IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,251

FLORIDA PATIENT'S COMPENSATION FUND, :

Petitioner,

vs. :

SUSAN ANN VON STETINA, by and through her parents, legal guardians and next friends, MARY VON STETINA and LEO VON STETINA, :

Respondents. :

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ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF AMICUS CURIAE, FLORIDA DEFENSE LAWYERS ASSOCIATION

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TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT

SECTION 768.56 VIOLATES THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS 2

A. The Legislative Classification Must Involve a Legitimate Purpose in Order to be Valid Under the Equal Protection Clauses 4

B. The Legislative Classification Must Bear a Reasonable, or Rational, Basis to the Legislative Goal 12

CONCLUSION 19

CERTIFICATE OF SERVICE 20

TABLE OF CITATIONS

	Page
Cases	
Atlantic Coast Line R. Co. v. Ivey, 148 Fla. 680, 5 So.2d 244 (1941)	13
Brown v. Central Bermudez Co., 162 Ind. 452, 69 N.E. 150 (1903)	11
Burns v. Shepherd, 264 S.W.2d 685 (Ky. 1953)	10
Engebretsen v. Gay, 158 Cal. 30, 109 P. 880 (1910)	11
Farmers' & Merchants' Ins. Co. v. Dobney, 189 U.S. 301 (1903)	8
Georgia Southern and Florida Railway Company v. Seven-Up Bottling Company of Southeast Georgia, Inc., 175 So.2d 39 (Fla. 1965)	3
Hamilton v. State, 214 So.2d 26 (Fla. 4th DCA 1968)	15
Hunter v. Flowers, 43 So.2d 435 (Fla. 1949)	7
In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980)	2
Jacksonville, T. & K.W. Ry. Co. v. Prior, 34 Fla. 271, 15 So. 760 (1894)	10
Kansas City So. Ry. Co. v. Anderson, 233 U.S. 325 (1914)	10
Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972)	12

Page

Liquor Store Inc. v. Continental Distilling Corp.,
40 So.2d 371, 374 (Fla. 1949)...................... 15

New Mexico Highway Dept. v. Bible,
38 N.M. 372, 34 P.2d 295 (1934).................... 8

Orr v. Orr,
440 U.S. 268, 99 S.Ct. 1102,
59 L.Ed.2d 306 (1979)............................. 16,17,18

Pomponio v. Claridge of Pompano
Condominium, Inc.,
378 So.2d 774 (Fla. 1979).......................... 6

Rollins v. State,
354 So.2d 61 (Fla. 1978)........................... 4,5

Spicer v. Benefit Assn. of Ry. Employees,
142 Or. 588; 21 P.2d 187 (1933).................... 9

State ex rel. Fulton v. Ives,
123 Fla. 401, 167 So. 394 (1936)................... 4

State ex rel. Gore v. Chillingworth,
126 Fla. 645, 171 So. 649 (1936)................... 7

State v. Lee,
356 So.2d 276 (Fla. 1978).......................... 4

Vermont Mutual Insurance Co. v. Bolding,
381 So.2d 320 (Fla. 5th DCA 1980).................. 9

Wilder v. Wright,
278 So.2d 1 (Fla. 1973)............................ 9

Others

Spence, Closing the Courthouse Door:
Florida's Spurious Claims Statute,
10 Stetson L.Rev. 397 (1981)....................... 5

Annot. 90 A.L.R. 530.................................. 8

Annot. 11 A.L.R. 884.................................. 8

Fla. Const. Article 16, Section 22 (1885)............. 7

Section 57.105, Florida Statutes...................... 12

Page

Section 427.428 9

Section 768.06, Florida Statutes 3

Section 768.56, Florida Statutes 1,2,3,4
.... 7,8,12,15
.... 19,22,24

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INTRODUCTION

This brief is filed on behalf of Amicus Curiae, Florida Defense Lawyers Association, in support of the position taken by Petitioner, Florida Patient's Compensation Fund. This brief is addressed solely to the constitutionality of Section 768.56 of the Florida Statutes, which provides for an award of attorneys' fees to the prevailing party in medical malpractice actions.

STATEMENT OF THE CASE AND FACTS

The Florida Defense Lawyers Association adopts the Statement of the Case and the Issues and Statement of the Facts contained in the Appellant's Initial Brief in Case Number 64,237.

ARGUMENT

SECTION 768.56 VIOLATES THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

The rational basis test, generally employed in equal protection analysis, requires that a statute bear some reasonable relationship to a legitimate state purpose. To be held unconstitutionally violative of the equal protection clause, the statutory classification "must cause different treatments so disparate as relates to the difference in classification so as to be wholly arbitrary." In re Estate of Greenberg, 390 So.2d 40, 42 (Fla. 1980).

The express purpose of Section 768.56 is to screen out "claims lacking in merit" and "enhance the prompt settlement of meritorious claims." To accomplish that purpose, the Legislature has imposed a mandatory financial requirement on solvent medical malpractice litigants who for whatever reason, do not settle, and ultimately suffer an adverse verdict. This burden,[1] not imposed upon other tort litigants, infringes on the right of litigants to have their claim or defense determined in a court of law. Medical malpractice cases, like many other kinds of tort litigation, often involve close questions -- questions which the trier of fact can often resolve only by weighing conflicting evidence.

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1 The attorney's fees award in this case, $1.5 million (as amended by the Fourth District Court of Appeal), exemplifies just how heavy this burden can be.

Litigants who reasonably believe they have a valid claim or defense should be able to present that claim or defense to the trier of fact, without the mandatory burden imposed by Section 768.56. Because of the complexity of most medical malpractice cases, it is often difficult for the parties to accurately determine the question of liability -- and yet, they are subject to the penalty of Section 768.56 unless they determine liability, and arrive at a settlement, prior to trial.

Section 768.56 permits prevailing parties in medical malpractice actions to recover their attorneys fees, distinguishing such actions from all other forms of noncontractual tort litigation. To paraphrase this Court in Georgia Southern and Florida Railway Company v. Seven-Up Bottling Company of Southeast Georgia, Inc., 175 So.2d 39, 40 (Fla. 1965), the instinctive reaction of all persons -- laymen and lawyers alike -- to such a singling out of one class of litigants for the imposition of such a burden should be one of surprise, shock and a feeling that the Legislature has violated the rules of fair play. In that case, the Supreme Court struck down Florida Statute Section 768.06, which singled out railroad companies as answerable in damages proratable with comparative negligence, when all other tort defendants enjoyed the affirmative defense of contributory negligence as a complete bar to liability.

The mere legislative establishment of a classification does not bar further inquiry into the validity of that classifi-

cation. Rollins v. State, 354 So.2d 61 (Fla. 1978). See also, State v. Lee, 356 So.2d 276 (Fla. 1978) (good drivers' incentive fund unconstitutional). The distinctions drawn must have some basis in practical experience. The courts will not sustain legislative classification upon hypothesis, but must ascertain clearly enunciated purposes to justify the continued existence of the legislation. Rollins at 64.

Although deference should be given to legislative determinations, this Court should not accept an articulated reason if it is found to be illusory.

> The Legislature cannot decide the question of emergency and regulations free from judicial review. The legitimacy of the conclusions drawn from the facts is a matter for consideration by the court. [State ex rel. Fulton v. Ives, 123 Fla. 401, 167 So. 394, 401 (1936)].

A. The Legislative Classification Must Involve a Legitimate Purpose in Order to be Valid Under the Equal Protection Clauses.

The equal protection clauses of the Florida and United States Constitutions require that a legislative classification bear a reasonable relation to a legitimate purpose. The principal purpose of Section 768.56, as stated in its preamble, is to discourage non-meritorious medical malpractice claims, thereby avoiding anticipated increases in professional liability insurance premiums and preventing a curtailment of the availability of health care services. Yet, there is no

difference between medical malpractice litigation and other tort litigation with regard to nonmeritorious claims. There is no evidence that the situation in the professional liability insurance market is so different than that in the liability insurance market in general as to justify discriminatory treatment. See, Spence, Closing the Courthouse Door: Florida's Spurious Claims Statute, 10 Stetson L.Rev. 397 (1981). See especially footnotes 20 and 23 and accompanying text.

In Rollins v. State, 354 So.2d 61 (Fla. 1978), the defendant was prosecuted under a statute which prohibited the owners of billiard parlors from admitting persons under 21. Owners of other types of establishments were not subject to the law. The asserted justification for the statute was that billiard parlors attracted undesirable characters, thereby providing a deleterious atmosphere for minors. The court agreed with the defendant that there was no practical difference between billiards played in a billiards parlor and billiards played in a bowling alley and thus invalidated the statute. Similarly, there is no real difference between frivolous claims and increasing insurance costs in the medical malpractice area and frivolous claims and increasing insurance costs in other areas.

The concern which the Legislature articulated in the preamble to Chapter 80-67 was that the striking of the medical mediation panel legislation might cause "a marked destabilization of the professional liability insurance marketplace and a

dramatic increase in professional liability insurance premiums" which "will be felt through significant increases in the costs of health care services and the imminent danger of a drastic curtailment in the availability of health care services." The Legislature found in 1980 that this prospect of future impact created a "present crisis" in the malpractice liability insurance market.

In an analogous situation, this Court held under the compelling governmental interest test, that an undocumented threat of harm was insufficient to warrant an impairment of private contracts by the state. Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1979). In that case, this Court invalidated a law requiring the payment of disputed condominium leasehold rents into the registry of the court pending the outcome of litigation. Although the law's purposes were not expressly stated, as they are here, the court rejected the preferred justification that the law was designed to protect unit owners from foreclosure for non-payment of the rents:

> There is to our knowledge neither a documented threat of massive condominium foreclosures in Florida nor any documentation of the underlying premise that unit owners would withhold rents from landlords pending litigation with them. [378 So.2d at 781].

Where important personal rights are involved, as here, a speculative future crisis is not, as a matter of law, a legitimate state purpose.

A review of cases in which other attorneys' fees statutes have been upheld is another way to analyze the constitutionality of Section 768.56. Judicial decisions indicate that non-arbitrary and non-discriminatory attorneys' fee statutes are valid to protect or penalize persons for certain substantive conduct which the government has an interest in promoting or deterring. In no case has an attorneys' fees statute been upheld which had as its sole purpose the penalizing of one's resort to a court of law for the determination of a legitimate claim.

Two classes deemed worthy of special protection are laborer's lien and worker's compensation claimants. In Hunter v. Flowers, 43 So.2d 435 (Fla. 1949), this Court noted that the Florida Constitution indicated a strong policy in favor of protecting laborer's liens, and upheld a statute authorizing recovery of attorneys' fees by successful claimants in summary proceedings to enforce laborer's liens. Article 16, Section 22 required that "the Legislature shall provide for giving to mechanics and laborers an adequate lien on the subject-matter of their labor." Hunter, 43 So.2d 36, citing State ex rel. Gore v. Chillingworth, 126 Fla. 645, 171 So. 649, 655 (1936) and Fla. Const. Article 16, Section 22 (1885). This Court emphasized the public policy furthered by ensuring that laborers recover their wages and of their importance to the economy as a whole:

> The wages paid to laborers are the very foundation of the security of their firesides, as well as of the entire economy of our country. In practically

> all cases today, these wages are the only source of income they have to maintain their families and prevent their becoming charges upon the community. [43 So.2d at 437].

Statutes providing attorneys' fees for worker's compensation claimants have also generally been upheld. The rationale for paying a successful worker's compensation claimant's attorney's fee is obvious. The entire purpose of worker's compensation laws is to provide a definite and immediate flow of income to injured workers to compensate them for economic losses resulting from work-related injuries. This right to compensation frequently precludes other forms of relief the worker might otherwise seek. Therefore, it is manifestly appropriate to the efficacy of such programs to require an employer who improperly delays a payment of worker's benefits to compensate the worker for his costs in obtaining that to which he was statutorily entitled without delay, especially when the amounts due were statutorily-prescribed. See New Mexico Highway Dept. v. Bible, 38 N.M. 372, 34 P.2d 295 1934): Annot. 90 A.L.R. 530; Annot. 11 A.L.R. 884.

It is also permissible for the legislature to enact attorneys' fees statutes to penalize certain types of conduct which society has a right to prevent. Examples of such legislation are statutes requiring insurance companies to pay attorneys' fees to successful insureds in actions to recover claims the companies have refused to pay. See e.g., Farmers' & Merchants'

Ins. Co. v. Dobney, 189 U.S. 301 (1903); Spicer v. Benefit Assn. of Ry. Employees, 142 Or. 588; 21 P.2d 187 (1933). The courts have upheld such unilateral attorneys' fees statutes because insurance companies' conduct was deemed to be vexatious by withholding money they were contractually obligated to pay and forcing an insured to sue.

In Wilder v. Wright, 278 So.2d 1 (Fla. 1973), this Court recognized that the Florida statute governing attorneys' fees in suits against insurance companies, Section 427.428, was intended to govern the relationship between the contracting parties to the insurance policy. The court adopted the holding of the district court as follows:

> The purpose of the statute is to discourage contesting of valid claims of insureds against insurance companies and to reimburse successful insureds reasonably for their outlays for attorney's fees when they are compelled to defend or to sue to enforce their contracts (emphasis added) [278 So.2d at 3].

Accord, Vermont Mutual Insurance Co. v. Bolding, 381 So.2d 320, 323 (Fla. 5th DCA 1980).

Thus, the rationale behind awarding attorneys' fees to claimants who prevail in their suits against the insurance companies with whom they contracted, is to penalize such companies for breaching their contractual duty to pay a valid claim. In the context of medical malpractice litigation, that same rationale does not exist.

The element of unreasonableness or vexatiousness is important. The Supreme Court of Kentucky struck down a worker's compensation attorneys' fees statute which failed to distinguish between employers willfully attempting to escape a statutory responsibility and employers acting in good faith. Burns v. Shepherd, 264 S.W.2d 685 (Ky. 1953). The only prerequisite to payment of attorney's fees under the Florida Malpractice Attorney's Fee Statute is that the other party prevails. It intends to punish litigants merely for exercising their right to litigate their claim or defense.

Statutes providing for attorney's fee awards in favor of successful claimants against railroad companies have also been held valid. For example, in Jacksonville, T. & K.W. Ry. Co. v. Prior, 34 Fla. 271, 15 So. 760 (1894), this Court upheld such a fee provision against a railroad company who refused to pay for damages to livestock caused by its failure to maintain a fence. It said the public had an interest in the maintenance of fences by railroads as protection against accidents to life and property, and that having to pay attorneys' fees was an acceptable method to ensure that railroads comply with the fencing statute.

The special duty traditionally imposed upon common carriers has also been cited to justify other such statutes. For example, in Kansas City So. Ry. Co. v. Anderson, 233 U.S. 325 (1914), the Court rejected the rationale that the statute should be upheld as one seeking primarily to enforce the payment of

debts. The rule was justified, however, as a method for compelling the performance of duties which the carrier assumed when it accepted its public function.

Several other decisions could instructively be canvassed. But one final example should suffice to illustrate the principle underlying valid attorney's fee statutes. Courts have upheld the assessment of attorney's fees as a penalty for delinquency in the payment of taxes. The public interest in enforcing the payment of taxes is obvious, and the sanction of attorneys' fees against a delinquent taxpayer has been held to be a reasonable and logical extension of the state's taxing power. See, e.g. Engebretsen v. Gay, 158 Cal. 30, 109 P. 880 (1910); Brown v. Central Bermudez Co., 162 Ind. 452, 69 N.E. 150 (1903). Again, it is the underlying substantive conduct which implicates public policy justifying the attorney's fee penalty for litigation arising out of that conduct.

In sum, the areas in which attorneys' fees statutes have been upheld are narrow.[2] These are areas (1) in which the law has attempted to protect certain people because of a para-

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2 This proposition does not purport to undermine the validity of statutes such as Section 57.105, Florida Statutes, which provides for attorney's fees to be awarded against litigants who assert spurious claims or defenses. The assertion of a claim or defense found to warrant such an award may by itself be deemed vexatious conduct and be penalized. But statutes providing for attorney's fees in particular classes of litigation, either unilaterally or for a prevailing claimant or defendant, penalizing litigation per se and not vexatious conduct, cannot be countenanced.

mount public purpose; or (2) which justify the imposition of a penalty for failing to adhere to a certain standard of substantive conduct. It is not a sufficient public purpose to penalize one's resort to courts of justice for nothing more than the determination of one's reasonably disputable legal rights.

The Fourth District thus erred in summarily upholding Section 768.56 on the ground that there exist numerous attorneys' fees statutes in this state.

B. The Legislative Classification Must Bear a Reasonable, or Rational, Basis to the Legislative Goal.

The purported purpose of Section 768.56 is to inhibit non-meritorious claims. However, it penalizes meritorious claims as well as non-meritorious claims by penalizing all losing parties. The fact that a plaintiff does not prevail in a lawsuit does not mean that his claim had no merit. A plaintiff's verdict does not mean that the defense was completely lacking in merit. Many cases involve close questions of law or fact; for example, cases involving architect and engineer liability and products liability cases. Florida already has a statute, Section 57.105, which allows a judge to award attorney's fees to a prevailing party if there are no justiciable issues of law or fact. That statute is a sufficient deterrent to frivolous claims or defenses.

In Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972), the Court invalidated an Oregon statute which

required a tenant who wished to appeal from an adverse decision in an eviction proceeding to post bond for twice the amount of rent expected to accrue pending the appellate decision and to forfeit the entire double bond if the lower court decision was affirmed. The Supreme Court stated:

> The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford bond. [405 U.S. at 78; 31 L.Ed.2d at 53].

Since the tenant was confronted by a "substantial barrier to appeal faced by no other civil litigant in Oregon," the requirement was arbitrary and irrational, thereby violating equal protection. 405 U.S. at 79, 31 L.Ed. 2d at 54. Similarly, since Section 768.56 is not reasonably tailored to discourage insubstantial claims and since it creates a substantial barrier to medical malpractice litigants, not faced by other civil litigants in Florida, it is unconstitutional under the equal protection clauses.

In <u>Atlantic Coast Line R. Co. v. Ivey</u>, 148 Fla. 680, 5 So.2d 244 (1941), this Court struck down legislation that imposed a penalty upon the railroad for livestock struck by a passing train. Under the statute, the owner of an animal killed by a train was entitled to recover its value plus $50 attorneys' fees without proof of negligence. This Court noted that if the same

animal was killed when struck by a truck on a highway in the same location, the trucking company would only be liable for the value of the animal, upon proof of negligence. As this Court said, "this certainly is not equal protection of the law." Id. at 247.

The same applies here. If a plaintiff is injured through medical negligence by a hospital, the hospital must respond in damages, plus attorneys' fees as a penalty. If the plaintiff slips and falls in a hospital, the hospital is only liable for damages. Likewise, a patient may unsuccessfully sue a hospital for a slip and fall injury without penalty, but must reimburse the hospital its attorneys' fees in an unsuccessful medical negligence case. This certainly is not equal protection of the law.

In addition to the statutory classification of medical malpractice/non-medical malpractice, the Statute also imposes a classification on the basis of wealth. The statutory mandate is not imposed on nonprevailing parties who are insolvent or poverty stricken. An analysis of that classification demonstrates the infirmity in the statute. Because insolvent or poverty stricken parties will not be required to pay the prevailing party's attorneys' fees, they will not be encouraged to settle. They have nothing to lose by going to trial. Because more often than not it will be the plaintiff, and not the defendant, who is insolvent or poverty stricken, the statute primarily operates to encourage solvent defendants to settle.

Likewise, the insolvent or poverty stricken plaintiff is not deterred from bringing a non-meritorious claim. It is only the financially responsible plaintiff and the solvent medical practitioner who suffer from the penalty of Section 768.56. Equal protection of the law means equal rights for the rich as well as the poor. Hamilton v. State, 214 So.2d 26 (Fla. 4th DCA 1968). Legislation premised upon police power is restricted to those things which of necessity affect public morals, health or safety. Promotion of the general welfare is the antithesis of legislation that subordinates the right of one group of citizens to advance the welfare of another. A statute cannot be the means of leveling unequal fortunes, favoring one segment of the people at the expense of another. Liquor Store Inc. v. Continental Distilling Corp., 40 So.2d 371, 374 (Fla. 1949).

There is clearly a lack of mutuality in the practical application of Section 768.56. Because, more often than not, it will be the plaintiff who is insolvent or poverty stricken, there is no quid pro quo in the average case. Defendants -- medical practitioners, hospitals and insurance companies -- will almost always have to pay the plaintiff's attorneys' fees when the plaintiff prevails. The plaintiff, however, more often than not will be immune from that obligation.

Aside from these irrational elements of the statute, part of the statutory scheme is vaguely drawn. One of the statutory provisions is as follows:

> When there is more than one party on one or both sides of an action, the court shall allocate its award of attorney's fees among prevailing parties and tax such fees against nonprevailing parties in accordance with the principles of equity.

That provision does not consider the effect of a settlement among some parties, a counterclaim of one or more defendants, one or more crossclaims, third party actions, or where the plaintiff prevails against one but not all of defendants. Too much discretion is left with the trial court, with no guidelines provided so that the court may apply "principles of equity." The statute also does not address the situation where there are multiple defendants, one or more of whom are not subject to the statute: for example, where one of the defendants is a nurse. Similarly, there is no standard in the statute for determining when a party is "insolvent or poverty stricken." These vague phrases are deficient since they do not inform the parties in advance with reasonable certainty what will be required of them.

In Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979), the Court considered an equal protection challenge to a gender-based Alabama statute, which provided that husbands, but not wives, could be required to pay alimony upon divorce. The statute was reviewed by the Court to determine whether the gender-based classification imposed by the statute served important governmental objectives and was substantially related to the

achievement of those objectives.[3] The statute did not withstand this scrutiny and was held violative of equal protection.

The Court observed that under the Alabama statute, only a financially secure wife whose husband was in need derived an advantage from the law, as compared to a gender neutral one. The arguable rationale for the statutory scheme was to provide help for needy spouses, using sex as a proxy for need, and to compensate women for past discrimination during marriage, which assertedly has left them unprepared to fend for themselves in the working world after a divorce. The Court held that these considerations did not justify the statute because in Alabama, individualized hearings were held to consider the parties' relative financial circumstances. Since such hearings could determine the relative need of the spouses, as well as which wives were in fact discriminated against, there was no reason to operate by generalization.

The _Orr_ case contains two parallels to the question under consideration here. First, in _Orr_ only a financially secure wife whose husband was in need derived an advantage from the statute; here, under Section 768.56, only a solvent medical malpractice litigant is affected. The insolvent or poverty stricken litigant is not affected at all. Second, in _Orr_ a case by case

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3 Although in _Orr_ the Court utilized the middle level of scrutiny test (important governmental interest substantial relationship), the case is nevertheless analogous to the instant case.

determination could be made at hearings routinely held; here, a case by case determination can be made by the trial court, which is in a position to review the merits of the claim and defense, and the settlement positions taken by all parties. The trial court is familiar with the case, the positions each side has taken with respect to liability, and knows what settlement offers have been made but refused. Just as in Orr, the mandatory attorney's fee provision here is not justified because individualized determinations can easily be made without the need for a generalization.

Because the legislature has not shown a legitimate governmental interest, and because the statute bears no reasonable relationship to the legislative goal, it should be declared unconstitutional, as violative of the equal protection clauses of the Florida and United States Constitutions.

CONCLUSION

The Florida Defense Lawyers Association urges this Court to determine that Section 768.56 is unconstitutional, as violative of the equal protection clauses of the United States and Florida Constitutions.

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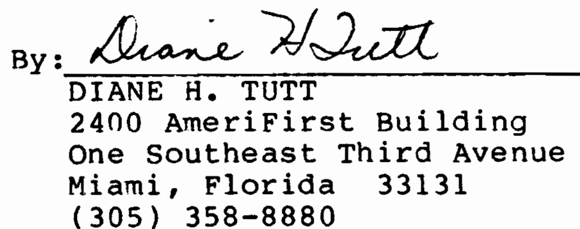

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I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amicus Curiae was mailed this 7th day of December, 1983 to all counsel listed on the attached service list.

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