IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,649

DCA Case No. 97-353

Fla. Bar No. 137172

NATHAN MIZRAHI and AVA RUTHMAN, etc.,

Petitioners,

vs.

NORTH MIAMI MEDICAL CENTER, LTD., et al,

Respondents.
_____/

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

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I.

INTRODUCTION

The petitioners, Nathan Mizrahi and Ava Ruthman (Mizrahi), as co-personal representatives of the estate of Morris Mizrahi, deceased, for and on behalf of Nathan Mizrahi and Ava Ruthman (Mizrahi), surviving adult children of the decedent, Morris Mizrahi, were the appellants in the Third District and were the plaintiffs 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 plaintiffs 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 plaintiffs' 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 plaintiffs' 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: MIZRAHI v. NORTH MIAMI MEDICAL CENTER, LTD., etc., et al, 712 So. 2d 826 (Fla. App. 3d 1998) (R. 159-167) (A. 11-15), affirmed a summary final judgment entered in favor of several health care providers in this medical negligence/wrongful death case (R. 155, 156) and 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.

Morris Mizrahi died on May 12, 1993, allegedly as a result of the medical malpractice of one or more of the defendants. The plaintiffs, Nathan Mizrahi and Ava Ruthman, as co-personal representatives of the estate of Morris Mizrahi, deceased, brought this action and sought damages for loss of consortium and mental pain and suffering pursuant to Section 768.21(8) of the Florida Wrongful Death Act. The parties ultimately stipulated that Nathan Mizrahi and Ava Ruthman are the

surviving adult children of the decedent who had no surviving spouse. After certain discovery and identification of the issues the defendants moved for summary judgment alleging that, pursuant to Section 768.21(8) of the Florida Wrongful Death Act, neither Nathan Mizrahi nor Ava Ruthman were entitled to recover damages for the death of Morris Mizrahi. The defendants sought relief pursuant to Section 768.21, Florida Statutes, which, as herein pertinent, provides:

* * *

> "(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 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)." (R. 120)

* * *

Plaintiffs and defendants stipulated that the only issue before the court was the constitutionality of Section 768.21(8), Florida Statutes. After hearing, the trial court entered the following order:

* * *

> "This Court takes judicial notice of the Session Laws, Staff Analysis and Economic Impact Statement concerning the enactment of Section 768.21(8) and marked as Plaintiffs' Exhibit 1. This Court also takes judicial notice of an Orlando opinion relied upon by Defendants, Jones v. Abernathy, M.D., Case Number 92-8661, in the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, which

declared Section 768.21(8) constitutional. For the reasons set forth below, this Court grants Defendants' Motion for Summary Judgment and Motion to Strike Plaintiffs' claim for loss of companionship and mental pain and suffering and determines that Section 768.21(8), Florida Statutes, does not unconstitutionally violate the equal protection clause set forth in Article I, Section 2 of the Florida Constitution and the Fourteenth Amendment of the United States Constitution."

"ANALYSIS

"The constitutionality of Section 768.21(8) has previously been addressed by Circuit Judge Guy W. Spicola in the case of Jones v. Abernathy, Case Number 92-8661, in the Thirteenth Judicial Circuit of Florida. In a well-reasoned opinion, Judge Spicola concluded that Florida Statute Section 768.21(8) is constitutional. The court in Jones initially addressed the appropriate level of judicial scrutiny to be applied in considering an equal protection challenge to a state statute. The court concluded that the strict scrutiny test did not apply because the statute at issue does not abridge a fundamental right or adversely affect a suspect class of people.

"Unlike the plaintiffs in Jones, the Plaintiffs in this case do not argue that Section 768.21(8) abridges a fundamental right such as the right of access to courts as provided in Article I, Section 21 of the Florida Constitution. Instead, the thrust of Plaintiffs' argument 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. The court in Jones stated that even though a fundamental right is not involved, the court may apply strict scrutiny if the statute adversely affects a suspect class of persons. Florida High School Activities Association, Inc. v. Thomas, 434 So. 2d 306 (Fla. 1983). However, the court recognized that a class encompassing all adult children is not 'suspect.' In rejecting plaintiff's argument that the mere fact that adult children are set apart by the statute and treated differently makes them a suspect class, the court stated:

> "'[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.'

Jones v. Abernathy, supra, p. 5.

"Accordingly, since no suspect class or fundamental right expressly or impliedly protected by the Florida or United States Constitution is implicated by Section 768.21(8), the court in Jones held that the test of constitutionality is whether the statutes have a rational relationship to a legitimate state interest. See, Vildibill v. Johnson, 492 So. 2d 1047 (Fla. 1986) (the court used the rational basis test in determining the constitutionality of a provision in the Wrongful Death Act which allowed parents to recover for an adult child's net accumulations only if there were no surviving lineal descendants); Pinellas v. Cedars of Lebanon Hospital Corporation, 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 Florida High School Activities Associations, Inc. v. Thomas, 434 So. 2d 306 (Fla. 1983), the Florida Supreme Court held:

> "'Under a `rational basis' standard of review, a court should inquire only whether it is conceivable that the regulatory classification bears some rational relationship to a legitimate state purpose...the burden is upon the party

> challenging the statute or regulation to show that there is no conceivable factual predicate which would rationally support the classification under attack and where the challenging party fails to meet this difficult burden, the statute or regulation must be sustained.'"

Id. at 308.

"The court in Jones noted that 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), and further that this presumption will survive unless the challenging party proves beyond a reasonable doubt that the statute is unconstitutional. ABA Industries, Inc. v. City of Pinellas Park, 366 So. 2d 761 (Fla. 1979). Accordingly, as in Jones, Plaintiffs in this case have the burden of proving beyond a reasonable doubt that Section 768.21(8), Florida Statutes, has no conceivable factual predicate to support barring recovery by adult children if the parent's death is a result of medical malpractice.

"As stated by the Supreme Court in State v. Bales, 343 So. 2d 9 (Fla. 1977), 'if any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends...Questions as to wisdom, need or appropriateness are for the Legislature.' In reviewing the constitutionality of the statute at issue here, this Court must heed the foregoing pronouncements. As stated by the court in Jones, `[i]t is not the 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's purpose'." See: Jones v. Abernathy, p. 7.

"In determining whether Section 768.21(8), Florida Statutes, was rationally related to a legitimate state purpose, this Court has reviewed the statute's legislative history. The court in Jones noted that, through the Tort Insurance Reform Act of 1987, the Florida Legislature established the Academic Task Force for Review of the Insurance and Tort Systems and stated:

"'Florida's Governor, in February of 1988, called the Legislature into a special session for the purpose of addressing the medical malpractice crisis existing in Florida. 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 in enacting Section 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 part decade to the point where it has become imperative to control such cost in the interest of the need for quality medical services.

"Section 766.201, Fla. Stat. (1993). Thus, in 1988, the Legislature felt that legislation was needed to control the costs of medical malpractice insurance." See: Jones v. Abernathy, p. 8.

"It is evident from a reading of the preamble to Chapter 81-1 and

Section 766.201, Florida Statutes, that the Legislature determined that the Academic Task Force had demonstrated the existence of a medical malpractice crisis in the State of Florida that could be alleviated only through immediate adoption of dramatic legislatively enacted reforms. Section 768.21, Florida Statutes, was enacted during the 1990 legislative session. The court in Jones noted that the legislative history underlying the bill evidenced that the purpose of the exclusion set forth in Section 768.21(8), Florida Statutes, was to prevent further dramatic increases in insurance premiums in order to keep medical care both affordable and accessible.

"This Court, likewise, finds that the legislative history indicates that the Legislature enacted Section 768.21(8), Florida Statutes, with the intent of curtailing rising medical costs while keeping services accessible. As noted in Jones, this clearly establishes 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. See, Pinellas v. Cedars of Lebanon Hospital Corporation, 403 So. 2d 365 (Fla. 1981).

"CONCLUSION

"For the above-stated reasons, this Court adopts the reasoning set forth by Judge Spicola in Jones v. Abernathy and finds that Plaintiffs have failed to establish beyond a reasonable doubt that the statute 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, this Court finds that Section 768.21(8), Florida Statutes, is constitutional." (R. 120-128)

* * *

The trial court's order removed from the case all non-pecuniary claims. The only claim remaining, a funeral bill. When the plaintiffs chose not to litigate a

medical negligence case solely for the amount of the funeral bill and noticed their dropping of same as the only remaining claim (R. 140-142), the trial court entered summary final judgment for the defendants (R. 155, 156). Plaintiffs appealed (R. 146-149).

C.

On appeal the District Court of Appeal, Third District, affirmed. The court reasoned:

* * *

> "We are not persuaded by appellants' argument that section 768.21(8) violates the equal protection guarantee of the federal and Florida constitutions. First, 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. Prior to the enactment of chapter 90-14, Laws of Florida, the Wrongful Death Act only permitted minor children to recover 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.
>
> "In other words, <u>we find no equal protection violation because of the separate treatment of those in the appellants' position–adult children of a person who wrongfully died as a result of medical</u>

malpractice. Since the right to wrongful death damages is not a fundamental right and those in the appellants' position are not a suspect class, section 768.21(8) would be unconstitutional as a violation of equal protection only if the challenged classification bears no rational relationship to a legitimate state interest. See, e.g., State v. Leicht, 402 So. 2d 1153 (Fla. 1981). In fact, under the rational basis test, the inquiry required of the court is 'only whether it is conceivable that the ...classification bears some rational relationship to a legitimate state purpose.' Florida High School Activities Ass'n v. Thomas, 434 So. 2d 306, 308 (Fla. 1983) (emphasis added).

"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 Section 766.201(1), Fla. State. (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 827-829.

* * *

This proceeding followed (R. 169, 170).

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 plaintiffs 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 (1990), 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 plaintiffs 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 (1990), 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 defendant's motions for summary judgment and to allow this matter to proceed to a jury trial on all issues.

A.

In granting the defendants various motions for summary judgment and in finding the subject statute constitutional the trial court took judicial notice of the legislative history of Section 768.21(8), Florida Statutes, and directly relied upon a 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 1990 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 judgment appealed, the Third District made no direct mention of either the legislative history of the subject section or the particular statistics upon which the subject section allegedly was justified. The Third District (simply) concluded:

* * *

"We find that the statute's disparate treatment of medical malpractice wrongful deaths does 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 plaintiffs would note at this juncture that the trial court in the instant cause made no "findings" separate from, independent of, or in addition to those perceived by the trial court in JONES, supra (R. 118-128). Likewise, while the Third District spoke to the perceived "crisis in the cost of medical care in Florida," it did so in light of the 1986 academic task force (report) for the review of tort and insurance systems (A. 11-15). When the Third District turned to a discussion of the subject section, it glossed over the actual statistics, stating merely:

> "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 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, 1990 session

(April 17, 1990); hearings on H. 709 before Fla. House Judiciary-Civil Comm., Fla. House, 1990 session (Apr. 16, 1990)." 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 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." 60 So. at page 766.

The plaintiffs 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 just and reasonable relation to a legitimate 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 plaintiffs 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.

Plaintiffs suggest 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 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 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 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) 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.

(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) 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."

* * *

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 its opinion

upholding the constitutionality of the subject section the Third District stated:

> "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 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, 1990 session, (April 17,1990); hearings on H. 709 before Fla. House Judiciary–Civil Comm., Fla. House, 1990 session (April 16, 1990)." 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. 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 plaintiffs 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 plaintiffs suggest 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 plaintiffs 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 (1990) 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 in GARBER v. SNETMAN, 712 So. 2d 481 (Fla. App. 3d 1998), Florida Supreme Court Case No. 93,650, presently pending on certified question:

> "I concur because I am bound to do so by Mizrahi (citations omitted). However, as I have preciously 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 plaintiffs respectfully urge this Honorable Court to answer the certified question in the affirmative, to declare Section 768.21(8), Florida Statutes (1990), 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 Petitioners and accompanying Appendix was mailed to the following counsel this 23rd day of September, 1998.

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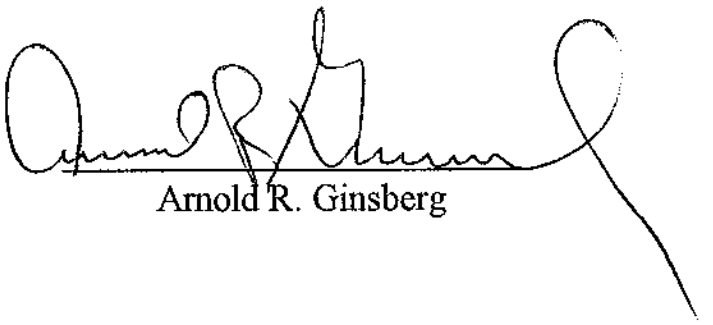

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APPENDIX

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