THE SUPREME COURT OF FLORIDA

GWENDOLYN GOLDEN YOUNG, as Personal Representative of WILLISHA GOLDEN YOUNG, deceased, Plaintiff/Petitioner, v. ST. VINCENT'S MEDICAL CENTER, INC., d/b/a ST. VINCENT'S MEDICAL CENTER; and/or d/b/a FAMILY MEDICAL CENTER, Defendant/Respondent.	Case No. 85,707 District Court of Appeal, First District-No. 93-2005 ON APPEAL FROM: Circuit Court, Fourth Judicial Circuit, Duval County, Florida; Case No. 92-08897-CA, Division CV-I

BRIEF ON THE MERITS OF RESPONDENT, ST. VINCENT'S MEDICAL CENTER, INC.

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The sole question certified by the First District Court of Appeal is as follows:

> Whether a fetus is a person within the meaning of Section 768.19, Florida Statutes (1993).

STATEMENT OF THE CASE AND FACTS

This is an appeal from a summary judgment granted in favor of the defendant, St. Vincent's Medical Center, Inc. ("St. Vincent's"). The amended complaint alleges two counts each seeking recovery by the personal representative of the estate of Willisha Young for her alleged wrongful death pursuant to § 768.16 et seq., Florida Statutes. Although St. Vincent's disputes many of the allegations of plaintiff's amended complaint, the only fact relevant to St. Vincent's motion for summary judgment was and is undisputed. This fact, that Willisha Young "did not experience a 'live birth'", was acknowledged by petitioner in her pleadings below (R. 140) and on page six of her Statement of the Facts. Because the law of Florida does not permit a wrongful death action in the absence of a live birth, no other facts were material to the trial court's grant.

The summary judgment was appealed to the First District Court of Appeal which affirmed the trial court. In deferrence to the views of Judge Mickle expressed in his concurring opinion, the panel certified a question of public importance. Judge Webster, who concurred in the result, dissented from certifying the question.

This Court postponed its decision on jurisdiction and directed the parties to submit briefs on the merits.

SUMMARY OF ARGUMENT

The legislature and the courts of Florida have never recognized or permitted recovery for the wrongful death of an unborn person. While this Court has been asked time after time to qualify, limit, reconsider or reverse this rule of law, it remains an essential requirement to recover for wrongful death that a child first be born and subsequently die. Because it is admitted that Willisha Young did not experience a live birth, summary judgment was proper.

The Florida Legislature likewise, by its action and inaction, has adopted and approved this Court's interpretation of the Wrongful Death Act. Despite clear judicial opinions preserving the "live birth" requirement and inviting the legislature to take action if it disagrees with these holdings, the elected lawmakers have taken no such action. In fact, the legislature has actively rejected several efforts to amend the law as proposed by the petitioner.

While the petitioner purports to identify a heretofore unknown common law right to recover for wrongful death in Florida, the settled and controlling law likewise refutes the existence of such a right. The Florida Legislature created a statutory right of recovery for wrongful death over one hundred years ago because of the absence of such a common law right. Florida's Supreme Court has unequivocally declared

that this right is entirely a creature of statute and, that absent a change in Florida's statute, the live birth requirement remains a prerequisite to assert of a valid cause of action.

The "live birth" requirement has been repeatedly affirmed by the courts, approved and adopted by the legislature and efforts to replace the requirement consistently rejected. A change in the law by this Court would constitute an improper usurpation of legislative authority. The constitutionality mandated separation of powers between the legislative and judicial branches of government require that the rulings of the trial court and of the district court be affirmed.

While petitioner and her Amici propose abandonment of the live birth requirement, arguing that it is arbitrary and produces harsh results, the analysis is flawed. The alternative proposed, viability, is by its very nature uncertain and therefore a speculative cutoff point. Viability is not a fixed event like live birth that can be readily discerned. It varies depending on innumerable factors unique to each mother and pregnancy, is largely subjective and changes from time to time. Moreover, it could just as well be argued that the legislature should draw the line at some earlier point in time, such as conception or the point where an egg is capable of fertilization. Such issues and the multitude of potential consequences of such decisions can

properly and best be addressed in the legislative process. Such radical changes are matters "for legislative action and not judicial legislation."

ARGUMENT

I. The Law of Florida does not Recognize or Permit a Cause of Action for the Wrongful Death of an Unborn Child.

The trial court properly granted summary judgment to St. Vincent's because the settled law in this state prohibits the bringing of a claim to recover for the wrongful death of an unborn person. Hernandez v. Garwood, 390 So.2d 357 (Fla. 1980). There is no dispute that the cause of action alleged in the amended complaint is not recognized in Florida. Based on the law as it currently is written, the First District Court of Appeal properly affirmed the grant of summary judgment.

The petitioner admits implicitly that unless this Court rewrites the law as drafted and enacted by the legislature, and reverses its four prior rulings on this issue, the summary judgment must be sustained. Brief for the Petitioner, p. 6. To avoid this result, petitioner asks this Court to reject 27 years of consistent rulings rejecting this type of claim, hold that such a cause of action should exist and create such a claim contrary to the will and intent of the Legislature.

These requests seek action which is beyond this Court's constitutional authority, would violate the fundamental separation of powers doctrine embedded in our state

constitution, is contrary to the doctrine of *stare decisis*, is directly contrary to the intent of the legislature, is unwise and without legal support. Such requests should be rejected.

A. Florida's Wrongful Death Act has been correctly interpreted and does not recognize or permit recovery for the death of an unborn person.

At least four separate times, this Court has been asked whether an unborn person is covered by Florida's wrongful death laws. Stokes v. Liberty Mutual Ins. Co., 213 So.2d 695 (Fla. 1968); Stern v. Miller, 348 So.2d 303 (Fla. 1977); Duncan v. Flynn, 358 So.2d 178 (Fla. 1978); Hernandez v. Garwood, 390 So.2d 357 (Fla. 1980). On each occasion, the Court refused to recognize the right to recover in the absence of a live birth and subsequent death. This remains the unaltered and unamended law of Florida.

1. The Florida Supreme Court has correctly and consistently interpreted the Act as requiring a live birth.

In 1968, the Supreme Court first addressed the issue of whether parents had a cause of action under the Wrongful Death of Minors Act for the death of a stillborn child. Stokes, 213 So.2d at 696 (Fla. 1968). This Court analyzed many of the same arguments raised by petitioner in her brief including the suggestion that such a cause of action can be found to exist

outside our wrongful death statute. Id. at 700. Despite acknowledging a diversity of opinion among the states, worthy arguments in favor and "equally strong and persuasive decisions" to the contrary, the Court focused on its duty to interpret the statutory language as written. Id. at 699. Justice Thornal announced the rule of law:

> [W]e hold that a right of action for wrongful death can arise only after the live birth and subsequent death of the child.
>
> Stokes v. Liberty Mutual Ins. Co., 213 So.2d 695, 700 (Fla. 1968) (emphasis added).

In 1972 the Florida Legislature rewrote the State's wrongful death laws and adopted the current Wrongful Death Act. § 768.16 - 768.27, Florida Statutes (the "Act"). The Act incorporated the state's two wrongful death statutes and the survival statute into a single law eliminating the distinction between deaths of minors and of other persons. While the laws were consolidated, the language in the Act was not significantly changed. Most significantly, the legislature retained the term "minor child" in the new statute and used it specifically in the damages section thus making damages recoverable only to the parent of a child first "born alive."

The first court called upon to interpret the 1972 Act was the First District Court of Appeal in the case of Davis v. Simpson, 313 So.2d 796 (Fla. 1st DCA 1975). In Davis, the question presented was virtually identical to the certified question in this case:

> Is a full term, viable, but stillborn fetus a "person" within the meaning of § 768.19, Florida Statutes, 1973?
>
> Davis, 313 So.2d at 796 (Fla. 1st DCA 1975) (emphasis added).

The court reasoned, "the whole question boils down to whether or not it was the intent of the legislature in its enactment of the new death by wrongful act statute to include within the meaning of the term 'person' an unborn fetus". Id. at 797.

After discussing the history of Florida's prior death statutes, the Supreme Court's analysis of those statutes and the minimal differences between the prior statutes and the new Act, the court held:

> We must assume that the legislature knew the construction that had been placed upon the previous death by wrongful act statute by the Supreme Court in *Stokes* when it enacted the new statute. There is no departure in the wording of the new statute from that of the old with relation to "persons" and "minor children" which would indicate an intent to create a new right of action on behalf of an unborn fetus. Had the legislature intended to make such a radical change in the law, there is every reason to believe

> that it would have done so in clear language. This is a matter for legislative action and not for judicial legislation.
>
> Davis v. Simpson, 313 So.2d at 798 (Fla. 1st DCA 1975) (Emphasis added).

This interpretation of the statute was approved by this Court two years later.

In 1977, the same question of great public interest was certified to this Court:

> 1. Whether an unborn, viable child killed as a direct and proximate result of another's negligence, is a "person" within the intent of Section 768.19, Florida Statutes (1973)?
>
> Stern v. Miller, 348 So.2d 303, 305 (Fla. 1977) (emphasis added).

The Court analyzed the same arguments raised in this case including that (i) a majority of states allow recovery, (ii) the legislature intended to create a cause of action where one did not previously exist, (iii) a viable fetus is capable of surviving outside the womb, and (iv) the apparent incongruity that a surviving fetus may sue where a fatally injured fetus may not. Id. at 305-307. This Court considered each of these arguments but was persuaded primarily by the prior interpretations of the laws and the legislative history of the Act. It answered the certified question in the negative. Id.

The reasoning of the Court is logical and consistent with established rules of statutory construction and analysis. If the legislature had disagreed with the Supreme Court's earlier ruling in Stokes[1] or the First District's ruling in Davis, each expressly rejecting a cause of action for the death of a viable but stillborn fetus, surely it would have changed the law accordingly. Stern, 348 So.2d at 308. We quote from the Court's unanimous opinion in Stern at length:

> With *Stokes* on the books in 1972, when the present wrongful death statute was enacted, the legislature had the opportunity to further define the meaning of the term "person" and chose not to do so. Although it amended the statute in several respects, that portion setting forth for whose death the action could be brought remained almost identical to the old statute. . . . Since the legislature did not materially change the language of the prior section [768.01 Right of Action for Death], it must be presumed that the legislature intended to carry forward into the new section the terms "person" and "minor child" as previously construed.
>
> The legislature is presumed to know the existing law when it enacts a statute. And it is presumed that the legislature

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[1] Despite the claims of one of the briefs to the contrary, the Stern court did not "overlook" or misunderstand its prior ruling in Stokes. Brief of Amicus Curiae - Academy of Florida Trial Lawyers, p. 9. On pages 305 and 307 of the Stern opinion, this Court noted that the Stokes opinion was concerned with interpreting the term "minor child" rather than "person." However, the Court found that the opinion was helpful nonetheless because by retaining the term "minor child" in the new Act, it suggested the legislature did not intend to expand coverage of the law. Stern at 307.

> was acquainted with the judicial construction of former laws on the subject concerning which some statute is enacted. It follows that where a provision has received a definite judicial construction, the subsequent re-enactment of that provision by the legislature may amount to legislative approval of the judicial construction.
>
> Stern, 348 So.2d at 307-308 (Fla. 1977) (emphasis added).

A year later, this Court was asked to address the same question a third time in Duncan v. Flynn, 358 So.2d 178 (Fla. 1978). Showing patience and restraint, the Court affirmed its prior holding by adopting the district court's ruling that a live birth is a requisite element of any wrongful death action. Id.

In 1980, addressing the issue a fourth time, the Court wrote:

> There is little to be said in support of the trial court's order, and there is no basis in law to sustain Garwood's attempt to maintain a cause of action for the wrongful death of a stillborn fetus.
>
> (1) With regard to the question of whether a cause of action can be maintained for the death of a stillborn fetus, we quite recently held that no such cause of action exists under Florida's Wrongful Death Act. *Duncan v. Flynn*, 358 So.2d 178 (Fla. 1978); *Stern v. Miller*, 348 So.2d 303 (Fla. 1977) . . . . Garwood [the plaintiff] argues, essentially, that we should construe the wrongful death statute exactly opposite to the way we construed it in *Duncan* and

> *Stern*, and thereby over come its constitutional infirmities.
>
> No legislative alteration of the statute has taken place since we announced our understanding of what the legislature said and meant when the statute was passed. We decline to reconsider our earlier analysis.
>
> Hernandez v. Garwood, 390 So.2d 357, 358-359 (Fla. 1980) (emphasis added).

The holding of the Court in Hernandez and in the three earlier opinions leaves no doubt that the petitioner's claim is prohibited and that summary judgment was properly granted. No legislative alteration of the statute, pertinent to this case, has taken place since 1980 when this Court again announced its understanding of what the legislature said and meant. As it did in 1980, this Court should decline to rewrite the law to permit recovery where none would otherwise exist.

2. Liberal construction of the Act does not permit the creation of a right of recovery contrary to the intent of the legislature.

In Section IIA of her brief, the petitioner argues that the Act and its prefatory statement of legislative intent, in Section 768.17, should be construed so liberally as to create a right of recovery where one does not appear to exist or have been intended. This Court in Stern expressly considered, discussed and then rejected the same suggestion:

Respondents submit that only by holding that a viable fetus is a "person" may the commendable objectives of providing "new and improved methods" be reached. They contend that only by allowing recovery for the death of the infant Miller can this court "correct the harsh results and inequities which oftentimes were wrought by the old act;" and, only by allowing recovery, can this court promote the legislature's intention of consolidating the Wrongful Death Statutes of Florida into one cohesive scheme and effectuate "the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer"; all of these reasons are the stated purposes of the legislature for enacting the present statute. See Section 768.17, Florida Statutes.

As compelling as these arguments may be, however, we are not at liberty to decide what is wise, appropriate, or necessary in terms of legislation. Only the legislature is so empowered. We are confined to a determination of the legislature's intent.

. . .

We recognize that the new Wrongful Death Act is remedial in nature and is to be construed liberally. However, we cannot construe the statutory provisions so "liberally" as to reach a result contrary to the clear intent of the legislature. The act must be construed to be consistent with the objectives sought to be accomplished. *Klepper v. Breslin*, 83 So.2d 587 (Fla. 1955). This Court is without authority to do by statutory construction that which the legislature has not intended.

Stern, 348 So.2d at 307-308 (Fla. 1977) (emphasis added).

The Supreme Court properly analyzed the language of the Act and the legislature's apparent intent. Id. at 308. The petitioner has cited no evidence or authority suggesting that the language of the Act or the legislature's intent have changed since the Court's decision in Stern, Duncan, and Hernandez. Therefore, the certified question answered negatively in Stern must again be answered in the negative.

B. The live birth requirement has been adopted and approved by the Florida Legislature.

Florida's wrongful death statutes date back to 1883 Chapter 3429, Laws of Florida (1883); See also, Chapter 4722, Laws of Florida (1899). Since that time, specifically enumerated categories of people have been entitled to recover specifically enumerated types of damages for the wrongful death of certain persons. At no time, before or after the enactment, has anyone recovered for the wrongful death of an unborn person in Florida.

Despite the absence of any such claims, in Section IIC of her brief the petitioner argues that the courts have always been "free to recognize a cause of action for the wrongful death of an unborn child." Brief of the Petitioner, p. 18; Amicus Brief, p. 2. She suggests that the legislature expects and "invites the courts" to include unborn children within the

definition of "person" in the Act. The legislative history of the Act demonstrates to the contrary.

1. The Florida Legislature has adopted the Supreme Court's construction of the Act.

From 1883 to 1968 there were no reported cases in which a parent obtained or sought recovery for the wrongful death of their unborn child. It is unlikely, though theoretically possible, that during that time the legislature never considered the inclusion or exclusion of the unborn from the statute. With the Stokes decision in 1968, however, it could no longer be said that the state's lawmakers mistakenly believed the unborn were included.

In Stokes, the Supreme Court held that the phrase "minor child" did not include an "unborn child". Stokes, 213 So.2d 695 (Fla. 1968). Four years later, the legislature rewrote the state's wrongful death laws incorporating multiple statutes into a single one. Knowing that the term "minor child" had been interpreted to include only children "born alive," to permit recovery for the death of an unborn child, the new law would have to either exclude the term "minor child" or expressly redefine it to include stillborn children. The legislature did neither. Rather, it left the term in the damages section of the new Act effectively permitting recovery

of damages only for parents of minor children, i.e., children born alive. § 768.21(1) and (4), Florida Statutes.

It is an established rule of statutory construction that when the legislature reenacts statutory language previously construed or interpreted by the Court, it intends to adopt the interpretation. Gulfstream Park Racing Assn., Inc. v. Dept. of Bus. Reg., 441 So.2d 627, 628 (Fla. 1983). The Stern Court expressly applied this rule and reached the following inescapable conclusion:

> The legislature is presumed to know the existing law when it enacts a statute. And it is presumed that the legislature was acquainted with the judicial construction of former laws on the subject concerning which some statute is enacted. It follows that where a provision has received a definite judicial construction, the subsequent reenactment of that provision by the legislature may be held to amount to legislative approval of the judicial construction.
>
> . . .
>
> The mere reading of the section regarding damages clearly indicates, on the basis of logic, that the legislature did not intend to create a cause of action for a stillborn child.
>
> Stern, 348 So.2d at 308 (Fla. 1977) (emphasis added).

The legislative history of the statute since the 1977 Stern decision confirms that the Legislature never intended to

permit this cause of action. Since that time, this Court has reaffirmed the live-birth requirement on two separate occasions. Duncan v. Flynn, 358 So.2d 178 (Fla. 1978); Hernandez v. Garwood, 390 So.2d 357 (Fla. 1985). The district courts of appeal have likewise announced in numerous decisions that, unless altered, the wrongful death act does not include an unborn fetus within its coverage. Despite these clear and unequivocal constructions of the statute, the legislature has taken no action altering the statute or implying any dissatisfaction with the current state of the law.

2. The legislature has refused to amend the Act to permit recovery for the unborn.

There have been recent legislative efforts to amend the statute to permit recovery for an unborn child but all have failed. In 1980, after the Court's rulings on the issue in Stern and Duncan, Representative Bush introduced a bill in the Florida House of Representatives to permit wrongful death actions for the death of an "unborn child." See Exhibit 1, attached. The express purpose of House Bill 1342 was to include an unborn child within the intent of the Act. The Judiciary Committee considered the bill but it died on the calendar for lack of support.

In 1988, bills were filed in both the House of Representatives and the Senate that would have amended

Sections 768.19 and 768.21 to include unborn children.[2] House Bill 153 was filed January 7, 1988 and Senate Bill 245 was filed February 9, 1988. See Exhibits 2 and 3 respectively. Hearings were held on the Senate version with testimony for and against given by multiple witnesses, including petitioner's Amicus in this case, the Academy of Florida Trial Lawyers.

Both bills failed. HB 153 was defeated in the judiciary committee. The Senate bill, while passing committee, did not have enough support to reach a floor vote. See, T.A. Borowski, Jr., Comment, *No liability for the wrongful death of unborn children - The Florida Legislature refuses to protect the unborn*. 16 Fla. St. U. L. Rev., 835, 839 (1988).

In the 1989 legislative session, House Bill 174 and Senate Bill 996 were introduced. See Exhibits 4 and 5, respectively. Both bills were identical to HB 153 introduced the year before. Again both died for lack of legislative support. The Senate staff for the committees which considered SB 996 reported to the committees that the bill would expand the Wrongful Death Act to permit a cause of action for unborn

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[2] The house and senate bills were originally identical but the senate bill was amended in committee. HB 153 would have defined "person" and "minor child" to include unborn children while SB 245 would have added the term "fetus" to Sections 768.19 and 768.21.

children thereby reversing the result in Stern v. Miller. See Exhibit 6 attached.[3]

The failure of attempts by a minority of lawmakers to redefine "person" in 1980, 1988 and 1989 to include a fetus confirms the legislature's true intent. American Bankers Life Assurance Co. of Fla. v. Williams, 212 So.2d 777, 778 (Fla. 1st DCA 1968). It can no longer be seriously questioned that the legislature never intended for a viable but stillborn child to be covered by Section 768.19, Florida Statutes.

C. The common law of Florida does not recognize or permit a cause of action for the wrongful death of an unborn person.

The Petitioner contends in Section IIB of her brief that "Wrongful death actions are a fundamental part of the common law" and that the Court is free to recognize such an action in favor of the unborn, citing cases addressing the common law of other states. Brief for Petitioner, pp. 24-30. Regardless of the common law elsewhere, the Florida Supreme Court has always held that the common law of this state does not provide a remedy for wrongful death outside the statute:

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[3] These staff analysis and economic impact reports are public records available from the Florida State Archives and may be considered by this Court in construing statutes on appeal. Ellsworth v. Ins. Co. of North America, 508 So.2d 395, 398 (Fla. 1st DCA 1987).

> An action for wrongful death is a creature of statute, unknown to the common law. If the respondents have a cause of action it must be founded on Section 768.19, Florida Statutes.
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> Stern, 348 So.2d at 304, 305 (Fla. 1977) (emphasis added).

See also, Stokes, 213 So.2d at 699-700 (Fla. 1968); Moragne, 211 So.2d at 163-164 (Fla. 1968); L. & N. R.R. Co. v. Jones, 45 Fla. 407, 34 So. 246. (1903).

This Court in Stern refused to recognize such a right after carefully considering the same arguments raised by the petitioner in this case. The petitioner cites the case of Mone v. Greyhound Lines, Inc., 331 N.E.2d 916 (Mass. 1975) which found a "common law" right to recover in Massachusetts. This Court was fully aware of the Mone decision and in fact cited the decision in footnote four of the Stern opinion issued in 1977. Further, the Court expressly referenced the adherence of eleven states to the position that the common law prohibited recovery absent a live birth. Stern, at 305-306. It is apparent that this Court has already considered the argument that some non-statutory right of recovery might exist but rejected the existence of such a right in Florida.

To support the claim that a common law action for wrongful death exists in Florida, petitioner relies primarily on the United States Supreme Court opinion of Moragne v. State Marine Lines, Inc., 389 U.S. 375 (1970). This case does not

support her argument for many reasons. First, the U.S. Supreme Court did not address the common law of Florida in its opinion. Second, the statutory law on wrongful death and the common law in each state is different because each has been shaped by different judicial precedent, legislative intent, statutory language and constitutional provisions making its application to Florida of little help. Third, the states which petitioner claims recognized such a common law right of recovery did so, in part, because the will of their legislatures was either unclear or apparently in favor of such a right unlike the clear legislative intent in Florida which is to the contrary.

The U.S. Supreme Court opinion in Moragne concerned remedies available under federal maritime law for a wrongful death on Florida State territorial waters. Id. at 378. The plaintiff sought recovery under Florida's Wrongful Death Act which claim was evaluated by the Florida Supreme Court in Moragne v. State Marine Lines, Inc., 211 So.2d 161 (Fla. 1968).[4] The Florida Supreme Court held that the Florida Death by Wrongful Act Statute did not permit recovery for the plaintiff's death.

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[4] The case reached the Florida Supreme Court when the federal appeals court certified the question of whether the Florida Death by Wrongful Act statute recognized the cause of action alleged. The Florida Supreme Court ruled on this question before the case was appealed to the U.S. Supreme Court.

When the U.S. Supreme Court opinion in Moragne and this Court's companion Moragne opinion are read together they refute, rather than support, petitioner's arguments in this case. First, the U.S. Supreme Court in Moragne did not hold that a cause of action for wrongful death existed at common law in Florida. It found only that such an action was not barred under the common law of England as it existed in 1776. In light of this, the U.S. Supreme Court found that it was permitted to recognize such a cause of action within federal common law. Interestingly, the reason the U.S. Court gave for recognizing such a right in the federal common law was because every state in the union had adopted, by statute, wrongful death laws. Moragne, 398 U.S. at 391. Surely the 50 state legislatures, including Florida's, would not have adopted such laws if they believed the right to exist at common law.

On the other hand, this Court noted in its Moragne opinion that a cause of action for wrongful death was not recognized at common law in Florida, but was "a totally new right of action" created by statute. Moragne, 211 So.2d at 163-164. While the U.S. Supreme Court may have found a right of action to exist in federal common law, it did not and could not decide whether such a right existed in the common law of Florida as that question had already been addressed and settled by this Court.

Next, the Florida Supreme Court in Moragne was asked to reject prior decisions on the issue, align itself with "the great weight of authority" in other jurisdictions and thus permit the wrongful death action alleged as within the Florida Wrongful Death Act. Moragne, 211 So.2d at 164. The Court rejected this argument noting that the decisions from other states were based on statutes written and interpreted differently than Florida's Wrongful Death Act. Id. at 165. One obvious danger in basing a change in Florida law on interpretations of the wrongful death statute in another state is that each state is likely to have based its current law on factors unique to that state including statutes with different language, different judicial constructions of the language and different legislative histories and intents.

The petitioner in this case makes the same appeal arguing that "holdings from a majority of other jurisdictions now recognize wrongful death actions to be of common law origin." Petitioner's brief at p. 24. In fact, the vast majority of states that have permitted recovery for the death of an unborn child have relied on the particular language of their state's wrongful death statute and judicial precedents and not on any newly "discerned" common law right.[5] Florida's wrongful death

[5] Of the three states which petitioner claims based recovery on their state's "common law," only the Massachusetts Supreme Court so held. Only the concurrence in the Pennsylvania Supreme Court's Amadio opinion relied on a

statute and precedent should not be uprooted merely because other states have changed their wrongful death law in response to their own unique judicial precedent and legislative intent.

Finally, in Moragne this Court stressed the importance of legislative history and intent in deciding the limits of the right to recover for wrongful death in Florida. In the face of clear legislative intent to the contrary, the Court held that it was prohibited from recognizing a new right of recovery:

> Finally, we note that the Legislature lost no time in amending the Wrongful Death Act following the decision of this Court in the *Whiteley* case, *supra*, 55 So.2d 730 (it was amended at the next succeeding session of the Legislature), yet more than fifteen years have elapsed since the Fifth Circuit Court of Appeals held in the *Graham* case, *supra*, 206 F.2d 223, that the Act was not applicable to a death action based on the maritime tort of 'unseaworthiness,' and it has been more than eight years since this holding was reaffirmed in the *Emerson* case, *supra*, 282 F.2d 271. The Legislature has not seen fit to act in response to such decisions.
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> In all of these circumstances, it is our opinion that to hold that

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"common law" right of recovery. 501 A.2d 1085, 1096-1097 (Pa. 1985) (Zappala, J., concurring). In the Arizona Supreme Court's Summerfield opinion, the court concluded that the state's statute and judicial precedent had combined to permit them to recognize a cause of action "with common-law attributes." 698 P.2d 712, 718 (Ariz. 1985). The court expressly refused to conclude whether or not such an action existed at common law. Id.

> 'unseaworthiness' is within the contemplation of our Wrongful Death Act would be tantamount to judicial legislation; and this, of course, is beyond our constitutional power.
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> Moragne, 211 So.2d at 167 (Fla. 1968) (emphasis added).

Since the Court's rulings in Stern, Duncan and Hernandez, 15 years have passed without a change to the law. Despite the introduction of numerous bills that would have permitted recovery, all have failed. Given this legislative history, to hold that a right of recovery exists outside our Wrongful Death Act would be the same type of judicial legislation this Court rejected in Moragne.

The Court has rejected other requests that it "recognize" a common law cause of action where the legislature's intent is to the contrary. Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987). In Bankston, the Court was asked to permit either a statutory or common law cause of action against a social host who served alcohol to minors. The Court first concluded that no such cause existed by statute and that the legislature had no intent to create such a cause. With respect to the request that it create a common law right of recovery, this Court refused. Noting the legislature's demonstrated ability to deal with the issue and the legislative intent against creating a new cause of action the Court held:

> Petitioner's final argument is that if this Court concludes that Section 768.125 does not apply to social hosts, we should recognize a common law cause of action in favor of similarly situated plaintiffs. We decline. We do not hold that we lack the power to do so, but we do hold that when the legislature has actively entered a particular field and has clearly indicated its ability to deal with such a policy question, the more prudent course is for this Court to defer to the legislative branch.
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> Bankston, 507 So.2d at 1387 (Fla. 1987) (emphasis added).

As with liability for serving liquor, the legislature created the remedy for wrongful death and actively entered the field regulating the scope of that remedy with more than 20 amendments to the wrongful death laws since their adoption. In the legislative sessions of 1980, 1988 and 1989, the legislature rejected the exact expansion of the law requested by the petitioner in this case. Given the history of legislative action in the field of wrongful death, this Court must deny the petitioner's request that it create a cause of action consistently rejected by the legislature.

The California Supreme Court considered the same argument that it recognize a common law right to recover for the wrongful death of an unborn child. Applying the same reasoning of this Court in Bankston, the California Supreme Court refused:

> [I]t was generally believed the common law did deny a cause of action for wrongful death . . . whether or not the belief was well founded, it was so widely held that we must presume the legislators acted upon it. Accordingly, their intent in adopting the 1862 statute, and its successor section 377, was manifestly to create an entirely new cause of action where none was thought to exist before. . . . In these circumstances, we are persuaded that the Legislature intends to occupy the field of recovery for wrongful death. For this reason the remedy remains a creature of statute in California [citations omitted] regardless of whether a cause of action for wrongful death did or did not exist at common law. In our state that question is now of academic interest only and we need not reconsider the many decisions addressing it.
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> Justus v. Atchison, 139 Cal. Rptr. 97, 103-104 (Cal. 1977) (emphasis added).

In the face of uniform judicial precedent and legislative action rejecting the new cause of action requested by petitioner, the summary judgment should be affirmed.

D. Creation of the proposed cause of action by the Judiciary would constitute an impermissible usurpation of legislative power.

The judicial amendment or modification of the Wrongful Death Act proposed by the Petitioner would constitute an unlawful encroachment by this Court on the powers of the legislature and would be in direct violation of the

Constitution of the State of Florida. Stern, 348 So.2d at 308. The Constitution provides:

> The power of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.
>
> Constitution of the State of Florida, Article II, Section 3 (1968) (emphasis added).

This principle of separation of powers is more than mere political theory or rhetoric. It is fundamental to our form of democratic government. Pepper v. Pepper, 66 So.2d 280, 284 (Fla. 1953). Just as the courts must remain diligent to prevent encroachment of the executive or legislative branches on each other or on the judiciary, "the courts should be just as diligent, indeed, more so, to safeguard the powers vested in the legislature from encroachment by the judicial branch of Government." Id.

In 1977, 1978 and 1980, after the adoption of the Wrongful Death Act in 1972, this Court held that the legislature did not intend that unborn children be included within the meaning of Section 768.19, Florida Statutes. In the 1977 Stern opinion, the Court expressly called upon the legislature to alter the statute if its will was to the contrary. Despite this request, the legislature not only

failed to reverse these holdings, it defeated all efforts to change the law in a way that would have permitted recovery. After all this, the position that the will of the legislature is subject to some doubt is indefensible.

Judge Webster, in his dissent to the certification of the question to this Court noted:

> While much may have changed since our Supreme Court decided Hernandez v. Garwood, 390 So.2d 357 (Fla. 1980), I am of the opinion that one thing clearly has not -- whether to permit recovery under Florida's Wrongful Death Act on facts such as those presented by this appeal is a question for legislative rather than for judicial resolution. As Judge Mickle points out, repeated efforts in recent years to amend the Act to permit recovery on facts such as those presented by this appeal have met with no success. It seems to me that, in light of the legislature's refusal to act, the action requested by the appellant would constitute an impermissible intrusion by the judicial branch into the powers of government vested by our constitution in the legislature. Therefore, while the question may be one of 'great public importance,' by certification, the wrong branch of government is being asked to provide an answer.
>
> Young v. St. Vincent's Medical Center, Inc., 653 So.2d 499, 507 *per curium* aff'd (Fla. 1st DCA 1995) (Webster, J., concurring in part and dissenting in part) (emphasis added).

Petitioner's argument that the Legislature has "invited" the courts to rewrite the wrongful death law or that it does not intend to regulate this statutorily created remedy is incorrect. Since its adoption, the legislature has actively regulated the law on wrongful death. It amended the Death by Wrongful Act statute 10 times and Florida's Wrongful Death of Minors Act 5 times. Both were consolidated into the current Act in 1972. Since then the legislature has amended the Act 6 more times. Including the consolidation in 1972, the legislature has amended our laws on wrongful death on at least 22 different occasions. By their number alone, these changes demonstrate that the legislature created the right to recover for wrongful death and has acted to amend the law when it saw fit.

The legislature has not hesitated to amend the wrongful death laws to reverse incorrect judicial interpretations of the law. For example, in Whiteley v. Webb's City, Inc., 55 So.2d 730 (Fla. 1951) this Court considered whether a wrongful death action based on breach of implied warranty was permitted under Section 768.01, Florida Statutes (the predecessor of the current Act). The Court held that because the statute addressed negligence but not actions "ex contractu," there was no cognizable action. Disagreeing with this limitation on recovery, the legislature amended the law the next legislative session.

While petitioner suggests to the contrary, the courts of Florida have not permitted individuals to bring wrongful death actions except where the right is provided by the clear language of the Act. In the case of Whitefield v. Kainer, 369 So.2d 684 (Fla. 4th DCA 1979) cited by petitioner, the Court observed that the Act permits an illegitimate child to recover for the death of his father if the father had recognized parental responsibility prior to his death but denied recovery in that case because there was no evidence that the father had recognized responsibility.

In Grant v. Sedco, 364 So.2d 774 (Fla. 2d DCA 1978), another case cited by petitioner, the Second District denied recovery in favor of an "equitably adopted" child on the basis that the child was not covered by the Act. The court noted:

> Although the limitations on recovery by an equitably adopted child might seem harsh, the Florida Wrongful Death Act does not compensate *all* those aggrieved by the death of another. It only compensates some and in certain ways. . . . A minor child that is neither the natural child or legally adopted child of a decedent simply has no claim under the Florida Wrongful Death Act.
>
> Grant, 364 So.2d at 775 (Fla. 2d DCA 1978) (emphasis added).

Rather than supporting petitioner's claim that the courts take an activist role in expanding coverage of the Act, these cases demonstrate to the contrary. This Court and the district

courts have carefully and properly refrained from encroaching on the legislature's responsibility to regulate the law of wrongful death in Florida.

Finally, the petitioner suggests that this Court may base a new right of recovery on the legislature's apparent intent behind the adoption of the manslaughter statute. The language used by the legislature in the manslaughter statute refutes, rather than supports petitioner's claim. It is apparent from the plain language of Section 782.09 that the legislature intended to include unborn children within the statute prohibiting manslaughter. It manifested that intent with language that was clear and unmistakable:

> The willful killing of an unborn quick child . . . shall be deemed manslaughter. . . .
>
> Section 782.09, Florida Statutes (1995).

As this Court noted in Stokes, the legislature has used the term "unborn child" when it wanted to express its intent to include children not yet born. Stokes, 213 So.2d at 700.

While many lessons may be derived from reviewing this statute, one is obvious: When the legislature intends for a statute to include children not yet born, it uses language that clearly and unequivocally identifies the unborn.

Certainly where an area of the Act is unclear, in dispute or the legislature's intended coverage of the Act is uncertain, the courts should and must interpret, construe and fill in the missing pieces. But where a right to recover has been expressly denied by the courts, the denial approved by the legislature and all legislative attempts to revise the rule have been rejected, there is no room for the courts to exercise the powers of the legislature and rewrite or create law. In the face of clear legislative action and intent to preserve the live birth requirement, this Court is obligated to sustain that standard.

II. The Law of Florida Should not Permit a Cause of Action for the Death of an Unborn Child.

Petitioner's appeal really asks not that this Court interpret the law as it <u>is</u> but rather as she believes it <u>should be</u>. These same arguments have been raised before this Court on numerous prior occasions and uniformly rejected. Likewise, the legislature has been called on to amend the statute on several occasions. It has reenacted the law without change and rejected efforts to extend the statute. In addition to these jurisprudential reasons for rejecting petitioner's request, there are numerous policy reasons militating against their plea and supporting the correctness

of the legislature's decision to maintain the live birth requirement.

A. Live birth is superior to viability for demarcating the right to recover.

In Section IB of her brief, the petitioner argues that the moment of birth is, "an arbitrary line" and the live birth requirement, "an illusory legal certainty." She suggests that somehow "viability" is not arbitrary or uncertain and should therefore replace birth as the dividing line between the fetus with a cause of action and the one without. While this new dividing line would unquestionably be a better one for her, it is speculative, variable and has little preexisting legal significance.

"Viability," like conception, quickening and live birth, is but another moment in the growth and maturation of the fetus. Unlike viability, however, the birth of a child is an event that is definite and objectively discernable. Viability, on the other hand, is in reality not a moment or event at all but a subjectively perceived probability. A fetus becomes more and more mature until somebody speculates or opines that it is able to survive outside the uterus. Unlike a child's birth which can be recorded as occurring at a particular moment in time, there is no definite moment in time that a child becomes viable.

The age of viability is variable. It is dependent on numerous factors including the medical history and conditions of mother and child. Viability is not attained at the same time in all pregnancies. The age of viability is not generally or uniformly agreed to among physicians making it different in different cases.

Currently, viability has little legal significance in Florida law while the live birth has been selected by the legislature as a legally significant event for a number of purposes. For example, live births are required by law to be recorded. Section 382.001 et seq., Florida Statutes. Infants born alive are issued birth certificates and their vital statistics obtained, preserved and used by the state for a variety of purposes. For infants who are not "born alive," such as Welisha Young, a certificate of fetal death is prepared, rather than a death certificate or a birth certificate. To qualify under the Neurological Injury Compensation Plan, a child must first be born alive. Section 766.301, et seq., Florida Statutes. Under Florida's Probate Code, a pretermitted child must be born to qualify for a share of its parent's estate. Section 732.302, Florida Statutes.

Other dividing lines such as quickening or conception likewise have preexisting legal significance. In Florida's manslaughter statute, quickening and not viability is the "line" for exposure to criminal liability. § 782.09, Florida

Statutes. In Florida children born after the death of an intestate decedent may inherit so long as they were conceived prior to death. § 732.106, Florida Statutes. Of course, even the right of such "afterborn heirs" is inchoate and the transfer of intestate property occurs only if, and after, the child is "born alive."

While live birth, quickening and conception have preexisting legal significance, viability is not the standard in any of the laws cited by petitioner which enumerate certain rights of the unborn. Interestingly, none of the bills introduced in 1980, 1988 or 1989 that would have permitted a wrongful death action on behalf of an unborn child used viability as the new dividing line. The bill introduced in 1980 used conception as its dividing line while the bills in 1988 and 1989 used fertilization.

Any dividing line which separates those who may recover from those who may not might be termed "arbitrary" in some sense, particularly by those who are denied recovery. If "arbitrary" means that some are included and others excluded, viability is arbitrary.

Because any dividing line (viability, conception or birth) will have debatable advantages and disadvantages, drawing that line is a decision traditionally and properly left to the legislature and not to the courts. As New York's highest court explained:

> It is argued that it is arbitrary and illogical to draw the line at birth, with the result that the distributees of an injured foetus which survives birth by a few minutes may have a recovery while those of a stillborn foetus may not. However, such difficulties are always present where a line must be drawn. To make viability rather than birth the test would not remove the difficulty but merely relocate it and increase a hundredfold the problems of causation and damages. Thus, one commentator aptly observed that (Wenger, Developments in the Law of Prenatal Wrongful Death, 69 Dickinson L. Rev. 258, 268), "since any limitation will be arbitrary in nature, a tangible and concrete event would be the most acceptable and workable boundary. Birth, being a definite, observable and significant event, meets this requirement."
>
> Endresz v. Friedberg, 248 N.E.2d 901, 905 (N.Y. 1969) (emphasis added).

The legislature of this state is not compelled to adopt the viability standard and has elected not to do so. That decision should not be disturbed.

B. Changes in medicine do not warrant a change in the law.

There is a superficial appeal to petitioner's argument that because of changes in medical science, a viable fetus is an individual apart from its mother and the law should therefore permit recovery for its wrongful death. If this

Court's prior rulings were based on a concern that medical science was not sufficiently advanced to support the viability standard, this position would have an arguable basis. While it is true that some courts have based their rulings on the then existing state of medical science, this Court has never based its decisions on this argument. As a result, changes or advances in medicine impact neither the continued validity of this Court's reasoning nor its rulings in Stern, Duncan and Hernandez.

In Stokes, the Court assumed the deceased was viable at the time of death as the parties had so stipulated. The Court's rejection of the right of recovery was not in any way based on whether or not in 1968 the child could have survived outside the womb. The Court heard and considered the argument in favor of the viability standard noting that "in some states, where recovery has been allowed, viability is a crucial element." Stokes, 213 So.2d at 698. The Court even identified the states which based their right of recovery on attainment of viability and discussed several opinions from those states in detail. In the end, however, the Court based its decision primarily on the particular language of Florida's statute and its historical development, not on a balance of the relative merits of viability and live-birth. Id. at 700. That sort of balancing is part and parcel of the legislative process.

The First District Court of Appeal in Davis was the first court to consider the issue after amendment of the wrongful death laws in 1972. In Davis, the certified question expressly included the issue of viability. Davis, 313 So.2d at 796. Like this Court in Stokes, the Davis court found that the legislature did not intend for a case of action to exist in favor of an unborn but viable child. Id. at 798.

In Stern, again viability was expressly included in the certified question. There was no factual question that the deceased had been viable at the time of death. The district court below had expressly considered and accepted the argument, raised by petitioner in this case, that once the fetus reaches viability, it should be considered a person within the meaning of the Wrongful Death Act. Miller v. Highlands Ins. Co., 336 So.2d 636, 640 (Fla. 4th DCA 1976) quashed by Stern, 348 So.2d at 303 (Fla. 1977). This Court in Stern, while recognizing the arguments in favor of adopting "viability" as the legal standard, reversed the lower court. It based its ruling not on any perceived inability to establish viability but entirely on its interpretation of "the clear intent of the legislature." Id. at 308.

In Duncan, the Court reaffirmed the live birth requirement and further defined what it meant to be "born alive." Again, the Court did not retain the live birth requirement because of any question that the deceased was or

could be proven to be viable, but because of the established law as announced in Stern.

In every case in which this Court has addressed the right of an unborn person to recover for wrongful death, the fetus was presumed to be viable. In none of the cases where this Court has considered the issue, has the decision been based on any real or perceived lack of ability to demonstrate viability or any concern regarding the state of medical knowledge. In every case, the Court analyzed what the legislature had said and done on the issue, and concluded that live birth, rather than viability, was intended to be the standard applied. In the absence of this as a basis of the Court's prior rulings, Petitioner's argument is merely a "strawman" and should be rejected.

Likewise, petitioner's suggestion that some new developments in medicine have occurred since 1980 now making "viability" a recognized dividing line for wrongful death actions is false. Viability has been the dividing line in some states since 1949. Verkennes v. Corniea, 229 Minn. 365 (1949). The petitioner has not identified any development in medicine justifying a change in the law today that did not exist when this Court refused to rewrite the law in 1977, 1978 and 1980 or when the legislature refused in 1980, 1988 and 1989. There is nothing intrinsically improper or impossible

about using viability as the "starting point" for accrual of an action; our legislature has simply chosen a different one.

C. The viability standard is in conflict with a variety of other statutes and the public policy of the State and would create many unanticipated consequences.

Petitioner asks this Court to take the place of the legislature and, with its decision in this case, rewrite the Florida statutes. While she portrays this change as a minor one, she fails to advise this Court of the many other laws that would be affected by this amendment. While the effects might be controlled or mitigated if the amendment were drafted and debated by the legislature, the judicial lawmaking requested by petitioner does not allow for such damage control.

Petitioner's proposal would permit the personal representative of an unborn but potentially viable child to recover damages if the fetus dies in utero. At present, an adult woman in Florida may legally abort a viable fetus. § 390.001, et seq., Florida Statutes. The change in the Wrongful Death Act requested by petitioner from this Court would not change that.

If petitioner's request is granted, a physician who performs a legal abortion in Florida might be subject to civil liability for the wrongful death of the fetus if any expert

would opine that the fetus was viable. The personal representative of the fetus would presumably have the right to bring a wrongful death action against the physician, the hospital or clinic where the viable fetus lost its life and presumably against the mother as well. This and other unforseen consequences of changing the law, while not envisioned or addressed by petitioner, could be addressed by a legislature that drafted and debated such an amendment but not by a Court which is called upon to rule in a single case.

Further examples of unintended consequences are numerous. The father as personal representative of an unborn child who died in utero may be entitled to sue if the cause of death was poor or inadequate prenatal care by the mother. Actually, any arguable negligence of the mother, causing injury to herself and simultaneously causing the death of her viable fetus would expose her to civil liability for the death of her own child. The mother's employer, while immune from action by a pregnant employee for her work related injuries, would not be immune for the death of the employee's stillborn fetus. This is but a brief list of possible consequences which should be considered before the settled law is uprooted.

This Court has previously confronted cases where the law as then drafted did not permit recovery and the petitioner appealed to the court to "construe" the law to permit recovery. Even in the face of compelling emotional or policy

arguments, the Court has refused, recognizing that the proper remedy for a law considered harsh or improvident is through amendment or repeal through the legislative process, not construction or interpretation by the courts. Baker v. State, 636 So.2d 1342, 1343 (Fla. 1994):

In response to similar pleas to "create" a cause of action at common law the Court has held:

> "[O]f the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus." [citation omitted]. The legislature has evidenced, through Chapter 562 and Section 768.125 for example, a desire to make decisions concerning the scope of civil liability in this area. While creating such a cause of action may be socially desireable as petitioners cogently argue, the legislature is best equipped to resolve the competiting considerations implicated by such a cause of action. We agree with the observation of the Nebraska Supreme Court when faced with a similar issue . . . "[T]he task of limiting and defining a new cause of action which could grow from a fact nucleus formed from any combination of numerous permutations of the fact situation before us is properly within the realm of the Legislature." Homes v. Circo, 196 Neb. 496, 504, 244 N.W. 2d 65, 70 (1976).
>
> Bankston v. Brennan, 507 So.2d 1385, 1387 (Fla. 1987) (emphasis added).

As in the Bankston case, the competing concerns and public policy questions implicated in this case warrant consideration by the branch best able to hear all people with an interest not merely the litigants and their amici. That branch of government is the legislature and not this Court or any court in the state. Rather than planting the seeds for future unexpected consequences, this Court should allow the elected legislature to work its will through the lawmaking process.

Conclusion

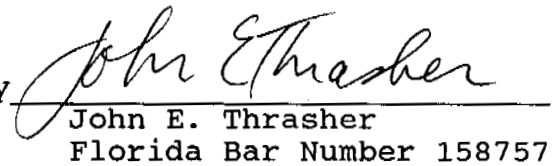
This Court has repeatedly and unequivocally held that there can be no recovery in Florida for the alleged wrongful death of a stillborn child. The Court has rejected the claim that such a right could be liberally construed from the Wrongful Death Act or discerned from the common law. Finding that the intent of the legislature was not to permit recovery, the Court has invited action. In response to this invitation, the legislature has for 25 years refused to alter the law, recently defeating several efforts to so amend it. It cannot be fairly said that any confusion or question remains as to whether an unborn child is covered by Section 768.19.

While it may be argued that viability is a superior dividing line for wrongful death actions, equally strong arguments exist in favor of preserving the live birth requirement. It is not the duty of this Court to resolve that debate. The perogative of balancing the competiting benefits and consequences of such a change to our law has been constitutionally vested in the legislature. Any change, if it is to come, must come from there.

Because the amended complaint seeks recovery for the wrongful death of a stillborn child, petitioner's claim is barred. The certified question should be answered in the

negative and the trial court's grant of summary final judgment should be affirmed.

SMITH HULSEY & BUSEY

By 
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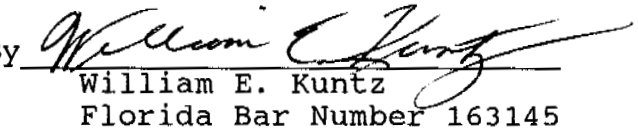
By 
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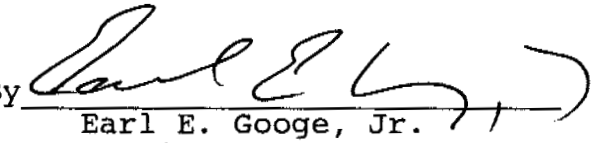
By 
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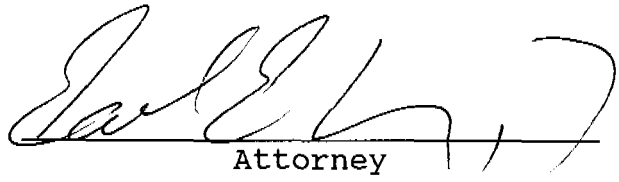
Certificate of Service

I hereby certify that a copy of the foregoing has been furnished by hand to Annette J. Ritter, Esq., Brown, Terrell, Hogan, Ellis, McClamma & Yegelwel, P.A., 804 Blackstone Building, Jacksonville, Florida 32202 and by mail to Richard A. Barnett, Esq., 4451 Sheridan St., #325, Hollywood, Florida 33021, Philip M. Burlington, Esq., Suite 3A/Barristers Bldg., 1615 Forum Place, West Palm Beach, Florida 33401, Richard A. Sherman, Esq., Suite 302, 1777 South Andrews Avenue, Fort Lauderdale, Florida 33316 and Wilton L. Strickland, Esq., P.O. Box 14246, Fort Lauderdale, Florida 33302 this 1st day of September, 1995.



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