defense to read into the record the depositions of various treating physicians.

**Held:** The trial judge abused her discretion when she limited the number of treating physicians the Gonzalezes could call to testify at trial. She compounded the error when she allowed defense counsel to read into the record the deposition testimony “of the very same witnesses” she precluded the plaintiffs from calling. “This gave the jury the misimpression that the deposition testimony belonged to witnesses for the defense,” the appellate panel ruled.

Additionally, when the Gonzalezes’ attorney referred to the defense’s closing comments regarding the three

treating physicians the plaintiffs called, the trial judge reprimanded the attorney in the jury’s presence. The plaintiffs’ counsel had no chance to explain to the jury why the plaintiffs called only three physicians.

“We cannot say that ... did not conceivably prejudice the plaintiffs,” the court concluded.

**Plaintiffs’ attorneys:** Peter Bellas, Richard Sarafan, Craig Rieders and Melanie Cherdack, Genovese Joblove & Battista, Miami, FL.

**Defendant’s attorneys:** Craig Salner, Clarke Silverglate Campbell Williams & Montgomery, Miami, FL; John Blue, Sylvia Walbolt and Alina Alonso, Carlton Fields, St. Petersburg, FL.

*Gonzalez v. Martinez*, 2005 Fla. App. Lexis 2462 (Mar. 2, 2005). ❖

## DAMAGE CAPS

# Studies Show Caps Are Not Working As Their Proponents Intended

## ► *Savvy trial lawyers are finding ways around limits on non-economic damages.*

If you’ve been feeling blue lately with all the talk of “frivolous lawsuits” and legislatures passing tort reform legislation, take heart. Two newly released studies support what trial lawyers have said all along: Med mal verdicts do not impact med mal insurance premiums and non-economic damages caps do not deter juries from handing out larger economic damage awards.

### Study One: Defense Costs Drive Med Mal Insurance Premiums

Law professors **Bernard Black** and **Charles Silver**, at the **University of Texas**, **David Hyman** at the **University of Illinois** and **William Sage** at **Columbia University**, studied a comprehensive dataset the **Texas Department of Insurance** maintains. The dataset includes all closed med mal claims, and the researchers looked at closed claims for 1988-2002.

**Findings:** After adjusting for general inflation and population, they found that the number of large paid claims (those over \$25,000 in 1988 dollars) remained roughly constant, while the number of small claims paid decreased sharply.

The researchers also found that the number of paid claims per 100 practicing Texas doctors declined from and average of 6.4 per year in 1990-1992 to 4.6 in 2000-2002.

Although paid claims remained constant during the 14-year period, defense costs did not. Those costs grew 4.4 percent annually.

**Conclusion:** Litigation outcomes are not driving increases in medical malpractice insurance premiums.

**Publication:** The study, “Stability, Not Crisis: Medical Malpractice Claim Outcomes In Texas, 1988-2002” will appear in the July 2005 issue of the *Journal of Empirical Legal Studies*, a peer-reviewed journal. To download an abstract, go to <http://ssrn.com/abstract=678601>.

### Study Two: Economic Damage Awards Are Larger (And Larger)

Differences in median jury awards in states with and without damage caps are statistically insignificant. So says **Catherine Sharkey**, a law professor at Columbia University. Sharkey examined jury verdicts from 22 states recorded in 1992, 1996 and 2001.

**Findings:** In states with caps, the median award was nearly \$324,000. In states without caps, the median award was \$387,000, a difference of \$63,000.

**Conclusions:** Sharkey believes non-economic damages caps do not have a significant effect on overall compensatory damage awards. The reason: Trial lawyers are finding ways to increase economic damage

*Damage Caps continued on page 332*

*[Cite as Theobald v. Univ. of Cincinnati, 2005-Ohio-1510.]*

**IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT**

Keith Theobald et al.,	:	
Plaintiffs-Appellees,	:	
	:	No. 02AP-560
v.	:	(C.C. No. 01-6461)
University of Cincinnati,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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**OPINION**

Rendered on March 31, 2005

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Douglas C. Holland; and James Sullivan, for appellees.  
Jim Petro, Attorney General, and Karl W. Schedler, for appellant.

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APPEAL from the Ohio Court of Claims.

KLATT, J.

{¶1} Defendant-appellant, University of Cincinnati ("UC"), appeals from a judgment of the Ohio Court of Claims finding that Frederick A. Luchette, M.D., Jamal Taha, M.D., Harsha Sharma, M.D., and Maureen Parrott, C.R.N.A., were not entitled to personal immunity pursuant to R.C. 9.86 and 2743.02(F). For the following reasons, we reverse the judgment and remand for further proceedings.

{¶2} On October 23, 1998, Keith Theobald was involved in a multi-vehicle collision during which he was thrown from his pick-up truck and seriously injured. Theobald was flown to University Hospital, the closest hospital that could handle the high degree of trauma that he had suffered. Dr. Luchette, the attending trauma surgeon, admitted Theobald to the hospital and began identifying his injuries. With the other members of the hospital's trauma team, Dr. Luchette determined that Theobald had upper rib fractures, a lacerated spleen, a right wrist fracture, and fractured vertebrae, resulting in paraplegia.

{¶3} Because Theobald had suffered a neurological injury, he was assigned to Dr. Taha, the interim director of the neurotrauma team. The morning after the accident, Dr. Taha and a neurotrauma resident examined Theobald and told him that based upon their initial assessment, he needed immediate surgery on his spine. Due to the extent and complexity of Theobald's spinal injury, Dr. Taha decided to involve Dr. Andrew J. Ringer, the chief resident in neurotrauma, in Theobald's care. Dr. Taha and Dr. Ringer discussed Theobald's case and examined Theobald's x-rays. After ordering and evaluating more x-rays, Dr. Taha and Dr. Ringer decided that Theobald's spinal injury did, indeed, require surgery. Dr. Ringer then contacted the critical care unit and asked them to determine if Theobald was stable enough to endure surgery. Dr. Luchette assessed Theobald's condition and concluded that he could tolerate the surgery.

{¶4} Both Dr. Luchette and Dr. Ringer then met with the Theobalds to discuss the surgery and obtain the Theobalds' consent to the surgery. Jacqueline Theobald, Theobald's wife, signed two informed consent forms for the surgery; one authorizing treatment by Dr. Luchette and the other authorizing treatment by Dr. Taha.

{¶5} Prior to surgery, Amy Wehrman, a student nurse anesthetist, prepared a preoperative anesthesia note, which documented Theobald's history and physical condition. Nurse Parrott reviewed this note and the remainder of Theobald's chart, and then she discussed Theobald's history, current physical condition, and the plan for administering anesthesia during the surgery with Nurse Wehrman and Dr. Sharma, the anesthesiologist.

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**Comments or Suggestions?**

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{¶6} Theobald's surgery began at approximately 8:00 p.m. on October 24, 1998 with Dr. Luchette opening with the assistance of Dr. Steven Giss, a trauma resident. After Dr. Luchette and Dr. Giss completed the first portion of the surgery, Dr. Taha and Dr. Ringer began freeing Theobald's spinal cord from bone that compressed it. During the surgery, complications arose, and Dr. Luchette reentered the operating room to insert a chest tube. When Dr. Taha and Dr. Ringer completed freeing and stabilizing the spinal cord, Dr. Luchette and Dr. Giss returned to close. The surgery ended at approximately 6:00 a.m. on October 25, 1998.

{¶7} Throughout the surgery, Dr. Sharma and Nurse Parrott administered anesthesia and monitored Theobald's medical condition. Nurse Wehrman observed and assisted by keeping records, monitoring vital signs and drawing blood.

{¶8} When Theobald awoke from sedation, he discovered he was blind and his arms were numb and had little mobility. Despite continued care, both conditions persisted.

{¶9} In October 1999, Theobald and his wife, on behalf of herself and the couples' minor children, filed a medical malpractice claim in the Hamilton County Court of Common Pleas against Dr. Luchette, Dr. Taha, Dr. Sharma, and Nurse Parrott, among others. Because Dr. Luchette, Dr. Taha, Dr. Sharma, and Nurse Parrott all asserted the defense of personal immunity, the Hamilton County Court of Common Pleas granted a stay of appellees' malpractice action to allow the Court of Claims to determine if any or all of the health care practitioners were entitled to immunity pursuant to R.C. 9.86 and 2743.02(F). Subsequently, appellees filed a malpractice action in the Court of Claims against UC alleging that Theobald was permanently injured by the health care practitioners' medical negligence. Specifically, appellees alleged that: (1) Nurse Wehrman was negligent in the preparation of the preoperative assessment; (2) Dr. Sharma and Nurse Parrott were negligent in assigning the preoperative assessment to Nurse Wehrman; (3) Dr. Sharma and Nurse Parrott were negligent in not verifying the accuracy and completeness of the preoperative assessment; (4) all the health care practitioners were negligent in not obtaining the test and x-ray results necessary for an accurate preoperative assessment; and (5) all the health care practitioners were negligent in providing Theobald medical care during and after his October 25, 1998 surgery. Finally, appellees also alleged that the health care practitioners failed to provide appellees with sufficient, accurate information regarding Theobald's condition and the risks of surgery so that appellees could give informed consent for the October 25, 1998 surgery.

{¶10} On November 29, 2001, the Court of Claims conducted an immunity hearing during which the court joined Dr. Taha, Dr. Sharma, and Nurse Parrott as parties to the immunity proceedings. In an order issued December 6, 2001, the Court of Claims also made Dr. Luchette a party to the immunity proceedings. The Court of Claims then issued an order stating that it would determine whether the health care practitioners were entitled to immunity based upon the hearing testimony, as well as any evidentiary materials and briefs the parties submitted.

{¶11} On April 23, 2002, the Court of Claims issued a judgment entry denying the health care practitioners personal immunity pursuant to R.C. 9.86 and 2743.02(F). In an accompanying decision, the Court of Claims concluded that Dr. Luchette and Dr. Sharma were not entitled to immunity because neither physician was acting within the scope of his employment when treating Theobald. Further, the Court of Claims held that Dr. Taha was not entitled to immunity because he was not an employee of the state and, even if he was an employee, he was not acting within the scope of his employment when he treated Theobald. Finally, the Court of Claims held that Nurse Parrott was not entitled to immunity because she was not an employee of the state. UC and each of the health care practitioners appealed from the April 23, 2002 judgment.

{¶12} On appeal, UC filed a motion to dismiss the health care practitioners' appeals, arguing that none of the health care practitioners had standing to appeal. This court granted UC's motion and, upon the motion of Dr. Sharma and Nurse Parrott, certified a conflict between the case law of this district and the First District Court of Appeals on the issue of a state employee's right to appeal from an immunity determination by the Court of Claims. This court later stayed proceedings in this appeal pending the Supreme Court of Ohio's determination of the certified conflict.

{¶13} On April 14, 2004, the Supreme Court of Ohio decided *Theobald v. Univ. of Cincinnati*, 101 Ohio St.3d 370, 2004-Ohio-1527, at ¶6, in which it held that "a state employee has no right to participate in the immunity determination proceedings before the Court of Claims or to appeal that determination." Once the Supreme Court issued its decision, this court vacated the stay of these proceedings, and we now consider this matter.

{¶14} On appeal, UC assigns the following errors:

- [1.] The Court of Claims erred in joining Frederick Luchette, M.D., Harsha Sharma, M.D., Jamal Taha, M.D., and Maureen Parrott, C.R.N.A. as parties to the immunity hearing.
- [2.] The Court of Claims erred in finding that Jamal Taha, M.D., was not an "employee" for purposes of R.C. 9.86.
- [3.] The Court of Claims erred in finding that Maureen Parrott, C.R.N.A. was not an "employee" for purposes of R.C. 9.86.
- [4.] The Court of Claims erred in finding that Frederick Luchette, M.D., is not entitled to immunity under R.C. 9.86.

[5.] The Court of Claims erred in finding that Harsha Sharma, M.D., is not entitled to immunity under R.C. 9.86.

[6.] The Court of Claims erred in finding that Jamal Taha, M.D., is not entitled to immunity under R.C. 9.86.

[7.] The Court of Claims erred in finding that Maureen Parrott, C.R.N.A., is not entitled to immunity under R.C. 9.86.

{¶15} By its first assignment of error, UC argues that the Court of Claims erred in joining Dr. Luchette, Dr. Taha, Dr. Sharma, and Nurse Parrott as parties to the immunity proceedings. We agree.

{¶16} In *Johns v. Univ. of Cincinnati Med. Assoc., Inc.*, 101 Ohio St.3d 234, 2004- Ohio-824, the Supreme Court recently held that a state employee cannot be a party to an immunity determination. In so holding, the Supreme Court recognized that R.C. 9.86 provides state employees with immunity from personal liability under certain circumstances and that, pursuant to R.C. 2743.02(F), the Court of Claims has exclusive jurisdiction to determine if those circumstances exist in each case. The Supreme Court also noted, however, that only the state can be a defendant in original actions filed in the Court of Claims. R.C. 2743.02(E). Construing these statutory provisions together, the Supreme Court held that they, "in effect, preclude[ ] a state employee from being a party to the immunity-determination proceedings." *Id.* at ¶31. See, also, *Theobald*, *supra*, at ¶6 ("[A] state employee has no right to participate in the immunity determination proceedings before the Court of Claims \* \* \* "). Therefore, the Court of Claims erred in joining Dr. Luchette, Dr. Taha, Dr. Sharma, and Nurse Parrott as parties to the proceedings to determine their immunity.

{¶17} Nevertheless, this error is not a basis for reversal because the error was harmless under these circumstances. A reviewing court will not disturb a judgment unless the error contained within is materially prejudicial to the complaining party. *Fada v. Information Sys. & Networks Corp.* (1994), 98 Ohio App.3d 785, 792. In other words, a trial court's error only provides a basis for reversal if the error affected a substantial right of the complaining party. Civ.R. 61. When avoidance of the error would not have changed the outcome of the proceedings, then the error neither materially prejudices the complaining party nor affects a substantial right of the complaining party. *Fada*, *supra*, at 792. Cf. *Crum v. Walters*, Franklin App. No. 02AP-818, 2003-Ohio-1789, at ¶22 ("Such error is considered harmless if it can be said that, in the absence of the error, the 'trier of facts would probably have made the same decision.' ").

{¶18} In the case at bar, the Court of Claim's error—the joinder of Dr. Luchette, Dr. Taha, Dr. Sharma, and Nurse Parrott as parties to the immunity determination—was beneficial, rather than prejudicial, to UC, the complaining party. Like UC, the health care practitioners argued that they were immune from liability for appellees' injuries. Thus, the interests of UC and the practitioners were aligned, and the inclusion of the practitioners as parties in the proceedings only strengthened UC's position. As the trial court found against UC and the practitioners even with the practitioners' participation, exclusion of the practitioners from the immunity determination proceedings would not have changed the outcome of the proceedings. Therefore, the joinder of the practitioners was not materially prejudicial to UC and did not adversely affect a substantial right of UC.

{¶19} Accordingly, we overrule UC's first assignment of error.

{¶20} By its second assignment of error, UC argues that the trial court erred in concluding that Dr. Taha was not an UC employee. We agree.

{¶21} Pursuant to R.C. 9.86:

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or malicious manner.

Thus, state employees are immune from tort and other liability for wrongs they commit, as long as those wrongs are committed in furtherance of the interests of the state. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 287. If the employee's acts do not further the interests of the state, then the state has not agreed to accept responsibility for the employee's acts and the employee is personally answerable for his acts in a court of common pleas. *Id.*

{¶22} Accordingly, before finding a person is entitled to immunity under R.C. 9.86, the Court of Claims must make two findings: (1) that the person is a state officer or employee, and (2) that the officer or employee was acting within his scope of employment and without malicious purpose, in bad faith or in a wanton or reckless manner. If these findings of fact are supported by some competent, credible evidence, they will not be disturbed on appeal as being against the manifest weight of the evidence. *Smith v. Univ. of Cincinnati* (Nov. 29, 2001), Franklin App. No. 01AP-404; *Scarberry v. Ohio State Univ. Hosps.* (Dec. 3, 1998), Franklin App. No. 98AP-143.

{¶23} A state employee is "[a] person who, at the time a cause of action against the person arises, \* \* \* is employed by the state."

R.C. 109.36(A)(1)(a). In the case at bar, the Court of Claims found that Dr. Taha was employed solely by the Mayfield Clinic, a private practice group. The evidence presented, however, does not support this conclusion. Rather, the evidence shows that while Dr. Taha was an employee of the Mayfield Clinic, he was simultaneously an employee of UC. First, Dr. Taha testified that throughout 1998 he was employed by the UC's College of Medicine as an assistant professor. Second, Dr. Taha produced a letter dated November 1, 1996 from the Chair of the Department of Neurosurgery and the Dean of the College of Medicine extending to Dr. Taha the position of "Assistant Professor of Clinical Neurosurgery Affiliated" effective from October 1, 1996 through August 31, 1999. Third, Dr. Taha produced a W-2 form showing that he earned \$9,863.64 during 1998 from his employment with UC. Fourth, Dr. Taha produced a form entitled "Request for Approval to Perform Outside Activity for Fulltime Faculty," in which he requested and received approval from UC to work for the Mayfield Clinic, in addition to his faculty job.

{¶24} Despite this evidence, appellees assert that no employment contract existed between Dr. Taha and UC, and that Dr. Taha only worked for UC at the behest of the Mayfield Clinic. Appellees maintain that UC entered into a contract with the Mayfield Clinic for Dr. Taha's expertise and UC compensated the Mayfield Clinic, not Dr. Taha, for his work. Although we conducted a thorough review of the record, we cannot find the contract, or testimony regarding the contract, that appellees assert UC and the Mayfield Clinic executed. Further, Dr. Taha testified that UC issued paychecks naming him, not the Mayfield Clinic, as the payee. Therefore, based upon the evidence in the record, we can only conclude that the weight of the evidence proves that Dr. Taha was an employee of UC.

{¶25} Accordingly, we sustain UC's second assignment of error.

{¶26} By UC's third assignment of error, it asserts that the Court of Claims erred in concluding that Nurse Parrott was not a UC employee. We agree.

{¶27} In its decision, the Court of Claims found that Nurse Parrott worked exclusively for University Anesthesia Associates ("UAA"), a private practice plan; that she was not employed by UC; and that she never received any pay from UC. Indeed, in her deposition, Nurse Parrott testified that she never worked for UC and never received pay from UC. However, Nurse Parrott also testified that she was a volunteer clinical instructor for UC during 1998 and, in that position, she was required to supervise nurse-anesthetist students.

{¶28} Neither Nurse Parrott's admission that she was not an UC employee nor her testimony that she was not compensated by UC is dispositive of her employment status. *Potavin v. Univ. Med. Ctr.* (Apr. 19, 2001), Franklin App. No. 00AP-715 ("[T]he issue whether a person is an officer or employee of the state cannot be answered simply by an admission that a person is not an employee of the state or by a showing that the employee was not directly compensated by the state."). Rather, in order to determine whether a volunteer clinical instructor at a state university is a state employee for purposes of immunity, this court must analyze the relationship between the university and the instructor's private practice plan. *Id.*

{¶29} In *Potavin*, we held that a volunteer clinical instructor for UC's Department of Obstetrics and Gynecology ("OBGYN Department") was an employee of the state. There, UC had such a high degree of control over the instructor's practice plan that the dean of the College of Medicine had to approve the amount of compensation the practice plan employees received. Also, the private practice plan contributed a significant amount of money to the OBGYN Department. Further, the OBGYN Department director testified that the practice plan would not exist if not for its relationship with UC, and that UC could not pay its employees if not for its relationship with the practice plan. Given this symbiotic relationship, this court concluded that UC and the practice plan functioned as one entity, even though they were separate legal entities. Therefore, this court held that the volunteer clinical instructor was an employee of the state.

{¶30} In the case at bar, UC had significant control over UAA, the private practice plan at issue here, during 1998. Dr. Phillip Bridenbaugh, M.D., the Chairman of the Department of Anesthesia within the UC College of Medicine and president of UAA, testified that UAA was "the practice plan portion of the academic Department of Anesthesia of the College of Medicine." UAA's purpose was to bill and collect payment for clinical services provided by its employees and disburse the revenue collected to the Department of Anesthesia to meet the Department's expenses. Without the revenue collected by UAA, UC would not have had any means to compensate the Department's clinical faculty members. Further, UC exerted control over the outlay of the funds UAA collected by requiring UAA to receive the approval of the Dean of the College of Medicine for its budget and the amount of the salaries it paid its employees. Therefore, we conclude that although UC and UAA were separate legal entities, their relationship was sufficiently close that UAA-employee Nurse Parrott, even though only a volunteer clinical instructor for UC, was an employee of the state for purposes of immunity.

{¶31} Accordingly, we sustain UC's third assignment of error.

{¶32} By its remaining assignments of error, UC argues that Dr. Luchette, Dr. Taha, Dr. Sharma, and Nurse Parrott were all acting within the scope of their employment with UC when treating Theobald and, therefore, they are immune from personal liability.

{¶33} Generally, in cases involving health care practitioners who are also clinical faculty members, immunity hinges upon whether the practitioners were acting within the scope of their employment. As we stated above, a state employee is entitled to immunity, unless that employee is manifestly outside of the scope of employment. R.C. 9.86.1 Although the term "scope of employment" is an elusive concept, both the Supreme Court of Ohio and this court have provided some guidance as to its meaning in the context of R.C. 9.86. *Oye v. Ohio State Univ.*, Franklin App. No. 02AP-1362, 2003-Ohio-5944, at ¶6. Primarily, a state employee is acting within the scope of his employment if he is acting "in furtherance of the interests of the state." *Conley*, supra, at 287. In other words, "conduct is within the scope of employment if it is initiated, in part, to further or promote the master's business." *Patena v. Univ. of Akron* (Apr. 18, 2002), Franklin App. No. 01AP-845. Conversely, "actions that bear no relationship to the conduct of the state's business" are outside of the scope of employment. *Oye*, supra, at ¶7.

{¶34} In cases such as this, determining whether a health care practitioner is within the "scope of employment" is particularly difficult given the dual nature of the practitioner's employment.<sup>2</sup> On one hand, the practitioner is a university faculty member, charged by the university with furthering the education of students and residents in a "real-world" setting. On the other hand, the practitioner is the patient's caregiver, providing treatment for compensation from a private practice plan. In many instances, the line between these two roles is blurred because the practitioner may be teaching by simply providing the student or resident an opportunity to observe while the practitioner treats a patient. In this situation, is the practitioner acting within the scope of his employment with the state or his private employer?

{¶35} Since *Katko v. Balcerzak* (1987), 41 Ohio App.3d 375, this court has struggled with identifying the appropriate analysis for resolving this issue. In our earlier cases, we reasoned that a practitioner was acting within the scope of employment for whichever employer had the most significant financial involvement in the provided treatment. Thus, our analysis centered primarily upon "financial" factors, i.e., whether the university or the practice plan paid the practitioner for his services, whether the university or the practice plan billed and collected payment from the patient for the practitioner's services, whether the university or the practice plan received the greater financial gain from the practitioner's services, whether the university or the practice plan insured the practitioner for malpractice. See, e.g., *Balson v. Ohio State Univ.* (1996), 112 Ohio App.3d 33; *Harrison v. Univ. of Cincinnati Hosp.* (June 28, 1996), Franklin App. No. 96API01-81.

{¶36} In each of the cases that focused upon financial factors in determining whether the practitioner was within the scope of employment with the state university at the time of the alleged wrongful act, the result was the same: the practitioner was not immune. Generally, we reached this result because the private practice plan typically had significantly greater financial involvement in the provided care. Most, if not all, Ohio state medical schools affiliate with separate corporations run and staffed by clinical faculty members to deal with the income generated from the clinical faculty members' practices. These corporations, or practice plans, employ the medical school clinical faculty and provide the majority of the clinical faculty members' salaries. Additionally, the practice plans are responsible for billing and collecting payments for the services the clinical faculty members provide as part of their practice of medicine. Often, the practice plans also provide the practitioner's malpractice insurance.

{¶37} The universities benefit in two ways from this arrangement. First, without tapping university funds, the medical schools are able to attract highly-regarded clinical faculty members with salaries comparable to those offered in the private sector. Students and residents then benefit from working with these clinical faculty members, learning to practice medicine by observing and assisting them in the treatment of patients. Second, the medical schools receive contributions from the practice plans, allowing them to maintain their departments.

{¶38} Although medical schools exercise a high degree of control over these practice plans and benefit from their profitability, the schools themselves have little direct involvement with the financial aspects of the practice of medicine. Therefore, the use of the financial factors to determine whether a practitioner is within the scope of his employment with the medical school will almost always result in a negative answer. Furthermore, the financial factors generally do not address the core scope of employment issue: whether the practitioner was acting to further the medical school's interests.

{¶39} Beginning with *Norman v. Ohio State Univ. Hosps.* (1996), 116 Ohio App.3d 69, we introduced a new factor into the scope of employment analysis: whether the practitioner only saw the patient in the course of supervising or instructing a resident (the "education" factor). If a practitioner, as the physician in *Norman*, only treated the patient as part of his duty to oversee and direct residents, then it was more likely that the patient was a "patient[ ] of the universit[y]," not a "private patient[ ] of the physician[ ]." *Id.* at 77. When a practitioner was treating a "private patient[ ]," he was acting outside of the scope of his employment with the university. Conversely, a practitioner treating a "patient[ ] of the universit[y]" was acting within the scope of his employment. See, also, *Chitwood v. Univ. Med. Ctr.* (May 5, 1998), Franklin App. No. 97API09-1235 (holding that a physician was immune because he saw the patient in his capacity as the on-call physician supervising residents rather than as a private patient).

{¶40} In an attempt to synthesize this new factor with the financial factors, we articulated a two-part test in *Kaiser v. Flege* (Sept. 22, 1998), Franklin App. No. 98AP-146. There, we held that:

The two major determining factors to be used in finding whether a physician was acting outside the scope of his or her employment for a state university hospital are: (1) whether the patient was a private patient of the physician, rather than a patient of the university; and (2) the university's financial gain from the medical treatment at issue relative to the physician's financial gain therefrom.

{¶41} Although this test properly summarized the factors we had previously used to determine whether a practitioner was acting within the scope of his employment, the test did not render a predictable result. Rather, the outcome of each case depended upon which factor we stressed.

{¶42} This lack of predictability quickly became apparent and is illustrated in *Scarberry*, *supra*, decided less than three months after *Kaiser*. The majority in *Scarberry* determined that the physician was immune because he was acting within the scope of his employment when he treated the patient in conjunction with a resident, whom he was supervising. Notably, the majority's analysis of the physician's employment status did not turn upon the financial factors. The dissent, however, concentrated almost solely upon the financial factors and concluded that the physician should not be immune because the financial factors weighed against him. The dissent pointed out that the practice plan billed the patient and provided the physician with malpractice coverage. Further, the physician earned over three-quarters of his salary from the practice plan, and received no compensation from the university for the services he rendered to the patient. As we previously pointed out, such business arrangements are typical between state universities and private practice plans.

{¶43} In *Ferguson v. Ohio State Univ. Med. Ctr.* (June 22, 1999), Franklin App. No. 98AP-863, we took a somewhat different tact. In *Ferguson*, we concluded that "[w]hile billing may be a relevant factor in determining whether the physician is acting within the scope of his state employment, it may not always be the determinative factor." Rather, the "key issue" was whether the practitioner "saw the patient only in his capacity as an attending physician supervising residents" or whether the practitioner "saw the patient as a private patient." Thus, although we listed the 15 factors that this court had historically examined in determining whether a practitioner was acting within the scope of employment, our holding in *Ferguson* elevated the education factor as the paramount factor in the analysis.

{¶44} With the exception of *Smith*, *supra*,<sup>3</sup> the cases following *Ferguson* turned upon the education factor. When evidence existed that a practitioner was supervising or instructing students or residents while rendering care to the patient, we concluded that the practitioner was acting within the scope of his employment. See, e.g., *Hopper v. Univ. of Cincinnati* (Aug. 3, 2000), Franklin App. No. 99AP-787; *Barkan v. Ohio State Univ.*, Franklin App. No. 02AP-436, 2003-Ohio-985. However, when the parties presented no evidence of supervision or instruction of a student or resident, we fell back upon a review of the financial factors to support a finding that the practitioner was acting outside of the scope of his employment. See, e.g., *Lynd v. Univ. of Cincinnati* (Nov. 23, 1999), Franklin App. No. 99AP-37; *Wayman v. Univ. of Cincinnati Med. Ctr.* (June 22, 2000), Franklin App. No. 99AP-1055.

{¶45} In *Kaiser v. Ohio State Univ.*, Franklin App. No. 02AP-316, 2002-Ohio-6030, one of our most recent cases, we reiterated the unimportance of the financial factors and focused instead upon the education factor. Recognizing that the financial aspects of each case remained virtually the same, we concluded that "it was the facts surrounding the actual treatment of the patient which served as the critical basis" for determining whether the practitioner was outside of the scope of employment. *Id.* at ¶15. Thus, whether a practitioner was acting outside the scope of his employment was dependant upon the degree to which the practitioner took care of the patient independently of his duties as a practitioner supervising the work of a resident. *Id.* at ¶25.

{¶46} As the above discussion demonstrates, since *Ferguson*, this court has implicitly and explicitly retreated from applying the financial factors as determinative factors and, instead, the outcome of each case essentially has turned upon the education factor. Therefore, we conclude that although the financial factors may be relevant to determine whether a practitioner is an employee of the state, the financial factors generally have little bearing upon whether a practitioner is acting within the scope of his employment. Instead, to determine whether a practitioner is acting within the scope of employment, the Court of Claims must primarily inquire whether the practitioner was educating a student or resident while rendering the allegedly negligent care to the patient. If the practitioner was educating a student or resident, then the practitioner was acting within the scope of his employment and, thus, is immune from liability.

{¶47} Making the education of students and residents the primary factor is consistent with the general definition of "scope of employment." As reflected by testimony, employment contracts, letters of appointment, and other evidence, the "master's business" in these cases is the education of students and residents in a "realworld" setting.<sup>4</sup> Therefore, anytime a clinical faculty member furthers a student or resident's education, he promotes the state's interest. Because the state's interest is promoted no matter how the edu-

cation of the student or resident occurs, a practitioner is acting within the scope of his employment if he educates a student or resident by direct instruction, demonstration, supervision, or simple involvement of the student or resident in the patient's care.

{¶48} Accordingly, in order to determine whether a practitioner is acting within the scope of his employment, the Court of Claims must first identify the aspect of the course of treatment that the plaintiff alleges gave rise to damage or injury. Then, if education is the university's interest, the Court of Claims must determine whether a student or resident was somehow involved with the patient's care during that aspect of the course of treatment. Thus, for example, if during a patient's visit to the emergency room a physician is negligent, that physician was acting within the scope of his employment, and is immune, if a resident or student was involved in the patient's treatment during that visit. *Kaiser v. Ohio State Univ.*, supra; *Barkan*, supra.

{¶49} Notably, the degree of the student or resident's involvement is not significant in this analysis as long as the practitioner was teaching at the time of the alleged wrongful act. Further, it is irrelevant how the patient views his relationship with the practitioner.

{¶50} In the case at bar, UC introduced evidence that a student and at least three residents were involved with Theobald's treatment. However, in determining that the practitioners were not acting within the scope of their employment, the Court of Claims did not concentrate on this evidence but, instead, relied solely upon the financial factors. Therefore, we must remand this case to the Court of Claims for it to make a determination whether a student or resident was involved during each aspect of Theobald's course of treatment that allegedly resulted in appellees' damages and injuries.

{¶51} Accordingly, we sustain UC's fourth through sixth assignments of error to the extent that the Court of Claims erred in determining whether the physicians were acting within the scope of their employment without considering whether students or residents were involved in each aspect of the course of treatment during which appellees' allege they were damaged and injured. Further, we sustain UC's seventh assignment of error to the extent that the Court of Claims failed to make any determination regarding whether Nurse Parrott was acting within her scope of employment.

{¶52} For the foregoing reasons, we overrule UC's first assignment of error and sustain UC's second and third assignments of error. Further, we sustain UC's fourth, fifth, sixth, and seventh assignments of error to the extent noted above. Finally, we reverse the Court of Claims of Ohio's judgment and remand this cause to that court for further proceedings in accordance with law and this opinion.

*Judgment reversed and cause remanded.*

BRYANT and SADLER, JJ., concur.

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1 Additionally, a state employee is not entitled to immunity if the employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner. R.C. 9.86. However, appellees here do not allege that the practitioners acted in such a manner and, thus, we need not address that issue.

2 Appellees argue that practitioners who are so dually employed are guilty of soliciting improper compensation, in violation of R.C. 2921.43. We do not address the merits of this argument because it is irrelevant to the sole controversy before us—whether the practitioners are immune from liability.

3 In *Smith*, supra, the plaintiff alleged that a physician was negligent in positioning him during surgery. Although a fellow and resident were present while the physician operated on the plaintiff, this court held that the physician was not acting within the scope of his employment for immunity purposes. Rather, we concluded that the physician was outside of the scope of his employment because the physician's practice plan billed and collected payment for the treatment, the patient was treated at a private hospital, and the physician received compensation and benefits from the practice plan.

4 For example, Dr. Taha's November 1, 1996 letter of appointment states that his faculty responsibilities included instructing residents in the operating room, on rounds, and in other teaching formats. Further, Dr. Taha testified that UC's main requirement of him was to teach residents how to be good neurosurgeons.

*Filed 3/30/05*

**CERTIFIED FOR PUBLICATION  
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION ONE**

CONNIE ARMIJO,  
Plaintiff and Appellant,

B166050  
(Los Angeles County  
Super. Ct. No. LC061944)

v.

JAMIE MILES et al.,  
Defendants and Respondents.

APPEAL from an order of the Superior Court of Los Angeles County, Richard Wolfe, Judge. Reversed with directions.

Law Offices of Diane Corwin and Diane Corwin; Law Office of David C. Codell, David C. Codell, Steve Kang and Aimee Dudovitz for Plaintiff and Appellant.

Horvitz & Levy, David M. Axelrad, Karen M. Bray and Jeremy B. Rosen; Herzfeld & Rubin, Michael A. Zuk and Roy D. Goldstein for Defendants and Respondents Jamie Miles and Labriute Medical Office, Inc.

Cassel Malm Fagundes and Joseph H. Fagundes; Rushfeldt, Shelley & Drake, and Kathryn S.M. Mosely for Defendant and Respondent Sherman Oaks Hospital and Health Center.

**INTRODUCTION**

Plaintiff Connie Armijo sued defendants Jamie Miles, M.D. (Miles), Labriute Medical Group Incorporated (Labriute) and Sherman Oaks Hospital and Health Center (Sherman Oaks Hospital) for the wrongful death of her domestic partner, Dana Schwartz (Dana). The trial court sustained defendants' demurrers to plaintiff's causes of action, concluding that plaintiff lacked standing to sue under the 2002 version of the wrongful death statute (Stats. 2001, ch. 893, § 2), in that she and Dana had not registered their domestic partnership with the Secretary of State.

Plaintiff appealed from the order and judgment dismissing her action. During the pendency of this appeal, and after the parties had filed their briefs, the Legislature amended the wrongful death statute (Stats. 2004, ch. 947, § 1). Based upon this amendment, which took effect on January 1, 2005 and which applies retroactively to plaintiff's wrongful death claim, we conclude the facts plaintiff alleged in her operative complaint are sufficient to establish her standing to sue for wrongful death. Accordingly, we reverse the judgment and remand for further proceedings.

**FACTS<sup>1</sup>**

Plaintiff and Dana first met in 1987. After dating for six months, the two women made a decision to be committed to each other exclusively as "life partners and 'spouses.'"

<sup>1</sup> In reviewing the trial court's order sustaining defendants' demurrers, we presume the material factual allegations in plaintiff's operative complaint, as well as those that may be implied or inferred therefrom, to be true. We disregard conclusions of law and factual allegations that are contrary to facts judicially noticed. (*Barratt American, Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809, 812, fn. 2; *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.)

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Plaintiff and Dana jointly were responsible for each other's living expenses. During their relationship, neither woman entered into any other relationship or domestic partnership. They lived with one another, and, in 1998, they purchased a home together, where they resided until Dana's death. Plaintiff and Dana were not related by blood in a way that would have prevented them from marrying each other if they could have been married. Each was over the age of 18 when they met and formed their relationship. On August 6, 2001, Dana died at defendant Sherman Oaks Hospital, where she had been "hospitalized for pain management and associated rehabilitation." Miles, an employee of Labriute, had been Dana's physician.

## PROCEDURAL BACKGROUND

On August 20, 2002, plaintiff and Dana's sister, Lori Schwartz (who is not a party to this appeal), filed this wrongful death action against defendants. Their operative second amended complaint was filed on December 20, 2002. Plaintiff alleged that Dana died as the result of defendants' medical malpractice. Plaintiff sought compensatory damages, including compensation for the loss of love, companionship, comfort, affection, solace and moral support, that she suffered as a result of Dana's death. Plaintiff also sought compensation for burial and funeral expenses, as well as the loss of Dana's income and future earnings.

Defendants demurred to plaintiff's causes of action. Relying on Code of Civil Procedure section 377.60 (section 377.60 or the wrongful death statute) and Family Code section 297, defendants asserted that plaintiff lacked standing to sue them for wrongful death, in that she and Dana had failed to file a Declaration of Domestic Partnership with the Secretary of State.

Plaintiff opposed the demurrers. Although she acknowledged that she and Dana had not fulfilled the registration requirement necessary to establish a domestic partnership, she argued that they had fulfilled the statutory intent and underlying purpose of domestic partnership registration despite the lack of registration. The trial court, believing it had no discretion in this matter, sustained the demurrers without leave to amend based on the failure to file a Declaration of Domestic Partnership with the Secretary of State. On May 7, 2003, the trial court dismissed all of plaintiff's causes of action with prejudice. This appeal followed.

## CONTENTIONS

The trial court's decision to sustain defendants' demurrers without leave to amend was based upon the 2002 version of the wrongful death statute. Plaintiff contends that under the most reasonable construction of that statute and the domestic partnership law, she need not allege that she and Dana registered their domestic partnership with the Secretary of State in order to establish standing. Plaintiff further contends that a registration requirement would run afoul of the state and federal equal protection clauses and that, apart from whether she and Dana were domestic partners under the 2002 wrongful death statute, she nevertheless was entitled to bring this lawsuit under the equal protection and privacy guarantees of the California Constitution and under the equal protection and due process provisions of the United States Constitution. We conclude that registration is a prerequisite for standing under the 2002 version of the wrongful death statute. We further conclude, however, that the 2005 version of the wrongful death statute affords plaintiff standing to sue. We therefore need not and do not address plaintiff's remaining constitutional contentions regarding the 2002 wrongful death statute.

With respect to the 2005 wrongful death statute, Assembly Bill 2580 (AB 2580), defendants contend that the Legislature amended the wrongful death statute for the sole purpose of changing the results in three cases presently on appeal. Defendants concede that the statute expressly provides that it is to have retroactive effect but contend that various constitutional provisions prevent the statute's retroactive application in this case. Defendants further contend that even if there is no constitutional impediment to the statute's retroactive application, AB 2580 cannot be enforced because it violates Proposition 22, an initiative measure approved by California voters during the March 2000 election. For the reasons that follow, there is no merit to these contentions.

## DISCUSSION

### *I. OVERVIEW OF PERTINENT STATUTORY PROVISIONS*

In order to place the issues in this case into perspective, an understanding of the evolution of the wrongful death statute in relationship to California domestic partnership law is required. In 1999, the Legislature passed Assembly Bill 26 (AB 26), which became effective on January 1, 2000. Among other things, AB 26 added Division 2.5, entitled "Domestic Partner Registration" (commencing with section 297), to the Family Code. (Stats. 1999, ch. 588, § 2.) This division set forth the definitions of domestic partners and domestic partnership, the procedural steps to be taken to register or to terminate a domestic partnership, the legal effect of registering a domestic partnership, and preemption provisions.

As originally enacted, Family Code section 299.5 provided that "[r]egistration as a domestic partner under this division shall not be evidence of, or establish, any rights existing under law other than those expressly provided to domestic partners in this division and Section 1261 of the Health and Safety Code." AB 26 "require[d] a health facility to allow a patient's domestic partner and other specific persons to visit a patient, except under specified conditions" and "authorize[d] state and local employers to offer health care coverage and other benefits to domestic partners." (Legislative Counsel's Digest, AB 26; 9 West's California Legislative Service (1999), ch. 588, p. 3373.) The new legislation conferred no other rights.

When Dana died in August 2001, California's wrongful death statute did not confer standing on a surviving domestic partner. Legislation passed in 2001, shortly after Dana's death, changed this. On October 14, 2001, Assembly Bill 25 (AB 25) (Stats. 2001, ch. 893) was enacted. Effective January 1, 2002, AB 25 amended subdivision (a) of section 377.60 to add the decedent's surviving "domestic partner" to the list of individuals entitled to sue for wrongful death.

AB 25 also added subdivision (f) to section 377.60, which specified that for purposes of the wrongful death statute, the term “domestic partners” has the meaning provided in Section 297 of the Family Code.”<sup>3</sup> (Stats 2001, ch. 893, § 2.) Subdivision (d) of section 377.60, which prior to the 2002 amendment provided that the wrongful death statute “applies to any cause of action arising on or after January 1, 1993,” was reenacted without change, thereby reflecting the Legislature’s clear intent that the 2002 amendment have retroactive application.

In 2003, the Legislature enacted Assembly Bill 205 (AB 205), the California Domestic Partner Rights and Responsibilities Act of 2003. (Stats. 2003, ch. 421, § 2.) Among other things, AB 205 amended Family Code section 297’s definition of domestic partnership. (Stats. 2003, ch. 421, § 3.) AB 205 also significantly expanded the rights and protections provided to registered domestic partners. Specifically, it “extend[ed] the rights and duties of marriage to persons registered as domestic partners on and after January 1, 2005.” (Leg. Counsel’s Digest AB 205; 8 West’s Cal. Legislative Service (2003) ch. 421, p. 2587.)

AB 205 added section 297.5 to the Family Code. It provided in part: “(a) Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.” Family Code section 297.5 (Stats. 2003, ch. 421, § 4), and the amendment to Family Code section 297 (Stats. 2003, ch. 421, § 3), became operative on January 1, 2005. (Stats. 2003, ch. 421, § 14.)

In 2004, while this appeal was pending but after the parties had fully briefed this case, AB 2580 was enacted into law (Stats. 2004, ch. 947, § 1). The Legislative Counsel’s Digest to AB 2580, as amended in the Senate August 16, 2004, states, in part, that “[e]xisting law provides that a cause of action for the wrongful death of a person may be asserted by his or her domestic partner, as defined. [¶] Under certain circumstances, this bill would allow a cause of action for wrongful death to proceed pursuant to the above although a Declaration of Domestic Partnership was not filed with the Secretary of State, if other specified requirements are met.” (Italics omitted.)

AB 2580 amended subdivision (f) of the wrongful death statute. Effective January 1, 2005, section 377.60, subdivision (f), provides: “(1) For the purpose of this section, ‘domestic partner’ means a person who, at the time of the decedent’s death, was the domestic partner of the decedent in a registered domestic partnership established in accordance with subdivision (b) of Section 297 of the Family Code.

“(2) *Notwithstanding paragraph (1), for a death occurring prior to January 1, 2002, a person may maintain a cause of action pursuant to this section as a domestic partner of the decedent by establishing the factors listed in paragraphs (1) to (6), inclusive, of subdivision (b) of Section 297 of the Family Code, as it read pursuant to Section 3 of Chapter 893 of the Statutes of 2001, prior to its becoming inoperative on January 1, 2005.*

“(3) The amendments made to this subdivision during the 2003-2004 Regular Session of the Legislature are not intended to revive any cause of action that has been fully and finally adjudicated by the courts, or that has been settled, or as to which the applicable limitations period has run.” (Italics added.)

## **II. UNDER THE 2002 VERSION OF THE WRONGFUL DEATH STATUTE, ONLY REGISTERED SURVIVING DOMESTIC PARTNERS HAVE STANDING TO SUE FOR WRONGFUL DEATH**

We reject plaintiff’s contention that under the 2002 wrongful death statute, registration of her partnership with Dana was not a prerequisite to her standing to sue for Dana’s wrongful death. In *Holguin v. Flores* (2004) 122 Cal.App.4th 428, Division Seven of this Court held that registration as a domestic partnership was required in order for the surviving domestic partner to sue for the wrongful death of the deceased partner. The court reached this conclusion after an extensive review of the 2002 wrongful death statute, relevant provisions of the domestic partnership law and legislative history underlying those provisions. (Id. at pp. 434-437.)

We agree with *Holguin* and adopt its reasoning. Accordingly, we hold that a surviving domestic partner can sue for wrongful death under the 2002 version of the wrongful death statute only if at the time of the decedent’s death the partnership had been registered with the Secretary of State. Inasmuch as plaintiff and Dana were not registered domestic partners at the time of Dana’s death, and plaintiff could not amend her complaint to allege registration, the trial court correctly determined that plaintiff lacked standing to sue for Dana’s wrongful death under the 2002 version of the wrongful death statute. We nevertheless must reverse the judgment because a subsequent amendment to the wrongful death statute, which amendment applies retroactively, confers on plaintiff the requisite standing even in the absence of partnership registration. We therefore need not and do not reach the merits of plaintiff’s remaining contentions with respect to the 2002 wrongful death statute. We now turn to defendants’ challenges to the 2005 wrongful death statute.

## **III. THE LEGISLATURE PASSED AB 2580 FOR THE PURPOSE OF CLARIFYING PREVIOUS LEGISLATION**

AB 2580 was a clean-up bill designed to clarify through technical changes that various provisions of the California Domestic Partner Rights and Responsibilities Act (Fam. Code, § 297 et seq.; Stats. 2003, ch. 421; AB 205) apply to state-registered domestic partners. (Assem. Com. on Judiciary, Analysis of Assem. Bill 2580 (2003-2004 Reg. Sess.) as introduced Feb. 20, 2004, p. 1.) This particular bill was sparked by inquiries as to whether AB 205 applied to domestic partners registered at one of the 59 local jurisdictions. (Ibid.)

The August 10, 2004 senate floor amendments to AB 2580 sought to “clarify application of existing law to wrongful death actions brought by domestic partners . . . . Among the provisions amended by AB 25 was Section 377.60 of the Civil Code [sic], to allow domestic partners to assert wrongful death claims in the same manner as spouses. Apparently courts have interpreted the amendment made by AB 25 to Section 377.60 of the Civil Code [4], as applied to deaths prior to its effective date of January 1, 2002, in different and conflicting ways. These amendments to AB 2580 clarify the application of the AB 25 amendments to those wrongful death actions. The amendments will not affect actions that have been adjudged or settled or where the statute of limitations has run.” (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2580 (2003-2004 Reg. Sess.) as amended Aug. 10, 2004, pp. 1-2.)

Contained in the legislative history materials supplied by plaintiff is a Senate Committee on Judiciary “Background Information Request.” Following as “background material in explanation of the bill,” is a document entitled “Explanation of Proposed Amendment to Wrongful Death Statute (Code of Civil Procedure Section 377.60) for Possible Inclusion in AB 2580 (2004) (Goldberg).”<sup>5</sup>

This document references AB 25, which amended the wrongful death statute effective January 1, 2002 by adding surviving domestic partners to the list of individuals who had standing to bring a wrongful death cause of action. Of particular interest is Part C of the document entitled, “The Need for Clarification With Respect to Suits for Wrongful Deaths Occurring Prior to January 1, 2002.” It explains that “[u]nfortunately, some of the plaintiffs for whom the Legislature contemplated that AB 25 would authorize recovery—that is, plaintiffs bringing wrongful death actions for pre-2002 deaths—have found themselves in a legal ‘Catch-22’ that the Legislature did not contemplate. During the lifetimes of their now-deceased partners, the plaintiffs that the Legislature expected to benefit from the retroactive availability of the wrongful death cause of action had no reason to expect that registration would entitle them to the protections of the wrongful death statute. Indeed, for the duration of years 2000 and 2001, Family Code section 299.5 expressly prohibited courts from considering registration as evidence of the right to bring any cause of action.”

Part C further explains that lawsuits filed under AB 25 with regard to pre-2002 deaths have resulted in incongruent holdings, necessitating clarification by the Legislature of the standing requirements. Such clarification effectively would conserve judicial resources in ongoing litigation by obviating the need for the Legislature to decide complex constitutional issues relating to same-sex partners’ previous inability to sue for wrongful death. Claims barred by the statute of limitations would not be revived. In addition, legislative clarification would “confirm[] that these surviving partners have a fair and rational legal remedy, as was intended by AB 25.”

The Legislature’s decision to amend the wrongful death statute therefore was fueled by its recognition that AB 25, as enacted, did not fully achieve its desired result—retroactive enjoyment of the benefit of the wrongful death statute by all surviving domestic partners for deaths occurring prior to January 1, 2002. References in the legislative materials to ongoing litigation and the disparate results reached therein served only to highlight the need for amendment of the wrongful death statute. Contrary to defendants’ assertion, such references do not evince an intent on the part of the Legislature to usurp the function of the judiciary.

#### **IV. DEFENDANTS HAVE FAILED TO DEMONSTRATE THAT THERE IS A CONSTITUTIONAL IMPEDIMENT TO THE RETROACTIVE APPLICATION OF AB 25806**

Defendants concede that the wrongful death statute as amended by AB 2580 provides that it is to apply retroactively. Defendants argue, however, that “it would be unconstitutional to apply AB 2580 retroactively here because: (1) it violates Dr. Miles’ due process rights by substantively changing the law regarding wrongful death tort liability, thereby upsetting Dr. Miles’ vested rights; (2) it violates the separation of powers by directing courts how to rule on pending appeals; (3) it constitutes an unconstitutional bill of attainder by singling out for punishment a small discreet group of defendants and [violates the prohibition against ex post facto laws; and] (4) it violates Dr. Miles’ equal protection rights by treating her differently from other similarly situated doctors who will not be liable in wrongful death actions brought by surviving nonregistered domestic partners.” As we now explain, each of defendants’ constitutional challenges lacks merit. We discuss each in turn.

##### **A. Due Process**

Defendants contend that it would be unconstitutional to apply AB 2580’s amendment of the wrongful death statute retroactively. In defendants’ view, AB 2580 is a legislative act that deprives them of a vested right without due process of law. We disagree.

Our state's high court has long held that the retroactive application of a statute may be unconstitutional if it deprives an individual of a vested right without due process of law. (*In re Marriage of Buol* (1985) 39 Cal.3d 751, 756, 758.) "A right is 'vested' when it is "already possessed" or "legitimately acquired." (Standard Oil Co. v. Feldstein (1980) 105 Cal.App.3d 590, 605, quoting *Harlow v. Carleson* (1976) 16 Cal.3d 731, 735.)

The right to sue for wrongful death by a person on whom the Legislature has conferred such right vests on the decedent's death. Once that right has vested, the Legislature cannot impair it. (*Wexler v. City of Los Angeles* (1952) 110 Cal.App.2d 740, 747.) Defendants assert that "[s]imple fairness dictates that the reverse must also be true — where a potential wrongful death defendant is protected by the law from any liability at the time of decedent's death the Legislature should be barred from retroactively imposing liability where none existed before." We reject this argument. Defendants do not cite to any California or federal case law that compels the conclusion that a person who wrongfully or negligently causes another's death has a right, vested or otherwise, to have the class of potential plaintiffs frozen as of the time of death. Expansion of the class of plaintiffs who can sue for wrongful death does not change the legal definition of negligence, the standard by which liability is assessed, or the character of defendants' acts or omissions. It simply enlarges the class of plaintiffs to whom defendants may be liable for their purported negligence.

Defendants' reliance on *Theodosius v. Keeshin Motor Express Co.* (1950) 341 Ill.App. 8 [92 N.E.2d 794] is misplaced. In *Theodosius*, the question before the Illinois appellate court was whether the Injuries Act of 1947, which increased the limit of recovery from \$10,000 to \$15,000, should be construed to apply retroactively. (At p. 795.) The Illinois court concluded that it could not be applied retroactively based on case law and a specific statute prohibiting retroactive application of statutes. (*Id.* at pp. 795-802.) *Theodosius* did not bar retroactive application of the Injuries Act of 1947 on due process grounds. *Theodosius* is of no aid to defendants and, in any event, we are not bound by the decisions of courts of other states. We conclude that defendants have not demonstrated a due process violation.<sup>7</sup>

### **B. Separation of Powers**

Defendants contend that AB 2580 violates the separation of powers doctrine "by attempting to legislate judicial interpretation of the AB 25 amendment." More specifically, defendants maintain that "AB 2580 constitutes an impermissible legislative intrusion into the function of the courts because the Legislature is purporting to make findings interpreting the meaning of an existing statute. But interpreting a statute and determining whether it is ambiguous is the role of the courts, not the Legislature. Such an intrusion into the judicial function should not be permitted. Accordingly, AB 2580 should not be applied in this case." We disagree with defendants' characterization of AB 2580.

"Separation of powers principles do not preclude the Legislature from amending a statute and applying the change to both pending and future cases, though any such law cannot 'readjudicat[e]' or otherwise 'disregard' judgments that are already 'final.' [Citation.]" (*People v. Bunn* (2002) 27 Cal.4th 1, 17; accord, *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 473-474, 476.) Although the Legislature's intent in passing AB 2580 was to "clarify" existing law, the portion of AB 2580 that retroactively amends the wrongful death statute to allow nonregistered partners to sue for wrongful death constitutes a change in the law designed to fill a gap left open by AB 25. We do not construe AB 2580's amendment of the wrongful death statute to be "a subsequent legislative declaration as to the meaning of a preexisting statute," which in any event would not be binding or conclusive. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1007.) Defendants have failed to demonstrate a separation of powers violation.

### **C. Bill of Attainder**

There is no merit to defendants' assertion that AB 2580, to the extent it amends the wrongful death statute retroactively, violates the federal and state constitutional proscriptions against passing a bill of attainder. (U.S. Const., art. I, § 9, cl. 3, § 10, cl. 1; Cal. Const., art. I, § 9.) "[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." (*United States v. Lovett* (1946) 328 U.S. 303, 315-316; accord, *Estate of Castiglioni* (1995) 40 Cal.App.4th 367, 377, fn. 17; *California State Employees' Assn. v. Flournoy* (1973) 32 Cal.App.3d 219, 225.)

Apart from whether AB 2580 applies to readily identifiable members of a particular group or constitutes punishment under a functional approach (*Sagaser v. McCarthy* (1986) 176 Cal.App.3d 288, 306), as defendants assert, defendants do not contend, let alone attempt to demonstrate, that the wrongful death statute, as amended by AB 2580, punishes anyone without a trial. The 2005 version of the statute merely sets forth the standing requirements that a surviving domestic partner must fulfill in order to obtain access to the courts and maintain a wrongful death action for a death occurring prior to January 1, 2002. Defendants therefore have failed to demonstrate that AB 2580 is an unconstitutional bill of attainder.

### **D. Ex Post Facto Law**

The United States Supreme Court has long recognized that "the constitutional prohibition on ex post facto laws applies only to

penal statutes which disadvantage the offender affected by them.” (Collins v. Youngblood (1990) 497 U.S. 37, 41; accord, INS v. Lopez-Mendoza (1984) 468 U.S. 1032, 1038-1039; Calder v. Bull (1798) 3 U.S. (3 Dall.) 386, 390-392 (opn. of Chase, J.), 396 (opn. of Paterson, J.), 400 (opn. of Iredell, J.)) We interpret our state ex post facto provision (Cal. Const., art. I, § 9) identically to that of its federal counterpart. (People v. Grant (1999) 20 Cal.4th 150, 158; People v. McVickers (1992) 4 Cal.4th 81, 84; Pro-Family Advocates v. Gomez (1996) 46 Cal.App.4th 1674, 1683, fn. 11.)

Defendants acknowledge that we are powerless to set aside the United States Supreme Court’s determination that the ex post facto clause applies only to criminal laws. Nevertheless, in an effort to preserve the issue for any future petition for writ of certiorari, defendants argue that “the ex post facto clause applies to civil cases and would operate independently to invalidate the Legislature’s attempt to retroactively apply AB 2580 to this case.” We reject this argument.

### **E. Equal Protection**

Defendants assert that application of AB 2580 to this case would violate the equal protection clause. They maintain that “the Legislature acknowledges that there are perhaps only three cases in the entire state which will be affected by this new statute. . . . Thus, Dr. Miles will be treated very differently from the numerous other doctors and medical groups who were sued by non-registered domestic partners for wrongful deaths that occurred prior to 2002 and who were not subject to any liability. There is no rational basis to create liability for Dr. Miles and two others when all other doctors in the state are immunized from any similar liability.” There is no merit to this assertion.

“In order to withstand an equal protection challenge, ordinarily a legislative classification need only bear a rational relationship to a conceivable legitimate state purpose.” (In re Marriage of Carpenter (1986) 188 Cal.App.3d 604, 617.) Although Miles and Labriute cite numerous cases as authority for general principles of constitutional law, they cite no authority and no facts establishing that AB 2580 actually violates their right to equal protection of the law.

We reject outright their specious suggestion that AB 2580 was enacted for the purpose of subjecting Miles and two other individuals to liability. AB 2580 was not designed to target any particular defendant. Under the 2005 version of the wrongful death statute, any person whose purported negligence resulted in the death of a domestic partner prior to January 1, 2002 can be sued by the surviving domestic partner if certain factors can be established. That AB 2580, practically speaking, may apply only in a limited number of cases does not render the legislation unconstitutional. Defendants have failed to demonstrate that under AB 2580 they will be treated differently from similarly situated defendants.

Moreover, the Legislature had a rational basis for amending the wrongful death statute. Effective January 1, 2002, AB 25 conferred upon surviving domestic partners standing to sue for wrongful death, including deaths occurring prior to January 1, 2002. Prior to January 1, 2002, however, the rights afforded to registered domestic partners were extremely limited and did not include the right to sue for wrongful death. Prior to January 1, 2002, domestic partners thus could not have foreseen that registration would entitle them to the protection of the wrongful death statute. Recognizing that for many domestic partners, the incentive to register their partnerships may not have existed prior to January 1, 2002 because of the very limited rights registration afforded, the Legislature amended the wrongful death so that non-registered domestic partners whose partners died prior to January 1, 2002 could benefit from the wrongful death statute. This legislation is not irrational in the constitutional sense and thus does not violate equal protection.<sup>8</sup>

### **V. PLAINTIFF ALLEGED FACTS SUFFICIENT TO PLEAD STANDING UNDER THE 2005 VERSION OF THE WRONGFUL DEATH STATUTE**

A wrongful death plaintiff is required to plead and prove standing to sue. (Nelson v. County of Los Angeles (2003) 113 Cal.App.4th 783, 789.) Having determined that there is no constitutional impediment to applying the 2005 version of the wrongful death statute in this case, we proceed to determine whether plaintiff alleged facts sufficient to establish her standing to sue for the wrongful death of Dana.

Under the current statute, for deaths occurring before January 1, 2002, a surviving same-sex domestic partner may maintain a cause of action for wrongful death by establishing the following:

“(1) Both persons [had] a common residence.

“(2) Both persons agree[d] to be jointly responsible for each other’s basic living expenses incurred during the domestic partnership.

“(3) Neither person [was] married or a member of another domestic partnership.

“(4) The two persons [were] not related by blood in a way that would [have] prevent[ed] them from being married to each other in this state.

“(5) Both persons [were] at least 18 years of age.

“(6) . . . [¶] (A) Both persons [were] members of the same sex.” (Former Fam. Code, § 297, subd. (b) (Stats. 2001, ch. 893, § 3); § 377.60, subd. (f)(2).)

A review of plaintiff’s operative complaint readily reveals that it contains factual allegations satisfying each of these six criteria. Plaintiff and Dana were members of the same sex. The women jointly were responsible for each other’s living expenses. They lived together in a common residence and ultimately purchased a home together. Plaintiff and Dana were not related by blood in a way that would have prevented them from getting married if they could have been married, and each was over the age of 18 when they met and formed their relationship. These allegations are sufficient to establish plaintiff’s standing to sue under the 2005 version of the wrongful death statute. We therefore conclude that plaintiff has stated a cause of action for wrongful death against defendants.

#### **VI. AB 2580 DOES NOT VIOLATE PROPOSITION 22, THE INITIATIVE MEASURE APPROVED BY CALIFORNIA VOTERS IN 2000**

On March 7, 2000, California voters approved Proposition 22, commonly known as the Knight Initiative or the California Defense of Marriage Act. This successful initiative measure (Cal. Const., art. II, § 8) added section 308.5 to the Family Code. It specifies that “[o]nly marriage between a man and a woman is valid or recognized in California.”

Defendants contend that AB 2580 violates Family Code section 308.5 by “impermissibly overturn[ing] the will of the voters as expressed through the passage of Proposition 22.” Marriage, defendants assert, “is more than just a name given to a particular relationship. By its terms, it also includes the benefits and status afforded by society to those individuals who have entered into the relationship.” In defendants’ view, “Proposition 22 must be read to mean that the benefits that are incidental to marriage are limited solely to opposite sex couples” and that “the Legislature’s decision to provide domestic partners with marital benefits such as the ability to sue for wrongful death, is prohibited by Proposition 22.”

When interpreting a voter initiative, we apply the same principles applicable to the construction of statutes. We look first to the language of the statute and give the words their commonplace meaning. (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) “The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme. [Citation.] When the language is ambiguous, ‘we refer to other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.’ [Citation.]” (*Ibid.*) Stated otherwise, “our ‘task is simply to interpret and apply the initiative’s language so as to effectuate the electorate’s intent.’ [Citation.]” (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-901.)

Family Code section 300, then and now, defines marriage as “a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. . . .” Family Code section 301, then and now, provides that “[a]n unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older, and not otherwise disqualified, are capable of consenting to and consummating marriage.”

To shed light on the fundamental underpinnings of Proposition 22, we deem it appropriate to refer to other indicia of the voters’ intent. (*People v. Rizo*, *supra*, 22 Cal.4th at p. 685.) We look first to the ballot’s legislative analysis and then to the arguments contained in the official ballot pamphlet to ascertain the intent of the voters. (*Robert L. v. Superior Court*, *supra*, 30 Cal.4th at p. 906.)

The Legislative Analyst explained the background of Proposition 22 as follows: “Under current California law, ‘marriage’ is based on a civil contract between a man and a woman. Current law also provides that a legal marriage that took place outside of California is generally considered valid in California. No state in the nation currently recognizes a civil contract or any other relationship between two people of the same sex as a marriage.” (Ballot Pamp., Primary Elec. (Mar. 7, 2000) analysis of Prop. 22 by Legis. Analyst, p. 51.) The law to which the Legislative Analyst made reference was Family Code section 308. Enacted in 1992 (Stats. 1992, ch. 162, § 10) and operative January 1, 1994, Family Code section 308 provides that “[a] marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state.”

The argument in favor of Proposition 22 consisted of a letter written by a 20-year-old voter. In part, it states: “When people ask, ‘Why is [Proposition 22] necessary?’ I say that even though California law already says only a man and a woman may marry, it also recognizes marriages from other states. However, judges in some of those states want to define marriage differently than we do. If they succeed, California may have to recognize new kinds of marriages, even though most people believe marriage should be between a man and a woman.” (Ballot Pamp., Primary Elec. (Mar. 7, 2000) argument in favor of Prop. 22, p. 52.) That Proposition 22 would prohibit California from recognizing as valid a same-sex marriage solemnized beyond its borders is also reflected in the Rebuttal to Argument Against Proposition 22: “Opponents say Proposition 22 is unnecessary. [¶] THE TRUTH IS, UNLESS WE PASS PROPOSITION 22, LEGAL LOOPHOLES COULD FORCE CALIFORNIA TO RECOGNIZE ‘SAME-SEX MARRIAGES’ PERFORMED IN OTHER STATES. [¶] That’s why 30 other states and the federal government have passed laws to close these loopholes. California deserves the same choice.” (*Id.*, rebuttal to argument against Prop. 22, p. 53.)

The legislative analysis and the ballot arguments readily demonstrate that Proposition 22 was crafted with a prophylactic purpose in mind. It was designed to prevent same-sex couples who could marry validly in other countries or who in the future could marry validly in other states from coming to California and claiming, in reliance on Family Code section 308, that their marriages must be recognized as valid marriages.

With the passage of Proposition 22, then, only opposite-sex marriages validly contracted outside this state will be recognized as valid in California. Same-sex marriages will be given no recognition.

The question remaining is whether the portion of AB 2580 that amends the wrongful death statute subverts Proposition 22. Defendants' position that it does is based on the faulty premise that the right to sue for wrongful death is an exclusive benefit of marriage. It is not.

At common law, personal tort claims expired when either the victim or the tortfeasor died. (*Willis v. Gordon* (1978) 20 Cal.3d 629, 637 (conc. opn. of Mosk, J.)) Today, a cause of action for wrongful death exists only by virtue of legislative grace. (*Rosales v. Battle* (2003) 113 Cal.App.4th 1178, 1182; accord, *Nelson v. County of Los Angeles*, supra, 113 Cal.App.4th at p. 789.) The statutorily created "wrongful death cause of action does not effect a survival of the decedent's cause of action, it 'gives to the representative a totally new right of action, on different principles. [Citation.]" (*Willis*, supra, at p. 637 (conc. opn. of Mosk, J.)) "The statute limits the right of recovery to a class of persons who, because of their relation to the deceased, are presumed to be injured by his death." (*Nelson*, supra, at p. 789, fn. 6.) This class of individuals includes the decedent's "surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession." (§ 377.60, subd. (a).) Thus, by no means is the right to sue for wrongful damages limited to spouses.

Nothing in AB 2580 validates same-sex marriages in California. In fact, it has nothing at all to do with marriage. As relevant to this case and the limited issue before us—whether plaintiff stated a cause of action for wrongful death—AB 2580 simply establishes that the right to sue for wrongful death belongs to registered domestic partners (whether they be same-sex or opposite-sex partners), except that for deaths occurring prior to January 1, 2002, the right to sue for wrongful death also belongs to non-registered surviving domestic partners who, like plaintiff, can satisfy six specific criteria.

#### DISPOSITION

The order and judgement of dismissal are reversed and the matter is remanded for further proceedings. The trial court is directed to vacate its order sustaining defendants' demurrers, to enter a new order overruling them, and to grant defendants time to file their answers. The parties are to bear their own costs on appeal.

#### CERTIFIED FOR PUBLICATION

SPENCER, P.J.

We concur:

MALLANO, J.

SUZUKAWA, J.\*

\* *Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.*

<sup>1</sup> In reviewing the trial court's order sustaining defendant's demurrers, we presume the material factual allegations in plaintiff's operative complaint, as well as those that may be implied or inferred therefrom, to be true. We disregard conclusions of law and factual allegations that are contrary to facts judicially noticed. (*Barratt American, Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809, 812, fn. 2; *Mashall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.)

<sup>2</sup> Miles and Labriute, as well as Sherman Oaks Hospital, have filed a supplemental letter brief addressing the effect of AB 2580. Sherman Oaks Hospital further "joins in the request of [Miles and Labriute] to file a supplemental letter brief in advance of oral argument to address the effect of the recent passage of assembly bill 2580." We construe this to be a request by Sherman Oaks Hospital to join in the letter brief filed by Miles and Labriute.

<sup>3</sup> AB 25 amended Family Code section 297 to read: "(a) Domestic partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring.

"(b) A domestic partnership shall be established in California when all of the following requirements are met:

"(1) Both persons have a common residence.

- “(2) Both persons agree to be jointly responsible for each other’s basic living expenses incurred during the domestic partnership.
- “(3) Neither person is married or a member of another domestic partnership.
- “(4) The two persons are not related by blood in a way that would prevent them from being married to each other in this state.
- “(5) Both persons are at least 18 years of age.
- “(6) Either of the following:
- “(A) Both persons are members of the same sex.
- “(B) One or both of the persons meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. Section 402(a) for old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals. Notwithstanding any other provision of this section, persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over the age of 62.
- “(7) Both persons are capable of consenting to the domestic partnership.
- “(8) Neither person has previously filed a Declaration of Domestic Partnership with the Secretary of State pursuant to this division that has not been terminated under Section 299.
- “(9) Both file a Declaration of Domestic Partnership with the Secretary of State pursuant to this division.” (Stats. 2001, ch. 893, § 3.)

4 AB 25 amended section 377.60 of the Code of Civil Procedure not the Civil Code.

5 Background information requests are a proper source for ascertaining legislative intent. (*Florez v. Linens ‘N Things, Inc.* (2003) 108 Cal.App.4th 447, 452; *Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th 1481, 1499-1500; *Forty-Niner Truck Plaza, Inc. v. Union Oil Co.* (1997) 58 Cal.App.4th 1261, 1284, fn. 11.)

6 At no time in their demurrers did defendants argue that the 2002 version of the wrongful death statute could not be applied retroactively in this case. On appeal, Sherman Oaks Hospital concedes “that [Dana’s] passing falls within the time limits dictated by A.B. 25.”

7 In addressing defendants’ due process concerns, we have restricted ourselves to those specific and limited arguments raised by defendant. We observe, however, that *Bouley v. Long Beach Memorial Medical Center* (March 15, 2005; B168667) \_\_\_ Cal.App.4th \_\_\_ [2005 D.A.R. 3103], recently decided by Division Five of this Court, contains an expanded and well-reasoned discussion as to why the retroactive application of the 2002 and 2005 amendments to the wrongful death statute does not violate due process. (At pp. 3104-3106.)

8 *Cunningham v. Superior Court* (1986) 177 Cal.App.3d 336, cited by Sherman Oaks Hospital, is factually inapposite and does not establish an equal protection violation in this case.

Damage Caps *continued from page 315*

awards. The tactics include emphasizing medical expenses, expanding the definition of economic damages and putting dollar values on things like domestic services (cooking, cleaning, home maintenance, bookkeeping) a spouse provided before injured.

**Publication:** Sharkey's study, "Unintended Consequences of Medical Malpractice Damages Caps," will appear in the May 2005 issue of the *New York University Law Review*. For an abstract, go to [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=668023](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=668023). ❖

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On appeal to the Superior Court, the plaintiffs, **Helen Choma** and her husband, and the defendant Dr. **Manny Iyer**, asserted that their disagreement centered on the reconstructive surgery method Iyer should have used following Helen's mastectomy.

The Superior Court disagreed. After sifting through the trial evidence, the court concluded the parties actually agreed that the TRAM flap procedure Iyer performed was the appropriate form of reconstructive surgery. Additionally, both parties agreed the procedure should not be used when a patient is extremely obese. The real issue was whether Helen was extremely obese.

The dispute was not about the course of treatment and therefore the "two schools of thought" doctrine did not apply. *Choma v. Iyer*, 2005 Pa. Super. Lexis 379 (Mar. 16, 2005). ❖

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