IN THE

SUPREME COURT OF FLORIDA

NANCY C. VILDIBILL, etc.,

Appellant,

vs.

EDDIE JOHNSON, et. al.,

Apellees.

CASE NO. 67,398

ON CERTIFICATION FROM

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

BRIEF OF

AMICUS CURIAE

STEPHEN R. SCHMIDT

DONALD. L. TUCKER, P.A.
Suite 804
215 South Monroe Street
Tallahassee, Florida 32301
(904) 222-5171

ATTORNEYS FOR AMICUS
CURIAE SCHMIDT

see address change 3-10-86

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STATEMENT OF THE CASE

Amicus Curiae Schmidt adopts the statement of the case made by the United States Court of Appeals for the Eleventh Circuit as reported at 766 F.2nd. 464.

SUMMARY OF ARGUMENT

The 1981 Florida Legislature amended the Wrongful Death Act to provide recovery of net accumulations when the decedent: (a) is not a "minor child", and (b) does not have "survivors". The drafters of the 1981 amendment testified as to the intent of the amendment to provide recovery of net accumulations to the non-dependent parents of an adult decedent. The Court must give full effect to the legislative intent, even if the literal words of the statute contradict that intent.

A Florida trial court has ruled that non-dependent parents of an adult decedent constitute "survivors" within the meaning of § 768.21(6)(a)2 so as to preclude the estate's recovery of net accumulations. Made aware of such ruling, the 1985 legislature passed an amendment to overrule the trial court. As a remedial measure affecting only the measure of damages, the 1985 amendment may properly be applied retroactively.

If the statute is construed to preclude recovery of net accumulations by the mere existence of non-dependent parents as "survivors", the statute creates an irrational classification which violates the constitutional guarantee of equal protection of the law. Another reasonable construction of the statute is available and it is the Court's duty to adopt the construction which avoids constitutional infirmity.

ARGUMENT

I. THE LEGISLATURE INTENDED TO PROVIDE A REMEDY FOR THE PARENTS OF AN ADULT DECEDENT.

A. The Intent Of The Legislature Governs Interpretation Of The Statute.

It is so fundamental as to be incontrovertible that when the intent of the legislature is discernible from the face of a statute, the courts must apply the statute in a manner which adheres to the purpose for which it was enacted. Many sections of the Florida Statutes contain a direct expression of legislative intent actually enacted into law for the guidance of the courts. See, e.g, § 768.17, Fla.Stat. 1983. Moreover, the courts also recognize that the legislative body is composed of fallible human beings who might, on occasion, err in the choice of words to accomplish their purpose in enacting a statute. When the intent of the legislature is known, the courts apply that intent - even if it is directly contrary to the literal wording of the statute.

> It is a fundamental rule of statutory construction that the legislative intent is the polestar by which the court must be guided, and this intent must be given effect even though it may contradict the strict letter of the statute. State v. Webb, 398 So.2d. 820, 824 (Fla. 1981).

* * * * *

> Nor is this a situation justifying departure from the plain literal meaning of the statute. Such a departure is permitted when a literal interpretation would lead to an illogical result or one not intended by the lawmakers. (Emphasis added). Parker v. State, 406 So.2d. 1089, 1091 (Fla. 1982).

* * * * *

> This literal requirement of the statute exhalts form over substance to the detriment of public policy, and such a result is clearly absurd. It is a basic tenet of statutory construction that statutes will not be interpreted so as to yield an absurd result. Woollard v. Lloyd's & Companies of Lloyds, 439 So.2d. 217, 218-219 (Fla. 1983).

The words of this Court apply directly to the absurd results which would be compelled by literal reading of the word "survivors" in § 768.21(6)(a)2 to preclude recovery of net accumulations by the surviving parents of an adult decedent. That is, if the parents of Steven Allen Paul were no longer alive, the Appellees would be liable to his estate for the prospective net accumulations. Yet, because his parents are still alive, the Appellees argue that the estate cannot claim net accumulations. There is no principled and rational distinction which could be made based upon the mere happenstance of whether an adult's parents are alive or dead at the instant that a tortfeaser causes his wrongful death. This is especially true where -as here - the parents were not dependent upon the deceased and therefore have no independant claim for lost support (§ 768.21(1)), and have no claim for pain and suffering accompanying the loss of their adult child (§ 768.21(4)).

Notwithstanding the absurd result reached by such a literal reading of the statute, such an irrational distinction would appear to violate the equal protection clause of the Florida Constitution. That is, the estate of Steven Allen Paul would be deprived of allegal claim for the prospective net accumulations on the basis of an irrational classification in the statute:

the classification between the estates of persons whose parents were alive at the time of the child's death, and the estates of those persons whose parents were dead at the time of the child's death.

B. The Legislature Intended To Create A Recovery For Parents Of Adult Decedents.

1. In order to correctly discern the intent of the Legislature, it is necessary to trace the history of § 768.21(6)(a).

a. Prior to the 1981 amendment discussed below, the only authority for a claim for net accumulations was contained in the last sentence of § 768.21(6)(a), which read as follows:

> If the decedent's survivors included a surviving spouse or lineal descendants, loss of net accumulations beyond death and reduced to present value may also be recovered. See, § 768.21(6)(a), Fla. Stat. 1979. (Appendix, Tab "A").

b. In 1981, Chapter 81-183, Laws of Florida, amended § 768.21(6)(a) by adding the following words to the above-quoted sentence after the words "lineal descendants."

> ...or if the decedent is not a minor child as defined in subsection (2) of § 768.18 and does not have survivors as defined in subsection (1) of § 768.18, loss of the prospective net accumulations of an estate, which might reasonably have been expected but for the wrongful death, reduced to present money value, may also be recovered. See, Chapter 81-183, Laws of Florida. (Appendix, Tab "B").

c. Chapter 81-183 was the result of a compromise reached by the Florida Senate on the original version of Senate Bill 150 (SB 150), drafted by Senator Steinberg, and an amendment

drafted by Senator Barron. See, Senate Bill 150 (Appendix, Tab "C") and the Barron Amendment to Senate Bill 150 (Appendix, Tab "D").

2. a. Senator Steinberg's original version of SB 150 would have made numerous and sweeping changes to the Wrongful Death Act. See, Appendix, Tab "C". Of direct concern to this case is his proposed change to § 768.21(6)(a). Senator Steinberg's proposal would have changed the law in such a manner that the prospective net accumulations could be recovered in all cases of wrongful death, without exception. Under Senator Steinberg's proposal, the last sentence of § 768.21(6)(a) would have read:

> Loss of the prospective net accumulation of an estate, which might reasonably have been expected but for the wrongful death, reduced to present money value, may also be recovered. (Tab "C", p. 3, l. 12-15).

b. It is worthy of note that Senator Steinberg's proposal also would have made non-dependent natural brothers and sisters "survivors" (Tab "C", p. 1, l. 24), and permitted all survivors to sue for their own mental pain and suffering, (Tab "C", p. 2, l. 28), as well as preserving the pain and suffering claims of the decedent himself. (Tab 'C", p. 2, l. 13-15). In short, Senator Steinberg's proposal would have made a dramatic increase in the monetary damages for which a tortfeasor could be liable in a wrongful death action.

c. Senator Barron's proposed amendment to Senator Steinberg's bill contained only two changes to the existing

Wrongful Death Act. The first change involved deleting the words "dependent unmarried" from the definition of "minor children" and changing the age of "minor children" from 21 to 25 years. (Tab "D", p. 1., l. 4-5). The second change was the addition of the language to § 768.21(6)(a) which is in issue in this case. (Tab "D", p. 2., l. 2-8).

3. a. On March 3, 1981, Senator Steinberg's SB 150 and Senator Barron's proposed amendment were considered by the Senate Commerce Committee. See, Appendix, Tab "E". Both Senator Steinberg and Senator Barron described to the committee the purposes and intent of the proposed changes to the Wrongful Death Act. From the examples given in their explanations, it is clear that both Senator Steinberg and Senator Barron intended and thought that the legislation they had drafted would provide for the recovery of net accumulations by the estate of an "adult child" whose parents are still alive. That is, both drafters of the proposed legislation - and the Senators to whom those drafters explained their intentions - believed that the precise situation presented in Steven Allen Paul's death would be covered by the provision for recovery of net accumulations by the estate.

b. Senator Steinberg described a situation which SB 150 was intended to address, a situation virtually identical to the situation involving Steven Allen Paul. Both the young girl in Senator Steinberg's example and Mr. Paul were over the statutory age limit defining "minor children." (The young woman was 22 years old at the time when § 768.18(2) specified

21 years of age; Mr. Paul was 25 years old at the time when that section specified 25 years of age.) Senator Steinberg stated,

> ...the parents could not believe that there was no compensation in Florida for the loss of a loved one.
>
> This bill was designed to cure some of those problems. (Tab "E", p.3, l. 9-12).

It is obvious that the young girl's parents were also "survivors" within the meaning of § 768.18(1). It is equally clear that Senator Steinberg believed that the bill being presented would provide for recovery by the parents of the assets which would have been accrued by their daughter during the course of her life expectancy.

> In other words, a parent with a child over 21, although that parent may not be dependent today, very simply might need that child's support later. (Tab "E", p.3, l. 1-3).

c. Senator Barron addressed the committee regarding the effects of his proposed amendment. Senator Barron gave a specific example of a situation addressed by his amendment which is identical to the situation of Steven Allen Paul, in that it involved an "adult" (over 25 years of age) who left no one dependent upon him.

> That left us one category of people that we didn't address, and that was a person 40 years old that left no one dependent upon them for support but that was a victim of a wrongful death; and we provided that that person out there -- and it would be very few of those who has neither a parent or a child or wife or someone dependent upon them for support -- that their estate would have a cause of action for the net accumulation of loss of prospective estate. (Tab "E", p. 5, l. 12-20).

d. Senator Steinberg supported Senator Barron's amendment and specifically addressed the issue of who would be the beneficiaries of the "net accumulation" provision which was to be added to the Wrongful Death Act.

> Having a net accumulation statute, allowing an individual's estate, regardless of who the beneficiary may be, his parents, his children, or third-parties to collect the value of that individual's estate reduced to present money value; in other words, when you take a life, you are figuring what this individual would have earned and produced for his normal dependents, reduce it to today's value, and that's what the estate will be able to collect.
>
> I think that is the minimum you can give the prospective beneficiaries of someone's life on earth when someone improperly takes that life away from them. (Emphasis added.) (Tab "E", p.6, l. 24 - p. 7, l. 10).

e. Ms. Elizabeth Duff addressed the committee and related the facts regarding the death of her 25 year-old divorced son and the effect of the Wrongful Death Act as it existed prior to the passage of the Steinberg/Barron bill. It is clear from Ms. Duff's recitation of facts that the situation presented in her son's case was precisely parallel to the situation of Steven Allen Paul. Both young men were over the statutory age of "minor children"; both were unmarried at the time of their death; both had parents still alive who were "survivors" within the meaning of 768.18(1). (Tab "E", p. 12, l. 17 - p. 14, l. 20).

f. Following Ms. Duff's presentation, Senator Steinberg discussed the effect on her son's situation which would occur under his bill, as amended by Senator Barron. Senator Steinberg

stated specifically that the net accumulations of the young man's estate would go to his surviving parents.

> The only thing that the individual in her case could get now under the amended -- the bill as amended, there would be a claim now for the loss of value for the prospective estate of this individual, something which did not exist at the time her son was killed; and, in her circumstances, since the son was not married, the claim would be to her and her husband; and, of course, once she would recover these funds, if they wanted to give those funds to the former wife who may have been dependent or work it out, she could have.
>
> So, she would do better, you know, if there can be a better when you lose the child. In other words, she financially would have some claim under the law as we are now amending it which she did not have in 1973 under the current statute. (Emphasis added.) (Tab "E", p. 15, l. 17- p. 16, l. 7).

4. It is manifest that the drafters of the 1981 changes to the Wrongful Death act intended that the estate of an "adult" who left no one dependent upon his support, but whose parents were still alive (i.e., "survivors"), would be entitled to the net accumulations which would reasonably accrue during the decedent's life expectancy. However, by referring to the definition of "survivors' in § 768.18(1), the drafters inadvertently created an irrational distinction in the statute which appears to defeat their clear intent. Yet, the courts are bound to give effect to the intent of the Legislature, even when their intent is poorly articulated, or in words which appear to contradict that intent. Webb, supra.

II. PRESENTED WITH A TRIAL COURT'S INTERPRETATION OF THE STATUTE, THE LEGISLATURE PASSED AN AMENDMENT TO OVERRULE THAT INTERPRETATION.

A. In A Virtually Identical Case, The Trial Court Ruled That Net Accumulations Are Not Available.

In the case of Schmidt vs. Gejo, et.al., Case No. 84-145, Second Judicial Circuit, Leon County, Florida, the trial court was faced with a situation identical to that presented in Villdibill vs. Johnson. Both young men were over the statutory age defining "minor children" and were unmarried at the time of the auto accident which resulted in their deaths. Both young men left no one dependent upon them for support and services, and both were surivived by non-dependent parents. In Schmidt v. Gejo, as in Villdibill vs. Johnson, the trial court ruled that § 768.21(6)(a)2, Fla.Stat. precluded the estate's recovery of net accumulations because the decedent's living parents constituted "survivors" within the meaning of that section. See, Appendix, Tab "F".

B. The Legislature Amended The Statute To Correct The Trial Court's Interpretation.

1. As previously noted, the legislative intent is the "polestar" by which statutory construction is to be guided. When the legislative body perceives that its intent has been misinterpreted, it holds the power to correct that misinterpretation.

> However, on decisions of statutory purpose and agency policy, the legislature always holds a trump, which is to amend the substantive statute. Gulf Coast Hospital, Inc. vs. Dept. of H.R.S., 424 So.2d. 86, 97 (Fla. 1st DCA 1982), Smith, CJ, specially concurring.

Although the Gulf Coast case involved an agency interpretation in the context of administrative hearing, the concept of the legislative "trump card" applies equally to the situation in which the legislature perceives that the courts have misinterpreted the statute.

2. Subsequent to the trial court's ruling on the meaning of "survivors" in § 768.21(6)(a)2 in the Schmidt vs. Gejo case, the undersigned attorneys presented the situation to various members of both houses of the Florida Legislature. There was general agreement that the 1981 amendment to the Wrongful Death Act was not intended to operate to the detriment of the living parents of a wrongful death victim. Both houses of the legislature overwhelmingly passed an amendment which specifically overrules the trial court's interpretation that surviving parents of an adult decedent precludes recovery of net accumulations from the tortfeasor. Chapter 85-260, Laws of Florida, 1985 (Appendix, Tab "G".) Having been presented directly with the trial court's erroneous order striking the claim for net accumulations in the Schmidt vs. Gejo case, the legislature played its "trump card" to bring the wording of the statute into conformity with the clearly expressed intent of the 1981 amendment to provide for recovery of net accumulations by the surviving parents of adult decedents.

C. The 1985 Amendment Is A Remedial Measure And May Properly Be Applied Retroactively.

1. The title which the legislature has seen fit to assign to § 768.21, Fla.Stat. is "Damages." Subsection (6) of that

section states, in pertinent part, "The decedent's personal representative may recover for the decedent's estate the following: .... " Accordingly, both before and after the 1985 amendment, § 768.21(6) addressed the measure of damages which could be recovered in pursuit of the substantive right to sue for wrongful death. Both before and after the 1985 amendment, the party who was entitled to recover was the estate of the decedent.

> A remedial statute is "designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good." It is also defined as "[a] statute giving a party a mode of remedy for a wrong, where he had none, or a different one, before." (Emphasis added). Adams vs. Wright, 403 So.2d. 391, 394 (Fla. 1981).

2. In Tel Service Co., Inc. vs. General Capital Corporation, 227 So.2d. 667 (Fla.1969), the Court held that a statute whose effective date was only twenty-eight days prior to the date of the Court's opinion was retroactively applicable to appellate proceedings in a case which had arisen more than five years before. Id., 673. The basis for the retroactive application was that the amendment involved only the measure of damages to be recovered, and therefore did not modify any substantive rights.

> Concomitantly, the question in Tel Service Co. involved the measure of damages to be recovered. Alteration of such measure of damages did not work any modification of fundamental substantive rights. Walker & LaBerge, Inc. vs. Halligan, 344 So.2d. 239, 243 (Fla. 1977).

It is long established Florida Law that a remedial statute which effects only the remedies available in a cause of action which already exists may be retroactively applied. Village of El Portal v. City of Miami Shores, 363 So2d. 275, 278 (Fla.

1978); Grammer v. Roman, 174 So.2d. 443, 446 (Fla. 2nd DCA 1965); City of Lakeland v. Cantinella, 129 So.2d. 133, 136 (Fla. 1961).

3. Thus, the 1985 amendment to §768.21(6)(a) presents a textbook example of a remedial statute which applies retroactively. That is: (a) there was a pre-existing substantive right for the estate to sue for wrongful death; (b) there was a pre-existing remedy for recovery of net accumulations under specified circumstances; (c) the 1985 amendment changed only the specified circumstances under which the pre-existing remedy applied (i.e. "the measure of damages recoverable"); and (d) the 1985 amendment was passed to overrule a trial court's ruling on the availability of the pre-existing remedy.

4. There is further evidence that the 1985 amendment was intended to clarify the intent of the legislature expressed in the 1981 amendment. The 1981 amendment was given specific effective date of application, making its new remedy applicable only to deaths occuring after July 1, 1981. See, § 3, Ch. 81-183, Laws of Florida, 1981. (Tab "B"). By contrast, the 1985 amendment was not specifically made prospective only, but was effective upon becoming law. See, § 2, Ch. 85-260, Laws of Florida, 1985. (Tab "G"). The legislature must be presumed to know the rule of law that remedial statutes may be applied to existing cases. Village of El Portal, supra, 278.

5. Moreover, even if the 1985 amendment were not to be applied retroactively, it still provides this Court with a reliable guidepost to the intent of the legislature in enacting

the 1981 amendment which expanded the circumstances under which the estate could recover net accumulations.

> ...we are not bound by statements of legislative intent uttered subsequent to either the enactment of a statute or the actions which allegedly violate the statute. However, we will show great deference to such statements, especialy in a case such as this, when the enactment of an amendment to a statute is passed merely to clarify existing law. State v. Lanier, 464 So.2d. 1192, 1193 (Fla. 1985).

Clearly, the committee testimony of Senators Steinberg and Barron demonstrates their belief that the legislation they had drafted would provide recovery of net accumulations when an adult decedent had surviving parents. Presented with a trial court's ruling to the contrary, the legislature responded with an amendment which specifically included the word "parent." It is evident that the legislature perceived that the court had misconstrued the intent of the 1981 amendment, and played its "trump card" to clarify the existing law. If this Court is to show great deference to such legislative statements, Lanier, supra; and if this Court is bound to apply the legislative intent even if it contradicts the literal wording of the statute, Webb, supra; then the only possible conclusion is that the 1981 amendment provides for recovery of net accumulations by the estate of Steven Allen Paul.

III. A LITERAL INTERPRETATION OF THE WORD "SURVIVORS" CREATES AN IRRATIONAL CLASSIFICATION WHICH VIOLATES EQUAL PROTECTION OF THE LAW.

A. The Statute Creates An Irrational Classification.

1. Assuming, arguendo, that the legislative intent was not so clearly documented by the testimony of Senators Steinberg

and Barron (Tab "E") and the 1985 amendment (Tab "G"), the Court would be bound by the legislative definition of "survivors". It could be forcefully argued that defeating the estate's claim for net accumulations by virtue of the inclusion of parents as "survivors" in § 768.21(6)(a)2 is in direct conflict with the expressed legislative intent to "...shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer." (Emphasis added). Section 768.17, Fla.Stat. 1983. However, a more fundamental problem is immediately apparent. If it is assumed that the legislature intended to foreclose a claim for prospective net accumulations when the parents of the decedent remain alive, the legislature has created an irrational classification which runs afoul of the equal protection guarantee of the state constitution. Art. I, § 2, Fla.Const. 1980.

2. For a statutory classification to pass muster under the equal protection clause, it must rest upon some difference which bears a just and reasonable relation to the purpose of the statute. Gammon v. Cobb, 335 So.2d. 261, 274 (Fla. 1976), citing to McLaughlin v. Florida, 379 U.S. 184 (1964). Under both the state and federal constitutions - in the absence of "suspect" classification, invasion of fundamental interests or invidious intent - all that is required is that the classification be rationally related to a legitimate state interest. Gluesenkamp vs. State, 391 So.2d. 192, 200 (Fla. 1981), citing to Jackson v. Marine Exploration Co., 583 F.2d. 1336, 1346 (5th Cir. 1978). However, it must be clear that the classification rests upon

some real difference of substance, rather than on a mere conceptual difference. Thus, statutes have violated equal protection guarantees when,

a. railroad and trucking companies were classified differently, even though both presented hazards to life and property by transportation activities; Atlantic Coast Line Railroad v. Ivey, 5 So.2d. 244, 247 (Fla., en banc, 1942):

b. deeds which conveyed more than one acre were classified differently than deeds conveying less than one acre, with no apparent reason for the different treatment; Kass v. Lewin, 104 So.2d. 572, 577-578, (Fla. 1958);

c. celery farmers were classified differently based upon whether or not they were producing celery during a selected two-year period, Rabin v. Conner, 174 So.2d. 721, 725 (Fla.1965);

d. dealers in beer and wine were classified differently than dealers in distilled liquor, where the purpose of the statute was to prevent restraint of trade, known as "tied-house" relationships; Castlewood International Corporation v. Wynne, 294 So.2d. 321, 324 (Fla. 1974);

e. married women with illegitimate children were classified differently than unmarried women with illegitmate children, where the purpose of the statute was to place responsibility for support of the illegitimate child upon the natural father rather than the state; Gammon v. Cobb, 335 So.2d. 261, 268 (Fla. 1976);

f. billiard parlors permitting minors to play billiards were classified differently than bowling alleys permitting minors to play pool; Rollins v. State, 354 So.2d. 61, 64 (Fla. 1978);

g. farming on platted land was classified differently than farming on unplatted land, where the purpose of the statute was to establish the present use of the land for tax purposes; Bass v. General Development Corporation, 374 So.2d. 479, 485 (Fla. 1979).

3. If the legislature had actuallly intended to foreclose the estate's claim for net accumulations based upon the existence of living parents, irrational results of such a statute become immediately apparent.

a. Where dependent surviving parents can claim lost support and services under § 768.21(1), a claim for net accumulations would be largely redundant. However, where the surviving parents are not dependent, (hence have no claim for lost support or services) there is no real and practical difference from where no parents survive (hence there is no claim for lost support and services).

b. Section 768.24 prescribes a limitation of support and services damages if dependent "survivor" dies before judgment. However, it is not at all clear at what point in time the non-dependent "survivors" are identified for purposes of the net accumulations clause of § 768.21(6)(a).

(1) At the instant of wrongful death: If the parents had died one day prior to the wrongful death of Steven Paul, the estate would have a valid claim for net accumulations, as there would be no "survivors." If, however, the parents died on the way to Steven's funeral, would their existence as "survivors' at the time of Steven's death foreclose the estate's claim for net accumulations?

(2) At the instant the case is filed: If the parents died after Steven's death, but the day before the case was filed, the estate would have a valid claim for net accumulations, as there would be no "survivors". If, however, the parents

died one day after the case was filed, would their existence as "survivors" on the day of filing foreclose the estate's claim for net accumulations?

(3) At the instant the Plaintiff's case is completed: If the parents die during the presentation of the Plaintiff's case, presumably the Plaintiff may then present evidence regarding the estate's claim for net accumulations. If, however, they die after the Plaintiff rests his case in chief, would the Plaintiff have an opportunity to advance the estate's claim for net accumulations based upon the lack of "survivors"?

(4) At the instant a verdict is returned: If the parents survive the return of a verdict which excludes the claim for net accumulations, but they die immediately after return of the verdict, may the trial court then order an additur for the estate's claim for net accumulations?

(5) At the instant judgment is rendered: If the parents survive the rendition of a judgment which forecloses the estate's claim for net accumulations, but die during the pendency of a timely appeal (that is, the judgment is not "final"), may the appellate courts remand the case for trial on the claim for net accumulations because there are no "survivors"?

It is clear that there is no rational and principled distinction which can be drawn based upon the existence of non-existence of living parents at any of the points in time illustrated above.

c. Section 732.103, Fla.Stat. 1983, prescribes the order of beneficiaries to receive the final distribution of the assets of an intestate estate. Since Nancy C. Vildibill

and Charles E. Paul, Senior, are "survivors," the assets to be distributed to them under § 732.103(2) would not include Steven Paul's net accumulations. If Nancy and Charles Senior had predeceased Steven, however, the assets to be distributed to Steven's brother (not a "survivor") under § 732.103(3) would include Steven's net accumulations.

d. It does not require a great stretch of imagination to envision the case where two unmarried and childless adults on a date are killed at the same instant in a traffic accident with the same tortfeasor. If victim A's parents are alive ("survivors"), they would not receive the net accumulations of their offspring. If victim B had no living relatives whatsoever, the estate could recover net accumulations - which would escheat to the State of Florida under § 732.107(10), Fla.Stat. 1983.

e. Perhaps the most irrational result of all would occur where victim B above had a family background which included an after-legitimated child. Consider the case where:

[Please see chart on following page.]

(1) the victim's fraternal grandfather (FGF) had an illegitimate child with the grandfather's paramour (GFP);

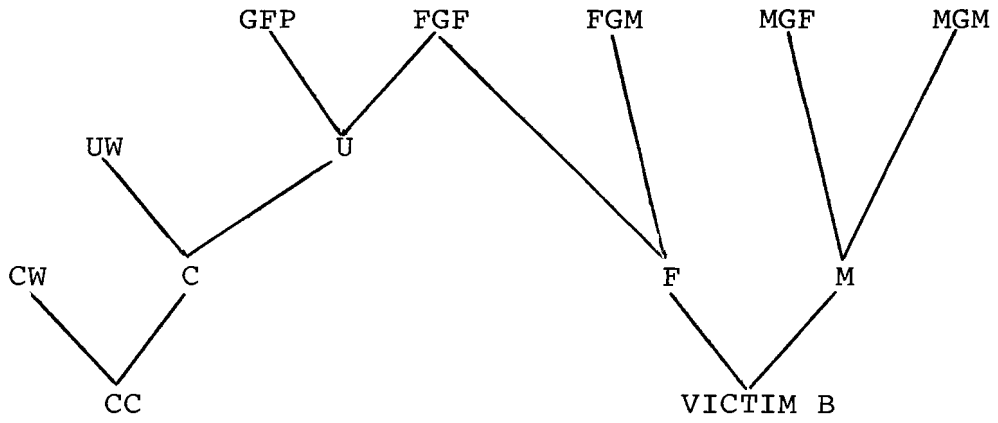
(2) the FGF later married the victim's fraternal grandmother (FGM), who gave birth the victim's father (F);

(3) the FGF later legitimized his illegitimate child, who then became, under the law, the victim's uncle (U);

(4) the uncle (U) and uncle's wife (UW) gave birth to the victim's cousin (C);

(5) the cousin (C) and cousin's wife (CW) gave birth to the cousin's child (CC);

(6) the cousin's child (CC) is the only living relative at the time of the victim's wrongful death.



The cousin's child (CC) would be the beneficiary of victim B's estate, pursuant to § 732.103(4)(b), Fla.Stat. 1983. The parents of victim A would not receive net accumulations because they are "survivors" under the Wrongful Death Act. However, the cousin's child of victim B is not a "survivor" and would be legally entitled to the net accumulations of victim B. It is utterly inconceivable that there could be any legitimate state interest in permitting a one-twelfth relative to collect net accumulations, and denying the same benefits to the living parent of a wrongful death victim.

B. <u>The Statute Is Capable Of Two Interpretations.</u>

The meaning of the word "survivor" in §768.21(6)(a)2 is subject to two differing interpretations. One such interpretation would create an irrational classification in violation of the equal protection clause of the Florida Constitution.

The other interpretation, entirely consistent with the literal wording of the statute, eliminates any possible irrational classification and bases the remedy in a wrongful death action on balanced terms.

1. The first interpretation of the word "survivor" as used in § 768.21(6)(a)2 is a precise and literal application of the definition found in § 768.18(1). That is to say, "survivor" means the decedent's spouse, minor children, and parents - without regard as to whether any of those persons were dependent upon the decedent; any blood relatives and adoptive brothers and sisters - but only if they were depedent upon the decedent for support or services; and illegitimate children apparently without regard to whether the child is either a "minor" or dependent upon the decedent. Moreover, the words "parents" appears to be all-inclusive and unequivocal. If the legislature intended "survivors" to foreclose any recovery by non-dependent parents of an adult decedent, then § 768.21(6)(a)2 creates an irrational classification and produces absurd results, as indicated in sub-section A. above.

2.a The other possible interpretation of the word "survivors" in § 768.21(6)(a)2 results from reading that phrase in pari materia with §§ 768.21(1) through (5). Under subsection (1), each "survivor" is entitled to recover the value of lost support and services. Subsection (2) provides for recovery of specified damages by a spouse who is a "survivor." Subsection (3) relates to recovery for minor children who are "survivors." Subsection

(4) authorizes recovery for parents who are "survivors" of their minor child. Under subsection (5) a "survivor" who has paid medical expenses may recovery those expenses. In short, each of subsections (1) through (5) relate to recovery by particular "survivors."

b. On the other hand, subsection (6) relates to recovery by the victim's estate, not other "survivors." Subsection (6)(a) authorizes recovery of net accumulations under two circumstances:

(1) if the "survivors" inlude a spouse or lineal descendant;

(2) if the decedent is not a minor child and if there are no "survivors."

A "lineal descendent" means nothing more than the decedent's minor child; adult children and grandchildren, etc. are not "survivors" under § 768.18(1). Moreover, if the spouse or "lineal descendent" recovers for lost support under § 768.21(1), that amount is deducted from the estate's recovery by virtue of the definition of "net accumulations" in § 768.18(5). Clearly, subsection (6)(a)(1) was not intended to be duplicative of recovery available to "survivors" under subsections (1) through (5). Similarly, subsection (6)(b) specifically excludes duplicate recovery by the estate of expenses recovered by a "survivor" under subsection (5).

c. The structure of § 768.21(1) through (6) suggests a legislative intent to provide a full and fair remedy, while avoiding duplicative or "windfall" recovery. Accordingly,

subsection (6)(a)(2) would appear to be an attempt to fashion a meaningful remedy by authorizing net accumulations when there was no other recovery authorized for the "survivors" delineated in subsections (1) through (5) and in subsection (6)(a)(1).

Hence, the words "...does not have survivors..." in subsection (6)(a)(2) may be interpreted to mean that there are no "survivors" who can invoke any of the remedies authorized in subsections (1) through (5). This construction would be entirely consistent with Senator Barron's explanation of his amendment:

> That left us one category of people that we didn't address, and that was a person 40 years old that left no one dependent upon them for support but that was a victim of a wrongful death; and we provided that that person out there -- and it would be very few of those who has neither a parent or a child or wife or someone dependent upon them for support -- that their estate would have a cause of action for the net accumulation of loss of prospective estate. (Tab "E", p. 5, l. 12-20).

Such a construction appears to be entirely consistent with Senator Steinberg's response to a question by Senator Childers.

> Say, if you have got an invalid child or an adult that's reached the age of 25 or 30 and is dependent upon the livelihood from a working parent; which, in most cases, would be the man; the father would be killed, now, what happens in those cases, would that mean that if you have a 30 year old individual and the parent is killed, that there is nothing that person could collect?
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> * * *
>
> Okay. The answer is, as amended the prospective estate of that individual still would have a claim for the loss of accumulated income that the deceased father would have produced during his lifetime had the life not been cut short by the tort-feasor. (Empshasis added) (Tab "E", p. 9, l. 1-11.)

Since the invalid adult child is not a "survivor" so as to invoke the net accumulations recovery under subsection (6)(a)(1), Senator Steinberg was clearly referring to the effect of adding subsection (6)(a)(2) when he said "...as amended..." the estate could claim net accumulations.

C. The Court's Duty Is To Apply The Construction Which Avoids Constitutional Infirmity.

> When the constitutionality of a statute is assailed, if the statute is reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other it would be valid, it is the duty of the court to adopt that construction which will save the statute from constitutional infirmity. Leeman v. State, 357 So.2d. 703, 705 (Fla. 1978)
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> * * * * *
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> Given that an interpretation upholding the constitutionality of the act is available to this Court, it must adopt that construction. Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So.2d. 981, 988 (Fla. 1981)
>
> * * * * *
>
> In addition, when an interpretation upholding the constitutionality of a statute is available to this Court, we must adopt that construction. Dept. of Insurance v. Southeast Volusia Hospital District, 438 So.2d. 815, 820 (Fla. 1983).

Therefore, if the word "survivors" in § 768.21(6)(a)2 is construed to preclude the estate's recovery of net accumulations when the victim's non-dependent parents are alive, the statute creates an irrational classification which offends the equal protection guarantee. The Court may not adopt that construction if another construction avoids the equal protection problem. In this case, the permissible construction is that "...does not have survivors..." in subsection (6)(a)(2) means that

none of the remedies available to "survivors" under subsections (1) through (5) are applicable. Such a construction is consistent with the statutory wording, is consistent with the intent of the senators who drafted the statute, is consistent with the expressed legislative intent to shift the loss from the survivors to the wrong-doer, and - most importantly - is consitutionally permissible.

CONCLUSION

Amicus Curiae Schmidt respectfully urges the Court to construe § 768.21(6)(a)2, Fla.Stat. 1981, to mean that the decedent's estate may recover the net accumulations when the decedent is not a minor child and has no persons who can recover damages in their own rights as "survivors" under sections 768.21(1) through (5) and 768.21(6)(a)1.

In the alternative, Amicus Curiae Schmidt respectfully urges the Court to rule that Chapter 85-260, Laws of Florida, 1985, is a remedial statute affecting only the measure of damages recoverable by the estate of a wrongful death victim, and may therefore be applied to existing cases.

I HEREBY CERTIFY that a true and complete copy of the foregoing has been served upon Todd R. Stern, Esquire, Antinori & Thury, 601 East Twigg Street, Tampa, Florida 33602, and Gwynne Young, Esquire, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Post Office Box 3239, Tampa, Florida 33601 by U.S. Mail on this 10th day of September, 1985.

DONALD L. TUCKER, P.A.
Suite 804
215 South Monroe Street
Tallahassee, Florida 32301
(904) 222-5171

BY: Douglas W. Abruzzo
Douglas W. Abruzzo

see address change 3-10-86