IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,649

DCA CASE NO. 97-353

NATHAN MIZRAHI and AVA RUTHMAN,
Co-Personal Representatives of the
Estate of MORRIS MIZRAHI, Deceased,

Petitioners,

vs.

NORTH MIAMI MEDICAL CENTER, LTD.,
d/b/a PARKWAY REGIONAL MEDICAL CENTER;
LEONARD FRANK, M.D.; HOWARD SUSSMAN, M.D.;
RICHARD B. FIEN, M.D.; SUSSMAN, STALLER
& FIEN, M.D., P.A., HOWARD PARMET, M.D.;
HOWARD B. PARMET, M.D, P.A.; JORGE
MORDUJOVICH, M.D.; and DRS. RUTECKI,
PRESSER, FRANKFURT and MORDUJOVICH, P.A.,

Respondents.
_____/

BRIEF AND APPENDIX OF RESPONDENTS ON THE MERITS

JANIS BRUSTARES KEYSER, ESQ.
Florida Bar No. 353167
Gay, Ramsey & Warren, P.A.
Attorneys for Respondents,
Howard Sussman, M.D., Richard
B. Fien, M.D., Howard Parmet,
M.D., Howard B. Parmet, M.D., P.A.,
Jorge Mordujovich, M.D., Drs.
Rutecki, Presser, Frankfurt and
Mordujovich, P.A. and EMSA
Limited Partnership
1601 Forum Place, Suite 701
West Palm Beach, Florida 33402
(407) 640-4200

TABLE OF CONTENTS

TABLE OF CITATIONS

Page

OTHER CITATIONS

INTRODUCTION

For purposes of clarification, the petitioners' appendix shall be referred to by symbols "P.A." and respondents' appendix shall be referred to by symbols "R.A."

STATEMENT OF THE CASE AND FACTS

Respondents are in essential agreement with the Statement of the Case and of the Facts set forth by the petitioners. However, respondents would add the following reasoning of the Third District Court of Appeal in affirming the trial court's finding that Section 768.21(8) is constitutional which was not included in petitioner's Statement of the Case and Facts:

> The legislature's purpose in creating the challenged classification is crystal clear and certainly qualifies as a "legitimate state interest". In 1986, the legislature created an Academic Task Force for the Review of Tort and Insurance Systems. This Task Force was directed to investigate the effect of increasing medical malpractice insurance premiums on medical costs to patients; its investigation revealed a crisis in the cost of medical care in Florida. The Task Force's findings were incorporated into a 1988 change to Florida's medical malpractice statutes, specifically enacted as section 766.201, which states:
>
> > (a) Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased medical care costs for most patients and functional unavailability of malpractice insurance for some physicians .... (c) The average cost of defending a medical malpractice claim has escalated in the past decade to the point where it has become imperative to control such cost in the interest of the public need for quality medical services.
>
> § 766.201, Fla. Stat. (1995). In 1990, the legislature again referred to and discussed the medical malpractice crisis -- specifically its adverse impact on the accessibility of health care for Florida residents -- during the passage of section 768.21 of the Wrongful Death Act. The exclusion of adult

children of persons whose death had been caused by medical malpractice, contained in subsection (8), was expressly linked to the same rationale expressed in section 766.201, cited above. See Act Relating to Wrongful Death; Hearings on S.324 Before Fla. Senate, Fla. Senate, 1990 Session (Apr. 17, 1990); Hearings on H.706 Before Fla. House Judiciary-Civil Comm., Fla. House 1990 Session (Apr. 16, 1990).

* * *

It is beyond question that the accessibility of health care for Florida residents, preserved by curtailing medical malpractice costs, is a legitimate interest of the state. See Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365, 367-68 (Fla. 1981)(statutory classification in section 768.50 requiring any judgment in a medical malpractice case -- but not in other negligence cases -- be reduced by the amount plaintiff had received from collateral sources bears a reasonable relation to legitimate goal of curtailing medical malpractice premiums in order to preserve availability of quality health care to Florida residents). Thus, we find there is a "rational basis" for the classification.

The statute as written allows minor children who suffer lost parental companionship, instruction, and guidance, pain and suffering, to recover for those losses regardless of the type of negligence precipitating the claim. In doing so, it affords the broadest recovery to those arguably most in need of compensation for the type of damages at issue. At the same time, in an effort to control skyrocketing medical costs, the statute restricts these limited basis for recovery, when made by adult children, arguably those better able to survive the specific types of harm at issue.

The fact that the legislature, through chapter 90-14, chose to expand avenues of wrongful death recovery to certain classes of survivors does not mean that it was required to open the door to all classes of survivors. The appellants have failed to overcome the presumption of section 768.21(8)'s constitutionality. See Florida Dep't of Education v. Glasser, 622 So.2d 944, (Fla.1993); Belk-James, Inc. v. Nuzum, 358 So.2d 174 (Fla. 1978). It is well established that this presumption of validity will survive unless the challenging party proves beyond a reasonable doubt that the statute is

> unconstitutional -- that there is no conceivable factual predicate to support the classification the statute contains. See Gluesenkamp v. State, 391 So.2d 192, 200 (Fla.1980); A.B.A. Industries, Inc. v. City of Pinellas Park, 366 So.2d 761, 763 (Fla. 1979). The appellants have not met this difficult burden.
>
> It is not the function of the courts to agree or disagree with whether the factual predicate actually exists, nor to quibble with the means selected by the legislature to accomplish its stated purpose for the challenged classification, so long as the classification is not wholly arbitrary. A statutory classification will not be invalidated merely because it is not the best possible means of achieving the stated purpose of the legislature. See Cash Inn of Dade, Inc. v. Metropolitan Dade County, 938 F.2d 1239, 1241-43, 1243 (11th Cir.1991)("even if the court is convinced the [legislature] made an improvident, ill-advised, or unnecessary decision, ... it must uphold the act if it bears a rational relation to a legitimate government purpose"); In re Estate of Greenberg, 390 So.2d 40, 42 (Fla.1980); 10 Fla. Jur.2d Constitutional Law § 413 (1998).
>
> For the aforementioned reasons, we agree with the trial court that section 768.21(8) is constitutional.

712 So.2d at 828-30.

SUMMARY OF THE ARGUMENT

Both the trial court and the Third District Court of Appeal properly determined that Section 768.21(8), Florida Statutes, is constitutional. The legislative history underlying the enactment of Section 768.21(8), Florida Statutes, demonstrates that the purpose of the exclusion set forth in that provision was to prevent further increases in insurance premiums in order to keep medical care both affordable and accessible. The Legislature's enactment of Section 768.21(8), Florida Statutes, bears a rational relationship to the legitimate state interest of preserving the accessibility of health care for Florida residents by curtailing medical malpractice costs.

Petitioners have failed to establish beyond a reasonable doubt that the statute has no conceivable factual predicate to support the classification. When the Legislature chose to expand wrongful death recovery to certain classes of survivors, it was not required to expand it to all classes of survivors. Therefore, the presumption of validity that is afforded to legislative enactments has not been overcome. The question certified should be answered in the negative, the constitutionality of section 768.21(8), Florida Statutes should be upheld, and the opinion of the Third District should be approved in all respects.

ARGUMENT

SECTION 768.21(8), FLORIDA STATUTES (1995), WHICH IS PART OF FLORIDA'S WRONGFUL DEATH ACT, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FLORIDA AND FEDERAL CONSTITUTION.

Florida's Wrongful Death Act, Section 768.16 through Section 768.27, Florida

Statutes, creates statutory causes of action on behalf of various "survivors" of persons who died because of the wrongful act of another. The provision of the Wrongful Death Act at issue in this case, Section 768.21, Florida Statutes, defines the elements of damages that may be awarded to the estate for the various losses incurred by the decedents and their survivors. Since its enactment in 1972, the Legislature has expanded the scope of damages allowable under the Wrongful Death Act three (3) times. See, Chapters 81-183, 85-260 and 90-14, Laws of Florida. A claim for wrongful death was not authorized at common law and, therefore, claimants are strictly limited to the damages allowed under the statutory scheme of recovery. See White v. Clayton, 323 So.2d So.2d 573, 575 (Fla. 1975).

The petitioners' challenge in this case is to Chapter 90-14, Laws of Florida. This Act permits adult children of persons who die from the wrongful act of another to assert a cause of action for wrongful death if there is no surviving spouse of the decedent. The Act also permits the parents of a non-minor (adult) child to recover damages for mental pain and suffering if there are no other survivors. These provisions expand the allowable damages under the Wrongful Death Act which were not previously authorized by the Legislature. As part of the same Act, however, the Legislature declined to extend these new forms of damages to claims for medical malpractice as defined by Section 766.106(1).

Petitioners have no disagreement with the Legislature's expansion of the causes of action and damages allowable under the Wrongful Death Act. Petitioners claim, however, that the Legislature acted unconstitutionally by not extending the expansion of

the Wrongful Death Act to include medical malpractice claims.

Section 768.21, Florida Statutes, of the Wrongful Death Act, states in pertinent part:

> (3) Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for any mental pain and suffering from the date of injury.
>
> * * *
>
> (8) The damages specified in subsection (3) shall not be recoverable by adult children, and the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical malpractice as defined in S. 766.106(1).

Petitioners challenge the statute on the grounds that it violates the Equal Protection Clause, Article I, Section 2 of the Florida Constitution and the Fourteenth Amendment of the United States Constitution, and assert that there is no rational distinction between death by medical malpractice and death by any other tort.[1] Petitioners further contend

---

[1] The Third District, while recognizing that it did not need to address the statute's constitutionality with regard to substantive due process since appellants did not raise a substantive due process challenge to section 768.21(8) either at the trial level or on appeal, nevertheless found that substantive due process was not implicated by the statute and stated:

> The constitutional guarantee of substantive due process protects *fundamental* rights from encroachment by the government, and fundamental rights are those rights flowing from either the federal or Florida constitution. See De Ayala v. Florida Farm Bureau Cas. Ins. Co., 543 So.2d 204, 206 (Fla. 1989). Certainly, there is no such constitutional right to wrongful death damages; wrongful death actions did not exist at common law and were created by the legislature. See White v. Clayton, 323 So.2d 573, 575 (Fla. 1975). Thus, no fundamental right is implicated here. Further, where no fundamental right is at stake, the standard for evaluating substantive due process challenges is virtually identical to the rational basis test for evaluating equal protection challenges. See 10 Fla. Jur.2d Constitutional Law §427

(continued...)

that the statute creates a classification which is discriminatory, arbitrary and irrational and bears no reasonable relation to any legitimate state objective.

Contrary to petitioners' suggestion on page 16 of their initial brief, in affirming the final summary judgment in favor of respondents, the Third District referred to the legislative history of section 768.21(8) as follows:

> The legislature's purpose in creating the challenged classification is crystal clear and certainly qualifies as a "legitimate state interest". In 1986, the legislature created an Academic Task Force for the Review of Tort and Insurance Systems. This Task Force was directed to investigate the effect of increasing medical malpractice insurance premiums on medical costs to patients; its investigation revealed a crisis in the cost of medical care in Florida. The Task Force's findings were incorporated into a 1988 change to Florida's medical malpractice statutes, specifically enacted as section 766.201, which states:
>
> > (a) Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased medical care costs for most patients and functional unavailability of malpractice insurance for some physicians .... (c) The average cost of defending a medical malpractice claim has escalated in the past decade to the point where it has become imperative to control such cost in the interest of the public need for quality medical services.
>
> § 766.201, Fla. Stat. (1995). In 1990, the legislature again referred to and discussed the medical malpractice crisis -- specifically its adverse impact on the accessibility of health care for Florida residents -- during the passage of section 768.21 of the Wrongful Death Act. The exclusion of adult

---

(...continued)

(1998), citing Wood v. United States, 866 F.2d 1367, 1371 (11th Cir. 1989). Therefore, the rational basis analysis we apply to appellants' claim would likewise apply to a substantive due process claim.

712 So.2d at 828, fn.3.

> children of persons whose death had been caused by medical malpractice, contained in subsection (8), was expressly linked to the same rationale expressed in section 766.201, cited above. See Act Relating to Wrongful Death; Hearings on S. 324 Before Fla. Senate, Fla. Senate, 1990 Session (Apr. 17, 1990); Hearings on H. 709 Before Fla. House Judiciary-Civil Comm., Fla. House, 1990 Session (Apr. 16, 1990).

Mizrahi v. North Miami Medical Center, 712 So.2d 826, 828-29 (Fla. 3d DCA 1998).[2]

The thrust of petitioners' argument in this case is that the statute violates the equal protection clause because it creates an irrational distinction between adult child survivors in medical negligence cases and adult child survivors in non-medical negligence cases. As noted by the Third District in this case, "no existing remedy has been denied to persons in the appellants' position, as adult children never enjoyed a statutory or common law right to collect wrongful death damages in circumstances where a parent died as a result of medical malpractice." 712 So.2d at 828. Florida case law recognizes the Legislature's prerogative to make reasonable classifications of individuals who may recover damages under the Wrongful Death Act. See: Capiello v. Goodnight, 357 So.2d at 228; White v. Clayton, 323 So.2d 573 (Fla. 1975). The Third District further stated:

> Prior to the enactment of chapter 90-14, Laws of Florida, the Wrongful Death Act only permitted minor children to recover

[2] Petitioners also claim that the Third District made no mention of the particular statistics upon which the subject section was justified. The Legislature is not required to support its conclusions with empirical data as long as the assumptions it makes are logical. See Cash Inn of Dade, Inc. v. Metropolitan Dade County, 938 F.2d 1239, 1242 (11th Cir. 1991). If any set of facts, known or to be assumed, justify the law, the court's power of inquiry ends. State v. Bales, 343 So.2d 9, 11 (Fla. 1977). Questions as to the wisdom, need or appropriateness are for the Legislature. Id.

> pain and suffering damages due to the death of a parent. Chapter 90-14 expanded recovery for wrongful death to *all* children of a decedent not survived by a spouse, for lost parental companionship and for mental pain and suffering. However, chapter 90-14 also explicitly precluded the application of this expanded recovery to adult children where the cause of the wrongful death was medical malpractice. While this indicates a disparate treatment between adult children of a person who died as a result of medical malpractice and adult children of a person who died as a result of other negligence, we do not find this disparate treatment to be constitutionally infirm.

712 So.2d at 828.

An equal protection argument similar to that raised by the petitioners in this case, i.e., that the statute impermissibly makes a distinction between personal injury tort plaintiffs and medical malpractice tort plaintiffs, was raised before the Florida Supreme Court in University of Miami v. Echarte, 618 So.2d 189 (Fla. 1993); and HCA Health Services of Florida, Inc. v. Branchesi, 620 So.2d 176 (Fla. 1993). The Supreme Court in Echarte and Branchesi rejected this argument and upheld the constitutionality of Sections 766.207 and 766.209, Florida Statutes, which limit non-economic damages and require arbitration in certain medical malpractice claims. While the court in Echarte limited their discussion to the right of access to the courts, the court specifically stated:

> However, we have also considered the other constitutional claims and hold that the statutes do not violate . . . equal protection guarantees, substantive or procedural due process rights . . .

618 So.2d at 191. Similarly, the Third District found that section 768.21(8) does not give rise to an equal protection violation because of the separate treatment of those in the petitioners' position - adult children of a person who wrongfully died as a result of

medical malpractice. 712 So.2d at 828.

As recognized by the trial court below as well as the Third District, since no suspect class or fundamental right expressly or impliedly protected by the Constitution is implicated by Section 768.21(8), the test of constitutionality is whether this statutory provision has a rational relationship to a legitimate state interest.[3] Id. See: also Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1986)(the court used the rational basis test in determining the constitutionality of a provision of the Wrongful Death Act which allowed parents to recover for an adult child's net accumulations only if there were no surviving lineal descendants); Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981) (the court applied the rational basis test in determining the constitutionality of Section 768.58, Florida Statutes, which required judgments rendered in medical malpractice actions to be reduced by amounts received by plaintiffs from collateral sources). In support of this conclusion, the trial court cited to the following language contained in Judge Guy Spicola's opinion in Jones v. Abernathy, Third Judicial Circuit Case No. 92-8661:

> [A] class does not become 'suspect' simply because it is set apart from the rest of society. See, Lite v. State of Florida, 617 So.2d 1058 (Fla. 1993)(finding that forming a class does not violate equal protection as long as all persons within the

[3] Amicus, The Association for Responsible Medicine's suggestion that the Third District Court of Appeal improperly applied the rational relationship analysis rather than a federal sensitive rational scrutiny test, is without merit. It is well-settled in Florida that social and economic legislation such as section 768.21(8) is subject to a rational relationship analysis. See B & B Steel Erectors v. Burnsed, 591 So.2d 644, 647 (Fla. 1st DCA 1991); Cash Inn of Dade, Inc. v. Metropolitan Dade County, 938 F.2d 1239 (11th Cir. 1991). This is particularly true with respect to the challenged statute at issue in this case since wrongful death damages did not exist at common law but, rather, were created by the Legislature. Mizrahi, 712 So.2d at 828, fn.3.

> statutorily created class are treated equally); LeBlanc v. State of Florida, 382 So.2d 299 (Fla. 1980)(holding that it is not an equal protection requirement that every statutory classification be all inclusive and that a statute is valid if it applies equally to people within a statutory class). In the instant case, all adult children whose parents died as a result of medical negligence are classified and treated equally.

(See P.A. 5).

In Woods v. Holy Cross Hospital, 591 F.2d 1164, 1174 (Fla. 5th DCA 1979), the court, quoting Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161; 25 L.Ed.2d 491 (1970), stated:

> In the area of economics and social welfare, a statute does not violate the equal protection clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice, it results in some inequality.'

Id. The courts have long recognized that "equal protection is not violated where a permissible classification includes one, but not others, who might have been included in the broader classifications, as long as those within the legally formed class are accorded equal treatment under the law creating the classification." State v. Lite, 592 So.2d 1202, 1204 (Fla. 4th DCA 1992) (citing State v. White, 194 So.2d 601, 603 (Fla. 1967)). When the Legislature chose to bring the classes of people benefitted by Chapter 90-14 within the scope of the Wrongful Death Act, the Constitution did not compel the Legislature to include all classes within the expanded scope of the Act. See: State v. Peters, 534 So.2d 760, 765 (Fla. 3d DCA 1988) (statute does not violate due process where legislative body could deny rights altogether.)

The First District Court of Appeal in B & B Steel Erectors v. Burnsed, 591 So.2d 644, 647 (Fla. 1st DCA 1991), explains the "some reasonable basis" standard when employing the rational basis test:

> Under this standard, the courts uphold classifications so long as there appears to be any plausible reason for the Legislature's action, asking only whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the government. It is 'constitutionally irrelevant' whether the plausible reason in fact supports the legislative decision, because the courts have 'never insisted that a legislative body articulate its reasons for enacting a statute.' . . . This standard is 'highly deferential' toward the State's actions, and the burden is on the party challenging the law to establish that the State's action is without **any** rational basis. (Emphasis added.)

591 So.2d at 647; See, also, Florida High School Activities Associations, Inc. v. Thomas, 434 So.2d 306 (Fla. 1983); Mizrahi, 712 So.2d at 828.

The party challenging a statute must also overcome the presumption of validity which is afforded legislative enactments. Belk-James, Inc. v. Nuzum, 358 So.2d 174 (Fla. 1978); State v. McDonald, 357 So.2d 405 (Fla. 1978). This presumption will survive unless the challenging party proves beyond a reasonable doubt that the statute is unconstitutional. Belk-James, 358 So.2d at 177. Accordingly, the petitioners have the burden of proving beyond a reasonable doubt that Section 768.21(8) has no conceivable factual predicate to support excluding recovery by adult children if the parent's death is a result of medical malpractice. As noted by the Third District, "[i]t is not the function of the courts to disagree with whether the factual predicate actually exists nor to quibble with the means selected by the legislature to accomplish its stated purpose" for the challenged classification, so long as the classification is not wholly arbitrary." 712 So.2d

at 830. (See P.A. 7).

In cases such as this one which involves an economic classification, the rational basis test is extremely lenient, a searching inquiry into the validity of legislative judgments is not required. Cash Inn of Dade, Inc. v. Metropolitan Dade County, 938 F.2d 1239 (11th Cir. 1991) ("even if the court is convinced the [legislature] made an improvident, ill advised, or unnecessary decision, ... it must uphold the act if it bears a reasonable relation to a legitimate governmental purpose"). Indeed, where there is a plausible reason for a legislative enactment, it is constitutionally irrelevant whether that reason in fact underlay the legislative decision. McElrath v. Burley, 707 So.2d 836, 839 (Fla. 1st DCA 1998). 10 Fla. Jur. 2d Constitutional Law §414. (1998). Under the rational basis test, it is not necessary to inquire whether the statutory classification effects a permissible goal in the best possible manner as some degree of imprecision or inequality is permitted. McElrath, 707 So.2d at 839 citing to Ciancio v. North Dunedin Baptist Church, 616 So.2d 61, 62 (Fla. 1st DCA 1993). This is a heavy burden, and "any doubt [must] be resolved in favor of an enactment's constitutionality." Id.

Upon application of the "some reasonable basis" standard to the instant case, the Third District properly held that Section 768.21(8) does not violate the constitutional guarantees of equal protection. The Florida Supreme Court has consistently recognized the public purpose served by various enactments addressing medical malpractice and the rational relationship of those enactments to such purpose. For example, in Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981), the Florida Supreme Court held that excluding recovery of "collateral sources" in medical malpractice actions did not

violate the equal protection clause. In so holding, the Court recognized the reasonable relationship to a legitimate state interest of protecting public health by insuring the availability of adequate medical care for the citizens of this State. Id. at 368. Furthermore, Florida courts have repeatedly upheld Florida's Wrongful Death Act against due process and equal protection challenges where a certain class of persons were not permitted to recover damages under the Act. See: Bassett v. Merlin, Inc., 335 So.2d 273 (Fla. 1976); Capiello v. Goodnight, 357 So.2d 225 (Fla. 2d DCA 1978); White v. Clayton, 323 So.2d 573 (Fla. 1975).

The Third District likewise recognized the public purpose served by section 768.21(8) and the rational relationship of this statutory section to such purpose:

> We find that the statute's disparate treatment of medical malpractice wrongful deaths *does* bear a rational relationship to the legitimate state interest of ensuring the accessibility of medical care to Florida residents by curtailing the skyrocketing medical malpractice insurance premiums in Florida. See §766.201(1), Fla. State. (sic) (1995). Obviously, these escalating insurance costs adversely impact not only physicians by also, ultimately, their patients through the resultant increased cost of medical care.

Mizrahi, 712 So.2d at 828.

The legislative history of Chapter 90-14, Laws of Florida, indicates that the Florida Legislature deliberately excluded medical malpractice claims from the Act expanding allowable wrongful death damages for other tort claims. (R.A. 1-9). Otherwise, the Legislature would have undermined the many reforms it had enacted two (2) years before in Chapter 88-1, Laws of Florida, to address the medical malpractice insurance crisis in Florida.

Legislative committee considerations of the 1990 proposals further reinforces the Legislature's awareness of the potential problems associated with expanding wrongful death damages in medical malpractice claims. During a House Judiciary Subcommittee Meeting, Mr. Paul Jess, representing the Academy of Florida Trial Lawyers, supported the proposal and stated:

> There was a study done last year by the department that said that there would be estimated approximately a 2.5% rise in insurance rates as a result of this bill, but a larger percent increase as a result of medical malpractice. And that, I believe, is the basis why last year an amendment was made to the bill to exclude medical malpractice. So it does have a rational basis, although we believe philosophically, it probably should be covered. But there's certainly a rational basis for the bill that you have in front of you today. . . .

(P.A. 9).

The foregoing indicates that the rational basis for the Legislature's exclusion of medical malpractice claims in the enactment of Section 768.21(8) was to curtail rising medical costs while keeping medical services accessible to the public. In finding that there is a "rational basis" for the classification set forth in section 768.21(8), the Third District stated:

> In our view, it is clear that medical malpractice wrongful deaths are in a different category than wrongful deaths caused by other forms of negligence. The difference is this -- medical malpractice wrongful deaths adversely impact upon medical malpractice premiums in Florida and, ultimately, upon the accessibility of health care to Florida citizens, whereas wrongful deaths caused by other forms of negligence simply do not impact these "crisis" areas. This distinction is *precisely* the one upon which the legislature's classification in section 768.21(8) is drawn. It is beyond question that the accessibility of health care for Florida residents, preserved by curtailing medical malpractice costs,

> is a legitimate interest of the state. See Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365, 367-68 (Fla. 1981) (statutory classification in section 768.50 requiring any judgment in a medical malpractice case -- but not in other negligence cases -- be reduced by the amount plaintiff had received from collateral sources bears a reasonable relation to legitimate goal of curtailing medical malpractice premiums in order to preserve availability of quality health care to Florida residents).

Mizrahi, 712 So.2d at 829.

Petitioners argue that the First District's holding in Stewart v. Price, 718 So.2d 205 (Fla. 1st DCA 1998) that Section 768.21(8) "bears a rational relationship to the legitimate state interest of limiting increases in medical insurance costs" cites to Section 766.201(1), Florida Statutes, which predates the subject amendment at issue in this case. The legislative history relied upon by Judge Spicola in Jones v. Abernathy, Third Judicial Circuit, Case No. 92-8661, however, demonstrates that the medical malpractice insurance crisis which existed in 1988, when Section 766.201(1) was enacted, was still in existence in October of 1990 when Section 768.21(8) took effect. For example, Judge Spicola cites to Senator Bob Johnson's testimony wherein he stated that he was a member of the Legislature in 1988 and information was presented on the on-going medical malpractice crisis in Florida and the need to curtail these costs to keep medical care both affordable and accessible. (R. 98-114) (See P.A. 9).

The Third District likewise relied on the legislative history of Chapter 90-14 in stating:

> In 1990, the legislature again referred to and discussed the medical malpractice crisis -- specifically its adverse impact on the accessibility of health care for Florida residents -- during the passage of section 768.21 of the Wrongful Death

> Act. The exclusion of adult children of persons whose death had been caused by medical malpractice, contained in subsection (8), was expressly linked to the same rationale expressed in section 766.201, cited above. See Act Relating to Wrongful Death; Hearings on So. 324 Before Fla. Senate, Fla. Senate, 1990 Session (Apr. 17, 1990); Hearings on H. 709 Before Fla. House Judiciary-Civil Comm., Fla. House, 1990 Session (Apr. 16, 1990).

712 So.2d at 829.[4]

Petitioners' argument that a greater numerical threshold must be met before a "legitimate state interest" finding can be made is without merit. An increase of 4.5% in medical malpractice insurance rates, absent the exclusion for medical malpractice claims set forth in Section 768.21(8), is substantial in light of the following legislative findings:

> (a) Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased medical care costs for most patients and functional unavailability of malpractice insurance for some physicians .... (c) The average cost of defending a medical malpractice claim has escalated in the past decade to the point where it has become imperative to control such cost in the interest of the public need for quality medical services.

Section 766.201, Fla. Stat. (1995).

Courts do not require mathematical certainty, as long as there is some reasonable relation to a permissible legislative objective. See: Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979). The prevention of any increase to the already staggering and

[4] Contrary to the suggestion of petitioners and amicus, the medical malpractice crisis continues to exist affecting the availability and affordability of health care for millions of Floridians. See pages 5-7 of brief of Amicus Curiae, Florida League of Health Systems, Florida Hospital Association, Florida Medical Association and The Association of Community Hospitals and Health Systems of Florida and S. Rep. 104-83 1995 WL 311930 (1995).

unaffordable medical malpractice liability insurance premiums is a "legitimate state interest." In light of the astronomical medical malpractice liability insurance premiums in Florida, the fact that Section 768.21(8) was enacted in order to prevent a future increase of 4.5%, constitutes a reasonable relation to a permissible legislative objective.

Finally, petitioners' suggestion that the legislative intent set forth in subsection (2) of Section 766.201, regarding the provision of a plan for a prompt resolution of medical negligence claims consisting of pre-suit investigation and arbitration, somehow limits the applicability of the legislative findings set forth in Section 766.201(1) is without merit. The Legislature's findings in subsection (1) with regard to the medical malpractice insurance crisis are not limited by the Legislature's announced intent to provide a plan for prompt resolution of medical malpractice claims. Rather, the findings set forth in Section 766.201(1) are a proper predicate for the trial court's conclusion that the Legislature had a "legitimate state interest" in enacting Section 768.21(8).

The Third District noted that "[t]he statute as written allows minor children who suffer lost parental companionship, instruction and guidance, pain and suffering, to recover for those losses regardless of the type of negligence precipitating the claim." 712 So.2d at 829. Accordingly, the statute affords the broadest recovery to those in greatest need of compensation for the damages at issue. The Third District recognized that "[a]t the same time, in an effort to control skyrocketing medical costs, the statute restricts these limited basis for recovery when made by adult children, arguably those better able to survive the specific types of harm at issue." Id.

In conclusion, as stated by the Third District:

> The fact that the legislature, through chapter 90-14, chose to expand avenues of wrongful death recovery to certain classes of survivors does not mean that it was required to open the door to all classes of survivors.
> The appellants have failed to overcome the presumption of section 768.21(8)'s constitutionality. See Florida Dep't of Education v. Glasser, 622 So.2d 944, 946 (Fla. 1993); Belk-James, Inc. v. Nuzum, 358 So.2d 174 (Fla. 1978). It is well established that this presumption of validity will survive unless the challenging party proves beyond a reasonable doubt that the statute is unconstitutional -- that there is no conceivable factual predicate to support the classification the statute contains. See Gluesenkamp v. State, 391 So.2d 192, 200 (Fla. 1980); A.B.A. Industries, Inc. v. City of Pinellas Park, 366 So.2d 761, 763 (Fla. 1979). The appellants have not met this difficult burden.

Id. at 829-30.[5]

For the foregoing reasons, respondents respectfully submit that the Third District

---

[5] Amicus, The Association for Responsible Medicine, also present an access to courts and substantive due process challenge to section 768.21(8) in their brief on the merits. Since petitioners did not raise these issues at the trial level, or on appeal before the Third District or this Supreme Court, this Court need not address these issues. See Penn v. Florida Defense Finance and Accounting Service Center, 623 So.2d 459 (Fla. 1993). See also Higbee v. Housing Authority of Jacksonville, 197 So. 479 (Fla. 1940) (an amicus curiae has no right to question the constitutionality of an act, and the court will not pass on grounds of invalidity urged by an amicus curiae but not presented by the parties). In any event, respondents would adopt the reasoning of the court in Mizrahi with regard to the substantive due process challenge. 712 So.2d at 828, fn.3. Further, respondents would adopt the following rationale of the First District in Stewart v. Price, 718 So.2d 205 (Fla. 1st DCA 1998) where the court rejected the plaintiff's access to court's challenge:

> Chapter 90-14 closed no courthouse doors. Rather, it opened, albeit only for some, those doors by creating a limited right of recovery where no recovery had previously existed at all.

718 So.2d at 210. Wrongful death actions were created by the legislature and did not exist at common law. White v. Clayton, 323 So.2d 573 (Fla. 1975). Accordingly, petitioners have no constitutional right of access to these claims. See McElrath v. Burley, 707 So.2d 836 (Fla. 1st DCA 1998).

Respondents submit this Court should reject amicus' suggestion to rephrase and broaden the issue certified by the Third District.

properly determined that section 768.21(8) is constitutional.

CONCLUSION

For the above-stated reasons, Respondents, HOWARD SUSSMAN, M.D., RICHARD B. FIEN, M.D., SUSSMAN, STALLER & FIEN, M.D., P.A., HOWARD PARMET, M.D., HOWARD B. PARMET, M.D., P.A., JORGE MORDUJOVICH, M.D., DRS. RUTECKI, PRESSER, FRANKFURT and MORDUJOVICH, P.A., and EMSA LIMITED PARTNERSHIP, respectfully urge this Honorable Court to answer the certified question in the negative, to declare section 768.21(8) Florida Statutes (1990) constitutional, to approve the decision of the District Court of Appeal, Third District, and to affirm the summary final judgment for the respondents.

Respectfully submitted,

GAY, RAMSEY & WARREN, P.A.
Attorneys for **Respondents, Sussman, et al.**
1601 Forum Place, Suite 701
Post Office Box 4117
West Palm Beach, Florida 33402
(407) 640-4200

By: _____
Janis Brustares Keyser
Florida Bar No. 353167

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all attorneys on the attached counsel of record list this _____ day of November, 1998.

GAY, RAMSEY & WARREN, P.A.
Attorneys for **Respondents, Sussman, et al.**
1601 Forum Place, Suite 701
Post Office Box 4117
West Palm Beach, Florida 33402
(407) 640-4200

By: _____
Janis Brustares Keyser
Florida Bar No. 353167

h:\188.61\appeal\respond.brf

COUNSEL LIST

Arnold R. Ginsberg, Esq.
Arnold R. Ginsberg, P.A.
66 West Flagler Street Suite 410
Miami, Florida 33130
Telephone: (305) 358-0427
Attorney for Petitioners

Hinda Klein, Esq.
Conroy, Simberg, & Ganon, P.A.
3440 Hollywood Boulevard, 2nd Floor
Hollywood, FL 33021
Telephone: (954) 961-1400
Attorney for Respondents N. Miami Medical Center d/b/a Parkway Regional Medical Center

Harriet Rae Freeman, Esq.
Association for Responsible Medicine
105 S. Narcissus Avenue Suite 702
West Palm Beach, Fl 33401
Telephone: (561) 626-9345
Lead Appellate Counsel for Amicus Curiae

Barbara Scheffer, Esq.
Association for Responsible Medicine
11380 Prosperity Farms Road
Suite 204
Palm Beach Gardens, Fl 33410
Telephone: (561) 622-8100
Co-appellate Counsel for Amicus Curiae

Michael J. Murphy, Esq.
Gaebe, Murphy, Mullen & Antonelli
420 South Dixie Highway, 3rd Floor
Coral Gables, Florida 33146
Telephone: (305) 667-0223
Attorney for Plaintiffs Mizrahi

William Zei, Esq.
Peterson Bernard Vandenberg
Zei Geisler & Martin
707 S.E. Third Avenue, 5th Floor
Fort Lauderdale, Florida 33316

Telephone: (954) 763-3200
Attorney for Defendant EMSA Limited Partnership

Robert I. Rubin, Esq.
Law Office of Robert I. Rubin
Cypress Court, Suite 303
6360 N.W. Fifth Court
Fort Lauderdale, Florida 33309
Telephone: (954) 491-5683
Attorney for Defendants Dr. Mordujovich & P.A.

Kevin O'Connor, Esq.
O'Connor & Meyers
2801 Ponce de Leon Boulevard, 9th Floor
Coral Gables, Florida 33134
Telephone: (305) 445-4090
Attorney for Defendants Dr. Parmet & P.A.

Miles A. McGrane, Esq.
McGrane & Nosich, P.A.
2801 Ponce de Leon Boulevard, 12th Floor
Coral Gables, Florida 33134
Telephone: (305) 442-4800
Attorney for Defendants Dr. Sussman,
Dr. Fien & P.A.