IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,650

DCA No. 97-1109

Fla. Bar No. 137172

LYNN GARBER, as personal representative of the estate of FRANCES GOLUB, deceased, and LYNN GARBER, surviving daughter,

Petitioner,

vs.

LAWRENCE SNETMAN, M.D., et al,

Respondents.
_____/

BRIEF AND APPENDIX OF PETITIONER ON THE MERITS (CERTIFIED QUESTION)

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I.

INTRODUCTION

The petitioner, Lynn Garber, as personal representative of the estate of Frances Golub, deceased, for and on behalf of the estate of Frances Golub, deceased, and Lynn Garber, surviving daughter, was the appellant in the District Court of Appeal, Third District, and was the plaintiff in the trial court. The several respondents were the appellees/defendants. Given the nature of the subject matter before this Court, the parties will be referred to as the plaintiff and the defendants. If necessary for clarification or emphasis, the involved party will be referred to by name. The symbols "R" and "A" will refer to the record on appeal and the appendix accompanying this brief, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

A.

Rejecting the plaintiff's several arguments that Section 768.21(8), Florida

Statutes, was unconstitutional under the equal protection clause, Article I, Section 2, of the Florida Constitution, and the Fourteenth Amendment of the United States Constitution, and further rejecting plaintiff's additional challenges to the statute that there existed no rational nor reasonable relation between the statute and any legitimate state objective, the District Court of Appeal, Third District, in an opinion now reported, see: GARBER v. SNETMAN, 712 So. 2d 481 (Fla. App. 3d 1998) (A. 11, 12), affirmed a summary final judgment entered in favor of several health care providers in this medical negligence/wrongful death case (R. 188, 189) and, as another panel of that court did in MIZRAHI v. NORTH MIAMI MEDICAL CENTER, LTD., 712 So. 2d 826 (Fla. App. 3d 1998) [presently pending before this Court, Florida Supreme Court Case No. 93,649] certified to this Court, as a question of great public importance, the following:

> DOES SECTION 768.21(8), FLORIDA STATUTES ((1995)), WHICH IS PART OF FLORIDA'S WRONGFUL DEATH ACT, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FLORIDA AND FEDERAL CONSTITUTIONS, IN THAT IT PRECLUDES RECOVERY OF NON-PECUNIARY DAMAGES BY A DECEDENT'S ADULT CHILDREN WHERE THE CAUSE OF DEATH WAS MEDICAL MALPRACTICE WHILE ALLOWING SUCH CHILDREN TO RECOVER WHERE THE DEATH WAS CAUSED BY OTHER FORMS OF NEGLIGENCE?

B.

The operative facts of this medical negligence/wrongful death case, as well

as the legal issue involved, can be learned from the summary final judgment appealed:

* * *

"This cause having come before the Court to be heard on the Motion for Summary Judgment filed by defendant, Lawrence Snetman, M.D., which Motion was joined by all other defendants, the Court, having heard argument from counsel, reviewed the pleadings, Motion, memoranda and cases cited, and being otherwise fully advised in the premises, finds and concludes that no issue of material fact remains. Accordingly, defendants are entitled to summary judgment as a matter of law. More specifically the Court finds as follows:

"Plaintiff instituted this action against several physicians and a hospital seeking recovery for intentional infliction of emotional distress and for mental pain and suffering. On March 26, 1994, Frances Golub was admitted to Mount Sinai Medical Center for treatment following a suspected stroke. On April 13, 1994, Mrs. Golub underwent surgery to remove a suspected cancerous tumor from her pelvis. She died on May 8, 1994.

"Mrs. Golub was seventy years old at the time of her death. She had never worked outside the home, did not have a spouse, and was survived only by Lynn Garber, her thirty three year old daughter, the plaintiff in this action.

"The claims for which Ms. Garber seeks recovery are governed by Chapters 768 and 766 of the Florida Statutes. She seeks damages for mental pain and suffering and for loss of support and services in her individual capacity, and for net accumulations on behalf of her mother's estate.

"After a review of the facts, this Court concludes that the entry of Summary Judgment is proper in that Florida law prohibits recovery by a non-minor child on the theories presented. The Court

respectfully rejects plaintiff's contentions that the applicable statutes are unconstitutional under either the state or federal constitutions. Accordingly, Final Summary Judgment is hereby entered in favor of defendants and against plaintiff." (R. 188, 189)

* * *

On appeal to the Third District that court affirmed and certified to this Court, as a question of great public importance, the question set out in full, supra.

This proceeding followed (R. 194-196).

III.

QUESTION PRESENTED

DOES SECTION 768.21(8), FLORIDA STATUTES ((1995)), WHICH IS PART OF FLORIDA'S WRONGFUL DEATH ACT, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FLORIDA AND FEDERAL CONSTITUTIONS, IN THAT IT PRECLUDES RECOVERY OF NON-PECUNIARY DAMAGES BY A DECEDENT'S ADULT CHILDREN WHERE THE CAUSE OF DEATH WAS MEDICAL MALPRACTICE WHILE ALLOWING SUCH CHILDREN TO RECOVER WHERE THE DEATH WAS CAUSED BY OTHER FORMS OF NEGLIGENCE?

IV.

SUMMARY OF ARGUMENT

The plaintiff would suggest to this Court that both the trial court and the District Court of Appeal, Third District, committed reversible error in finding Section 768.21(8), Florida Statutes (1995), constitutional. For the following reasons the question certified should be answered in the affirmative, the subject

section should be held unconstitutional, the opinion of the Third District should be quashed and the summary final judgment appealed should be reversed.

The exception to the subject statute violates the concepts of equal protection as there is no rational distinction that can be made between death occurring as a result of medical malpractice and death occurring as a result of all other torts. The subject statute targets the elderly–those persons with adult children and no surviving spouse! The statute discriminates against them by depriving redress for even the most flagrant "medical" mistreatment yet allows redress for the same degree of non-medical mistreatment! In that regard, the subject statute devalues human life and health, and allows for "mistreatment!"

There exists no legitimate state objective that has been identified to date to allow for the drawing of those distinctions which have been made in this case and this is so even if such distinctions could have been (preliminarily) justified in 1986. The classifications found in the exceptions to the subject statute are quite simply discriminatory, arbitrary and irrational. Where, as here, both the task force and the Florida Legislature noted that the "high cost" of medical malpractice claims in the state could be substantially alleviated by requiring early determination of the merit of claims, by providing for early arbitration of claims (thereby reducing delay and attorney's fees) and by imposing reasonable

limitations on damages, any suggestion (and judicial holding) that the total exclusion of a class of persons from the benefits otherwise available to others equally situated cannot be justified and should not be allowed.

The statute's exception was enacted for the sole benefit of health care providers. The statute's exception spots the health care industry for privileged attention and constitutes special legislation which should not be allowed to exist. Because said section unlawfully singles out adult survivors in cases of medical negligence and leaves them entirely without a remedy, while similarly situated adult survivors in cases of non-medical negligence are afforded a remedy, the exception to the subject statute should be held unconstitutional. Such result can clearly be accomplished without adversely impacting the remainder of the enactment.

The question certified should be answered in the affirmative and the opinion of the District Court of Appeal, Third District, should be quashed.

V.

ARGUMENT

SECTION 768.21(8), FLORIDA STATUTES (1995), WHICH IS PART OF FLORIDA'S WRONGFUL DEATH ACT, VIOLATES THE EQUAL PROTECTION CLAUSE OF BOTH THE FLORIDA AND FEDERAL CONSTITUTIONS, IN THAT IT PRECLUDES RECOVERY OF NON-PECUNIARY DAMAGES BY A

DECEDENT'S ADULT CHILDREN WHERE THE CAUSE OF DEATH WAS MEDICAL MALPRACTICE WHILE ALLOWING SUCH OTHER CHILDREN TO RECOVER WHERE THE DEATH WAS CAUSED BY OTHER FORMS OF NEGLIGENCE.

The plaintiff would suggest to this Court that both the trial court and the District Court of Appeal, Third District, committed reversible error in finding Section 768.21(8), Florida Statutes (1995), constitutional. For the following reasons the question certified should be answered in the affirmative, the subject section should be held unconstitutional, the opinion of the Third District should be quashed and the summary final judgment appealed should be reversed with directions to the trial court to deny the defendants' motions for summary judgment and to allow this matter to proceed to a jury trial on all issues.

A.

In moving for summary final judgment (R. 37-40; R. 41, 42; R. 74-76; R. 77-79; R. 159-161; R. 162-164; R. 165-171) the defendants early on relied upon the trial court opinion entered February 16, 1995 by the Honorable Guy Spicola, Circuit Court Judge for the Third Judicial Circuit, in the case of JONES v. ABERNATHY, Third Judicial Circuit Case No. 92-8661 (A. 1-10). In that case, the trial court found the subject statute constitutional:

* * *

"In 1986, the legislature created the Academic Task

Force for the Review of Tort and Insurance Systems. As testified by Dr. Marvin Dewar, this Task Force, of which he was a member, examined the relationship between medical malpractice claims and medical malpractice insurance, and the effect these had on the public. (Dewar depo. pp. 8-11) Dr. Dewar testified that the Task Force found that in the late 1980's there were substantial increases in medical malpractice insurance and in the number of claims paid. (Dewar depo. pp. 13-15).

"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. This recommendation was based on findings that doctors were refusing to perform certain procedures in order to keep their premiums lower. During the 1988 legislative session, the legislature adopted these findings and recommendations when enacting §766.201 into law. 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.
>
> (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 interests of the need for quality medical services.

§766.201 Fla. Stat. (1993). Thus, in 1988, the legislature felt that legislation was needed to control the costs of medical malpractice insurance.

"Florida Statute §768.21 was enacted during the legislative session. During Senate hearings on the bill, Senator Peter Weinstein was questioned as to why medical malpractice claims were excluded under subsection (8). The Senator responded by stating that there is a perceived crisis in the area of medical malpractice, and, whether or not the crisis is real, the exclusion would prevent any problems in delivering medical care. (Senate Transcript 4/17/90). This conclusion is further supported by Dr. Dewar who surmised that the medical malpractice legislation passed in the late 1980's has prevented further dramatic increases in insurance premiums. (Dewar depo. 5. 50).

"Additionally, the legislature was provided with a letter form Richard Hickson, an actuary with the State of Florida's Department of Insurance, which related to the passage of §768.21. In his letter Mr. Hickson stated that as a result of the bill being enacted general liability rates would increase by 2.5%, while medical malpractice liability rates would increase by 4.5%."

* * *

"Senator Bob Johnson testified that he was a member of the legislature in 1988 and voted for the passage of §768.21. He recalled that before the bill was passed there were several discussions regarding the medical malpractice exclusion and the reasons in support of it. Specifically, he stated that information was presented on the ongoing medical malpractice crisis in Florida and the need to curtail these costs to keep medical care both affordable and accessible. Thus, the legislature had a rational basis (i.e. controlling medical costs for the benefit of the public) for excluding medical malpractice under §768.21(8)."

* * *

> "In the instant case, the evidence supports the finding that the legislature enacted §768.21(8) with the intent of curtailing rising medical costs while keeping services accessible. This clearly establishes a rational relationship to a legitimate state interest. Furthermore, 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 enacted laws has not been overcome. Accordingly, this Court finds that Florida Statute §768.21(8) is constitutional." (A. 1-10)

* * *

In affirming the summary final judgments appealed, a panel of the Third District relied upon the opinion rendered by another panel of that same court in MIZRAHI, supra–neither panel making mention of either the legislative history of the subject section or the particular statistics upon which the subject section allegedly was justified. However, as to these particular matters, the MIZRAHI court, see: 712 So. 2d at pages 828 and 829, supra, merely concluded:

* * *

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

* * *

> "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..." 712 So. 2d at pages 828 and 829.

* * *

It would appear, from a consideration and analysis of the authorities upholding the statute to date [including the decision of the First District Court of Appeal in STEWART v. PRICE, 22 Fla. L. Weekly, D2352a, corrected opinion, 23 Fla. L. Weekly, D1800 (July 19, 1998, 1st DCA), pending on jurisdiction, Supreme Court Case No. 93,804] the enactment survives equal protection challenge because:

1. There exists some rational relationship to a legislatively stated purpose;

2. The preamble to Section 766.201, Florida Statutes (1988), acknowledges and recognizes a crisis in the health care industry and the resultant need for reform; and

3. The reason for excluding medical malpractice claims

from the challenged statute is that the Legislature had a rational basis (i.e., controlling medical costs for the benefit of the public).

The plaintiff would note at this juncture that the subject trial court judge made no findings at all. The court simply rejected the plaintiff's argument concluding:

* * *

> "After review of the facts, this court concludes that the entry of summary judgment is proper in that Florida law prohibits recovery by a non-minor child on the theories presented. The court respectfully rejects plaintiff's contentions that the applicable statutes are unconstitutional under either the state or federal constitutions..." (R. 188, 189)

On appeal to the Third District that court affirmed adopting the opinion in MIZRAHI, supra, where a panel of that court spoke to the perceived "crisis in the cost of medical care in Florida." However, in so speaking, it did so in light of the 1986 academic task force (report) for the review of the tort and insurance systems. See: MIZRAHI, supra, 712 So. 2d at pages 828 and 829. In MIZRAHI when the Third District turned to a discussion of the now challenged section, it glossed over the actual statistics, stating merely:

* * *

> "In , 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 sub-section (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, session (April 17,); hearings on H. 709 before Fla. House Judiciary-Civil Comm., Fla. House, session (Apr. 16,)." 712 So. 2d at page 829.

Given that these are the expressed legal reasons for the Florida Legislature allowing geriatric patients [with no surviving spouse and only adult children to mourn their passing] to die without recourse at the hands of negligent health care providers, discussion regarding such purported justification can now be made.

B.

The Florida and United States Constitutions accord all persons equal rights before the law and prohibit any state from denying to any person within its respective jurisdiction the law's equal protection. See: Fla.Const., Article I, Section 2; United States Constitution, Fourteenth Amendment. In STATE v. BRYAN, 99 So. 327 (Fla. 1924) this Court noted:

> "The organic declaration that "all men are equal before

> the law" may be regarded as a guarantee that all persons shall have equal consideration and protection of the law for the maintenance and security of the rights to which they are legally entitled (citation omitted).
>
> "The constitutional right of equal protection of the law means that everyone is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon others in a like situation.
>
> "Equal protection of the laws means subjection to equal laws applying alike to all in the same situation (citations omitted)." 99 So. at page 329.

In DAVIS v. FLORIDA POWER CO., 60 So. 759 (Fla. 1913) this Court stated:

> "The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws <u>was designed to prevent any person, or class of persons, from being singled out as a special subject for arbitrary and unjust discrimination and hostile legislation</u>."
> 60 So. at page 766.

The plaintiff would suggest to this Court that from the above, it would necessarily follow, that "without exception, all statutory classifications that treat one person or group differently than others must appear to be based at a minimum on a rational distinction having a <u>just</u> and <u>reasonable</u> relation to a <u>legitimate</u> state objective" See: PALM HARBOR S.P. FIRE CONTROL DISTRICT v. KELLY, 516 So.2d 249 (Fla. 1987).

In VILDIBILL v. JOHNSON, 492 So.2d 1047 (Fla. 1986) this Court

recognized that a classification may not be discriminatory, arbitrary or oppressive. In that case, this Court construed the Wrongful Death Act in such a manner as to prevent an irrational classification, one which would otherwise have been compelled by a strict reading of a section of the Florida Wrongful Death Act, which would have precluded an adult decedent's estate from recovering prospective net accumulations if the decedent were survived by parents, yet allow recovery if the decedent were not survived by parents.

The plaintiff would further suggest to this Court that Section 768.21(8), Fla. Stat. (1995), is facially violative of the constitutional guarantees of equal protection. Said section unlawfully singles out adult survivors in cases of medical negligence and leaves them entirely without a remedy, while similarly situated adult survivors in cases of non-medical negligence are afforded one! To place this legal observation in proper perspective one can consider the following hypothetical scenarios.

While at home, a 65 year old male, whose wife passed away some five years previous and who has two adult children, feels faint and calls for an ambulance. The ambulance comes to transport the gentleman to the local hospital.

On the way to the hospital the ambulance is broadsided by a vehicle and the gentleman dies.

On the way to the hospital nothing untoward happens and the gentleman is delivered to the hospital. The gentleman is admitted, tested, treated and dies through the negligence of a health care provider.

Under the first scenario, the adult surviving children can sue for their pain and suffering. Under the second scenario, the adult children are precluded from suing for their pain and suffering. There is something fundamentally wrong and inherently unfair with a statute (or perhaps more appropriately, a statutory "exception") that allows for such arbitrary result.

C.

Plaintiff suggests that what is involved here is special legislation enacted to benefit (certain) health care providers for the consequences of their own negligent acts. The legislation simply, squarely and directly targets the health care industry and provides it protection from suit while the negligence of all other wrongful death tortfeasors remains actionable. On its face, the subject enactment denies equal protection. As such, that portion of Section 768.21(8) which excludes adult children from recovering damages with respect to claims for medical malpractice as defined in

Section 766.106(1) should be found unconstitutional! Such result can clearly be accomplished without adversely impacting the remainder of the enactment. See: SMITH v. DEPARTMENT OF INSURANCE, 507 So.2d 1080, 1089 (Fla. 1987) and cases cited thereat.

In finding a legitimate state interest and in upholding the statute as a consequence thereof, the Third District in MIZRAHI, 712 So. 2d 826, stated:

> "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 costs in the interest of the public need for quality medical services.

> Section 766.201, Fla. Stat. (1995). In , 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 sub-section (8), was expressly linked to the same rationale expressed in Section 766.201, cited above (citations omitted)." 712 So. 2d at page 829.

While at first blush it would appear that the Third District has thoughtfully, logically and concisely traced the legislative history of the several enactments so that its opinion appears to be based upon a continuum of legislative concerns, a close reading of the court's opinion and an analysis of the authorities relied upon leads to a much different conclusion.

While it is true that in 1986 the Legislature created an academic task force for the review of tort and insurance systems and which task force was directed to investigate the effect of increasing medical malpractice insurance premiums on medical cost to patients, and while it is further true that the task force's findings were incorporated into a 1988 change to Florida's medical malpractice statutes (specifically enacted as Section 766.201) still, the Legislature did not determine that the solution to the (perceived) crisis would be to eliminate causes of action, restrict access to the courts, or to allow negligent acts to go without recourse. As recognized

by this Court in UNIVERSITY OF MIAMI v. ECHARTE, 618 So. 2d 189 (Fla. 1993), the academic task force for review of the insurance and tort systems (task force):

> "...recommended implementation of a medical malpractice plan designed to stabilize and reduce medical liability premiums. The recommended plan included that parties conduct a reasonable investigation preceding malpractice claims and defenses in order to eliminate frivolous claims and defenses, and incentives for parties to arbitrate medical malpractice claims in order to reduce litigation expenses..." 618 So.2d at page 191.

The Legislature adopted the task force's recommendations and findings in Chapter 88-1, Laws of Florida and Section 766.201, Florida Statutes (Supp. 1988). Deemed to be significant in the ultimate determination of the issues addressed in UNIVERSITY OF MIAMI v. ECHARTE, supra, they will likewise be discussed herein:

* * *

"Chapter 88-1, Laws of Florida, provides:

> WHEREAS, the Legislature finds that there is in Florida a financial crisis in the medical liability insurance industry, and
>
> WHEREAS, it is the sense of the Legislature that if the present crisis is not abated, many persons who are subject to civil actions will be unable to purchase liability insurance, and many injured persons will therefore be unable to recover damages for either their economic losses or their noneconomic losses, and
>
> WHEREAS, the Legislature believes that, in general, the cost of medical liability insurance is excessive and injurious to the people

of Florida and must be reduced, and

WHEREAS, the Legislature finds that there are certain elements of damage presently recoverable that have no monetary value, except on a purely arbitrary basis, while other elements of damage are either easily measured on a monetary basis or reflect ultimate monetary loss, and

WHEREAS, the Legislature desires to provide a rational basis for determining damages for noneconomic losses which may be awarded in certain civil actions, recognizing that such non-economic losses should be fairly compensated and that the interests of the injured party should be balanced against the interests of society as a whole, in that the burden of compensating for such losses is ultimately borne by all persons, rather than by the tortfeasor alone, and

WHEREAS, the Legislature created the Academic Task Force for Review of the Insurance and Tort Systems which has studied the medical malpractice problems currently existing in the State of Florida, and

WHEREAS, the Legislature has reviewed the findings and recommendations of the Academic Task Force relating to medical malpractice, and

WHEREAS, the Legislature finds that the Academic Task Force has established that a medical malpractice crisis exists in the State of Florida which can be alleviated by the adoption of comprehensive legislatively enacted reforms, and

WHEREAS, the magnitude of this compelling social problem demands immediate and dramatic legislative action. NOW, THEREFORE,..." 618 So. 2d at page 192.

* * *

In ECHARTE this Court spoke directly to the task force's recommendations and stated:

> "The recommended plan included that parties conduct a reasonable investigation preceding malpractice claims and defenses in order to eliminate frivolous claims and defenses,

> and incentives for parties to arbitrate medical malpractice claims in order to reduce litigation expenses." 618 So. 2d at page 191.

Adopting the task force's recommendations, the Legislature set out in Section 766.201, Florida Statutes (Supp. 1988), its rationale behind legislative enactment. To that extent Section 766.201 provides:

* * *

> (1) The Legislature makes 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.
>
> (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 interests of the public need for quality medical services.
>
> (d) <u>The high cost of medical malpractice claims in the state can be substantially alleviated by requiring early determination of the merit of claims, by providing for early arbitration of claims, thereby reducing delay and attorney's fees, and by imposing reasonable limitations on damages, while preserving the right of either party to have its case heard by a jury</u>.
>
> (e) The recovery of 100 percent of economic losses constitutes overcompensation because such recovery fails to recognize that such awards are not subject to taxes on economic damages.
>
> (2) <u>It is the intent of the Legislature to provide a plan for prompt resolution of medical negligence claims. Such plan shall consist of two separate components, presuit investigation and arbitration</u>. Presuit investigation shall be mandatory and shall apply

> to all medical negligence claims and defenses. Arbitration shall be voluntary and shall be available except as specified."
>
> * * *

UNIVERSITY OF MIAMI v. ECHARTE, 618 So.2d at pages 191 and 192.

Where, as here, both the task force and the Florida Legislature noted that the "high cost" of medical malpractice claims in the state can be substantially alleviated by requiring early determination of the merit of claims, by providing for early arbitration of claims (thereby reducing delay and attorney's fees) and by imposing reasonable limitations on damages, any suggestion (and judicial holding) that the total exclusion of a class of persons from the creation of a cause of action can be justified at all (much less upon the flimsiest of reasons the existence for which do not "match up" with the initial stated legislative concerns) cannot, and should not, be allowed.

The subject statute targets the elderly -- those persons with adult children and no surviving spouse! The statute discriminates against them by depriving redress for even the most flagrant "medical" mistreatment yet allows redress for the same degree of non-medical mistreatment! In that regard, the subject statute devalues human life and health, and allows for "mistreatment"! This is not how the Legislature considered the wrongful death statute to operate and certainly this is not how this Court viewed the Florida wrongful death statute to operate when

this Court, holding the subject statute constitutional in MARTIN v. UNITED SECURITIES SERVICES, INC., 314 So.2d 765 (Fla. 1975) stated:

> "...We believe that the new right of surviving close relatives to recover for their own pain and suffering brought about by the wrongful death of a decedent is a reasonable alternative to dividing among the survivors the amount formerly recoverable under Section 46.021, Florida Statutes, for the decedent's pain and suffering, if any. The new item of damage is much more susceptible of proof, since the party claiming damage for the pain and suffering is available to testify, while the claim formerly permitted under Section 46.021 for the decedent's pain and suffering had to be based upon testimony of others." 314 So.2d at page 771.

The subject statute cannot be saved by suggesting it will, would, shall or should "control" health care costs and reduce insurance premiums. In MIZRAHI, supra, the court in upholding the constitutionality of the subject section stated:

> "In , 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 sub-section (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, session, (April 17,); hearings on H. 709 before Fla. House Judiciary–Civil Comm., Fla. House, session (April 16,)." 712 So. 2d at page 829.

Notably absent from Third District discussion was the letter from Richard Hickson, an actuary with the State of Florida's Department of Insurance, see: A. 8,

wherein Mr. Hickson stated that as a result of the (subject) bill (then) being enacted, general liability insurance rates would increase by 2.5 percent while medical malpractice liability rates would increase by 4.5 percent. The Senate staff analysis and economic impact statement, dated April 12, 1989 (R. 98-114) which included the Department of Insurance estimates on the economic impact on medical malpractice liability insurance rates for the (then) proposed amendments estimated that medical malpractice insurance rates would not increase for several years after passage and then only approximately 4.5 percent -- just 2 percent above its 2.5 percent estimated increase in all other forms of liability insurance from the proposed amendments without excluding those claims contemplated in Section 768.21(8). Under this analysis, to avoid an estimated 2% increase in malpractice insurance premiums the Legislature excluded those claims which form the basis for the subject legislation. In point of fact this two percent increase is arguably less than the error margin for such studies. This cannot realistically be considered a "legitimate state interest."

When the Legislature determined it would allow redress to decedents with no surviving spouse only surviving (adult) children, it had no constitutional right to draw the line where it did. As a general proposition of law the Legislature has a certain measure of discretion in creating classifications. Still, in creating such

classifications the law must apply equally and uniformly to all persons within the class and must also bear a reasonable and just relationship to the stated legitimate state objective. See, for example: STATE v. LEICHT, 402 So. 2d 1153 (Fla. 1981). Application of such principle of law to the facts and circumstances of the instant cause leads to the inescapable conclusion that there does not exist a "reasonable" relationship to the "stated" objective. There exists nothing in the legislative history to the subject amendment that establishes that the amendment will serve the public welfare as distinguished from the welfare of a particular class, to wit: "health care providers." See: STATE v. LEE, 356 So.2d 276 (Fla. 1978).

In an earlier portion of this brief, the plaintiff presented a hypothetical scenario involving a 65-year-old and his trip to the hospital. Consistent therewith it may be further inquired, from a purely rhetorical aspect, how, and to what extent, given a factor of increased medical insurance premiums of 2 percent over the “approved” increase as to other general liability insurance premiums of 2.5 percent, does the exclusion under Section 768.21(8) abate the perceived medical malpractice crisis or even substantially relate to such concerns by denying recovery to adult children, granting recovery to minor children and carving out favored status to "health care providers?" Such amendment is totally inconsistent

with the reasoning behind the enactment of Section 766.201 which, as pertinent here, reflects:

* * *

> "(1)(d) The high cost of medical malpractice claims in the state can be substantially alleviated by requiring early determination of the merit of claims, by providing for early arbitration of claims, thereby reducing delay and attorney's fees, and by imposing reasonable limitations on damages, while preserving the right of either party to have its case heard by a jury.
>
> * * *
>
> "(2) It is the intent of the Legislature to provide a plan for prompt resolution of medical negligence claims. Such plan shall consist of two separate components, presuit investigation and arbitration. Presuit investigation shall be mandatory and shall apply to all medical negligence claims and defenses. Arbitration shall be voluntary and shall be available except as specified." See: UNIVERSITY OF MIAMI v. ECHARTE, supra, 618 So. 2d at page 192.

The plaintiff suggests to this Court the subject statute violates equal protection by irrationally classifying tort victims, to wit: decedents of medical malpractice vis a vis all other tort decedents. The subject enactment fits nowhere in the Legislature's stated "plan." Where, as here, the statute merely excludes a class of potential plaintiffs based not on the merits of their claim, but rather on the happenstance of their injury, the statute must be found to be arbitrary, unreasonable and violative of equal protection concerns.

The plaintiff would suggest to this Court:

1. The exception to the subject statute violates the concepts of equal protection as there is no rational distinction that can be made between death occurring as a result of medical malpractice and as a result of all other torts.

2. There exists no legitimate state objective identified for such a distinction even if such distinction can be (preliminarily) justified.

3. The classifications found in the exceptions to the subject statute are quite simply discriminatory, arbitrary and irrational.

4. The statute's exception was enacted for the sole benefit of health care providers. It spots that industry for privileged attention and constitutes special legislation which should not be allowed to exist.

That portion of Section 768.21(8), Florida Statutes (1995) which denies to the adult children of wrongful death victims of medical malpractice recovery of damages [for loss of companionship, instruction, guidance and mental pain and suffering] in wrongful death suits brought as a consequence of medical negligence should be held unconstitutional. As Chief Judge Schwartz stated in his special concurrence to the majority opinion entered herein:

> "I concur because I am bound to do so by Mizrahi (citations omitted). However, as I have previously indicated (citation omitted), I believe that it is contrary to the requirements of substantive due process and equal protection to discriminate between survivors of the victim of a wrongful death on the basis of their age only to

> accomplish the stated purpose of making medical malpractice insurance somewhat less expensive. To my mind, it is no less 'unreasonable, arbitrary, capricious, discriminatory [and] oppressive', (citations omitted)...to restrict the right to recover on this basis, then it would be for the Legislature to do so as to survivors with blue eyes or–heaven forfend!–of less than a certain height." 712 So. 2d at page 482.

The certified question should be answered in the affirmative and the opinion of the District Court of Appeal, Third District, should be quashed.

VI.

CONCLUSION

Based upon the foregoing reasons and citations of authority the plaintiff respectfully urges this Honorable Court to answer the certified question in the affirmative, to declare Section 768.21(8), Florida Statutes (1995), unconstitutional, to quash the decision of the District Court of Appeal, Third District, to reverse the summary final judgment appealed and to remand this cause with directions to the trial court to allow this matter to proceed to a jury trial on all liability and damage issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner on the Merits and accompanying Appendix was mailed to the following counsel of record this 1st day of October, 1998.

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