IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA THIRD DISTRICT

LYNN GARBER, as PERSONAL REPRESENTATIVE of the ESTATE OF FRANCES GOLUB, deceased & LYNN GARBER, surviving daughter,

Appellant,

vs.

LAWRENCE SNETMAN, M.D., MALCOLM COHEN, M.D., STEVE POLIAKOFF, M.D., FLORIAN YANDEL, JR., M.D., FRANK MOYA, M.D. AND ASSOCIATES, P.A., AND MOUNT SINAI MEDICAL CENTER OF GREATER MIAMI, INC., their agents, servants & employees,

Appellees.
_____/

3DCA CASE NO. 97-1109

L.T. CASE NO. 96-7444

FLA. BAR NO.: 353167

# ANSWER BRIEF OF APPELLEE, LAWRENCE SNETMAN, M.D.

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## SUMMARY OF THE ARGUMENT

The trial court properly granted the Defendants' Motion for Summary Judgment based on the finding 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 dramatic 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 reducing the size of claims, increasing claims predictability and insurance availability, and otherwise assuring adequate, available and inexpensive health care to Florida's citizens.

Accordingly, Plaintiff has failed to establish beyond a reasonable doubt that the statute has no conceivable factual predicate to support the classification. Therefore, the presumption of validity that is afforded to legislative enactments has not been overcome.

## ARGUMENT

## POINT ON APPEAL

**THE TRIAL COURT PROPERLY GRANTED THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON THE FINDING THAT SECTION 768.21(8), FLORIDA STATUTES, IS CONSTITUTIONAL.**

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.

The Plaintiff's 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).

The Plaintiff has no disagreement with the Legislature's expansion of the causes of action and damages allowable under the Wrongful Death Act. The Plaintiff claims,

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).

The Plaintiff challenges 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 asserts that there is no rational distinction between death by medical malpractice and death by any other tort. Plaintiff further contends that the statute creates a classification which is discriminatory, arbitrary and irrational and bears no reasonable relation to any legitimate state objective.

As noted by the Plaintiff in her initial brief, the First District Court of Appeal has recently upheld the constitutionality of Section 768.21(8) in the case of Stewart v. Price, 22 Fla. L. Weekly D2352 (1st DCA Oct. 7, 1997). However, Plaintiff fails to fully set forth the First District Court of Appeal's analysis in finding that the statute does not constitute an equal protection violation. The court's analysis in Stewart "begins with the recognition that under the common law, an adult, who has not been dependent on a parent, was not entitled to recover damages for the wrongful death of a parent" citing to

U.S. v. Durrance, 101 F.2d 109 (5th Cir. 1939) and Louisville & N. R. Co. v. Jones, 45 Fla. 407, 34 So. 246 (1903). The court in Stewart further stated:

> Prior to the enactment of chapter 90-14, Laws of Florida, under section 768.21(3), only minor children could recover damages for their pain and suffering upon the wrongful death of a parent. See: Weimer v. Wolf, 641 So.2d 480 (Fla. 2d DCA 1994). In chapter 90-14, the Legislature amended Section 768.21(3), among other things, to expand the definition of 'survivors' who may recover for the wrongful death of a parent. Thus, in addition to minor children, chapter 90-14 authorized all children of the decedent to recover for lost parental companionship, instruction and guidance and for mental pain or suffering, when there is no surviving spouse. At the same time, however, in chapter 90-14, the Legislature precluded the application of this expanded 'survivors' definition to adult children where the cause of the wrongful death is the result of medical malpractice. Thus, chapter 90-14 treated adult children of a person who dies as a result of medical malpractice differently than adult children whose parent dies as a result of a cause other than medical malpractice.
>
> We do not find that an equal protection violation is presented by this separate treatment. Had the Legislature eliminated an existing remedy, we would be required to employ a different constitutional analysis. See: Kluger v. White, 281 So.2d 1 (Fla. 1973). Because no statutory or common law right existed for the adult children of persons who wrongfully died as a result of medical malpractice, however, section 768.21(8) may be declared an unconstitutional denial of equal protection only if it bears no rational relationship to a legitimate state objective. See: State v. Leicht, 402 So.2d 1153 (Fla. 1981). Florida's Wrongful Death Act was found constitutional even though it provided no general right of recovery to adult non-dependent children of persons subject to wrongful death of any cause. Henderson v. Insurance Company of North America, 347 So.2d 690 (Fla. 4th DCA 1977); and Capiello v. Goodnight, 357 So.2d 225 (Fla. 2d DCA 1978). We find no constitutional barrier to the Legislature's subsequent **limited** grant of the right to recover damages for pain and suffering to adult, non-dependent children. (Emphasis added.)

Id. at D2353.

The thrust of Plaintiff's 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 recognized by the First District Court of Appeal in Stewart, however, survivors in a wrongful death action had no claim at common law. See: Stern v. Miller, 348 So.2d 303 (Fla. 1977). 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). Furthermore, an equal protection argument similar to that raised by the Plaintiff 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 upheld the constitutionality of Section 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 . . .

618 So.2d at 191.

As noted by the trial court in Jones v. Abernathy, Third Judicial Circuit, Case No. 92-8661, 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. (R. 67-68)

See: 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 Spicola's opinion in Jones v. Abernathy, supra:

> [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 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.

(R. 67)

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 D&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).

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 Plaintiff has 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 stated by Judge Spicola in the Jones v. Abernathy decision, it is not this Court's function "to agree or disagree with whether the factual predicate actually exists or with the means selected by the legislature to accomplish the state purpose." (R. 69)

Upon application of the "some reasonable basis" standard to the instant case, the trial court 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. 403 So.2d 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 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. 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.

In 1986, the Florida Legislature enacted the Tort Reform and Insurance Act. A portion of this Act created the Academic Task Force for Review of Tort and Insurance Systems. As noted by Judge Spicola in Jones v. Abernathy, supra, the Task Force submitted their findings to the Legislature and recommended that the increase in premiums was negatively affecting the practice of medicine in Florida. (R. 69) During the 1988 legislative session, the Legislature adopted the Task Force's findings and recommendations resulting in the enactment of Chapter 88-1, Laws of Florida (Section 766.201). This section states, in relevant part, that the Legislature has made the following 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;
>
> (b) The primary cause of increased medical malpractice liability insurance premiums has been the substantial increase in loss payments to claimants caused by tremendous increases in the amounts of paid claims; and
>
> (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 costs in the interest of the need for quality medical services.

The foregoing demonstrates that, in 1988, the Legislature felt that legislation was needed to control the cost of medical malpractice insurance and the cost of defending medical malpractice claims in the interest of the need for quality medical services.

Section 768.21 was enacted during the 1990 Florida legislative session. During Senate hearings on the bill, Senator Peter Weinstein addressed the concern of expanding damages in wrongful death medical malpractice claims:

> The reason that [medical malpractice claims were excluded] is because whether real or imagined, there has been in this State, a crisis in the area of medical malpractice. And I say real or imagined because some people claim that it's real, some claim it's imagined. But all recognize, for the purpose of making sure that this doesn't become an issue that might create further problems in delivering medical care, it was determined that this was not the area of greatest loss and should not be part of the bill. As far as the insurance costs, we did not want to do that and create any problem in the medical malpractice insurance area. . . .

(A. 3-4)

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. . . .

(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. As stated by Judge Spicola in Jones v. Abernathy, supra, this clearly establishes a rational relationship to the legitimate state interest of reducing the size of medical malpractice claims, increasing the claims predictability and insurance availability and otherwise assuring adequate, available and inexpensive health care to Florida's citizens. (R. 72) See: Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981).

Plaintiff argues that the First District's holding in Stewart, supra, 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, supra, 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. 71)

Next, the Plaintiff's 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 Legislature's findings that "medical malpractice liability insurance premiums have increased dramatically in

recent years." Section 766.201(1)(a), Florida Statutes (1988). 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 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, Plaintiff's 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 existing 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).

In conclusion, the foregoing demonstrates that the Legislature's enactment of Section 768.21(8), Florida Statutes, bears a rational relationship to the legitimate state interest of curtailing rising medical costs while keeping services accessible. Plaintiff has failed to establish beyond a reasonable doubt that Section 768.21(8), Florida Statutes, has no conceivable factual predicate to support the classification. Thus, the presumption of validity that is afforded to legislative enactments has not been overcome. Accordingly,

the trial court properly rejected Plaintiff's contention that Section 768.21(8) is unconstitutional under either the state or federal constitutions.

## CONCLUSION

For the above-stated reasons, Appellee, LAWRENCE SNETMAN, M.D., respectfully submit that the trial court's entry of final summary judgment in his favor should be affirmed.

Respectfully submitted,

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## 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 list this _____ day of January, 1998.

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April 24, 2000

**GARBER v. SNETMAN, M.D., et al.**

**3DCA CASE NO. 97-1109**


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