IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,649

DCA Case No. 97-353

Fla. Bar No. 137172

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NATHAN MIZRAHI and
AVA RUTHMAN, etc.,

Petitioners,

vs.

NORTH MIAMI MEDICAL
CENTER, LTD., et al,

Respondents.
_____/

REPLY BRIEF OF PETITIONERS (CERTIFIED QUESTION)

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed in Times New Roman 14 cpi type size.

I.

INTRODUCTION

In this reply brief of petitioners the parties litigant 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. Subsequent to the filing of plaintiffs' (petitioners') main brief, this Court has received numerous amicus curiae briefs. Argument on, or comment about, the contents of any one particular brief will reference that specific brief and the page (or pages) of the brief where such statements are found.

The symbols "R" and "A" will refer to the record on appeal and the appendix which accompanied plaintiffs' main brief, respectively. Appendices which accompanied the briefs of all other participants to this proceeding will be referenced directly. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

REPLY 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, as they did in their main brief, 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. As a consequence the certified question should be answered in the affirmative, the subject statutory section should be held unconstitutional, the opinion of the Third District should be quashed and this case should be remanded for a jury trial on all liability and damage issues.

A.

At the outset, lest it be overlooked in the precise legal arguments to be otherwise advanced herein, these plaintiffs affirmatively state that, in their opinions, the subject enactment is purely and simply a bad piece of legislation and this Court should so hold. The Florida Legislature should not be allowed to deny equal protection to the citizens of this state by enacting statutory exclusions based solely on age (or marital status).

The plaintiffs would remind this Court that the sole justification for the subject enactment is the purported savings to the health care industry of insurance

premium dollars. Of course, one can always theorize that the rationale of "savings" to business (even one in "crisis") promotes public welfare. In truth, this theory could be used to justify any legislative enactment. The point here, however, is that the subject justification is neither "legitimate" nor "plausible." To suggest (as defendants and their supportive amicus do) that any legitimate, rational, or plausible state interest can be found when a physician, negligent in the operation of his vehicle, would be liable to the adult surviving children of a person killed by the vehicle but the same physician would be "immune" from liability to the very same people where the death arises from negligence in the professional arena defies logic and screams in the face of common sense! This is especially compelling here, where, according to the Legislature, a 2.5% increase in "general" liability insurance premiums (to include negligent physician automobile drivers) provides no overriding legislative concern but an additional 2% increase (for medical malpractice insurance premiums) is not only a concern but one of such magnitude that it constitutionally justifies the subject exclusion.

While it would appear, at first blush, that these plaintiffs alone voice concern that the 2.5 percent-4.5 percent considerations are neither plausible nor legitimate as a basis to sustain the subject legislation, plaintiffs do find additional support for their arguments in the writings of amicus who, after citing to numerous studies, state at

page 7 of their brief:

* * *

> "...The highest incident of claims made remains in the acute critical care and obstetrics area, the same areas recognized to be 'in crisis' by the Legislature in 1986-1988...What is abundantly clear from this study is that tort reform measures like Chapter 766 and Section 768.21(8) are working to weed out the frivolous claims, while still assuring fair compensation for claimants affected by medical negligence...('...This analysis indicates that hospital malpractice claims in Florida are decreasing in frequency, and that the no-cost and expense-only (frivolous) claims are being wrung from the system'.). It is this goal that the Florida Legislature desired to achieve when it enacted the legislation in question..."

The above emphasizes and highlights what the plaintiffs have been saying all along, to wit: one of the goals of Chapter 766 was to reduce medical costs by weeding out frivolous claims. However, the subject enactment goes much too far. It eliminates all claims–frivolous or not. The recent enactment is inconsistent with the intent of the task force. If the goal of reducing costs, eliminating frivolous claims, etc. is being met by a system which does not deny access to the courts, how can the subject enactment be validated. More importantly, why should it be?

Additionally, if the highest incidence of claims made remains in the acute critical care and obstetrical areas, the same areas recognized to be "in crisis" by the Florida Legislature in 1986-1988 and Chapter 766 did not preclude any class of victims access to the courthouse (much less those whose claims arose in the "crisis

area") but merely required that such victims comply with stringent pre-suit requirements before a lawsuit would be legally authorized, what justification could possibly exist for precluding victims not within the "crisis" areas from being allowed to sue?

Plaintiffs have above directly quoted from page 7 of an amicus brief. The quotations and observations do not come from the amicus brief filed in support of the petitioners by the Association for Responsible Medicine. Rather, the above quotations, observations and considerations are found at page 7 of amicus curiae, Florida League of Health Systems, Florida Hospital Association, Florida Medical Association, and the Association of Community Hospitals and Health Systems of Florida filed in support of the respondents! Suffice it to say at this juncture the observations made by defense amicus are totally consistent with and (factually) supportive of the arguments advanced by these plaintiffs in their main brief wherein they stated (at page 24 thereat):

> "...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..."

Apparently all agree that it was not the task force's recommendation that injured people not be allowed to sue. Apparently it was also not the intent of the Legislature at the time of the crisis to implement a plan which would keep injured

people from suing! These facts bear repeating where, as here, both the task force and the Florida Legislature noted that the "high cost" of medical malpractice claims in this 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 that the total exclusion of a class of persons from the creation of a cause of action can be justified at all does not "match up" with the initial stated legislative concerns and as a consequence, such legislation should fall.

B.

At page 1 of the defendant's brief defendants indicate "essential agreement" with the Statement of the Case and Facts set forth by these plaintiffs. The defendants, however, additionally set out those portions of the Third District opinion which they claim establish the reasoning behind the court's conclusion to affirm the summary final judgment appealed. As these plaintiffs previously noted at page 29 of their main brief, conspicuously absent from the opinion rendered by the Third District is any reference to the 2.5 percent-4.5 percent figures which admittedly form the sole constitutional justification for the challenged enactment. The closest the District Court of Appeal, Third District, came to even addressing the legitimacy of the sole justification for the statute, to wit: the savings of 2.5 percent in medical

insurance premium costs is found in MIZRAHI v. NORTH SHORE MEDICAL CENTER, LTD., 712 So. 2d 826, 829 (Fla. 3d DCA 1998) wherein the Court stated:

> "The exclusion of adult children of persons whose death had been caused by medical malpractice, contained in subsection (8), was expressly linked to the same rationale expressed in 766.201, cited above..."

With all due respect to the Third District it was not free to "mix and match." If the concerns were the same, if the rationale was the same, if the continued validity of the recommendations were the same, then the subject exclusion should never have been enacted. This is especially noteworthy where defense amicus has candidly acknowledged that the task force's intent as implemented is working.

The thrust of the defendants' argument, indeed the entire premise for same, rests on the statement found at page 12 of defendants' brief, to wit:

> "...Since no suspect class or fundamental right expressly or impliedly protected by the Constitution is implicated by Section 768.21(8), the test of constitutionality is whether this statutory provision has a rational relationship to a legitimate state interest..."

First, and foremost, plaintiffs do not agree there exists "no suspect class." It is entirely arguable that what the Legislature actually created is a sub-class within a category of litigants rather than a separate class. Plaintiffs would argue that the Legislature expanded the statutory remedy for wrongful death torts and it then

created this exemption for medical malpractice victims. It thus created a sub-class (a class within a class) which, as it exists, establishes a wholly unreasonable and arbitrary enactment of the Legislature. The task force itself did not believe the "crisis" need be addressed by prohibiting any injured citizen from having his day in court.

Second, in attempting to justify the constitutionality of the subject enactment the defendants argue that the applicable test seeks "a rational relationship to a legitimate state interest." Defendants rely upon B & B ERECTORS v. BURNSED, 591 So. 2d 644 (Fla. App. 1st 1991) from which case defendants quote:

> "Under this standard, the courts uphold classifications so long as there appears to be any plausible reason for the Legislature's action, asking only whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the government..." See: brief of defendants at page 14 and 15.

The plaintiffs would respectfully suggest to this Court the above underscores plaintiffs' position. The plaintiffs maintain now, as they have maintained all along, there exists no rational basis to distinguish between the adult survivors of persons killed by doctors who drive and the adult survivors of persons killed by medical negligence. The stated basis for sustaining the subject statute is a (supposed) 2% malpractice insurance premium cost saving (a "concern") over and above a 2.5% general liability increase (deemed not "a concern"). This is simply not rational.

At page 21 of the defendants' brief, in its quotation from BURNSED, supra, defendants embrace the notion that the courts have never insisted that a legislative body articulate its reasons for enacting a statute. The defendants miss the thrust of the plaintiffs' position. The plaintiffs are not necessarily questioning the test to be applied. Plaintiffs' position is more fundamental. There exists nothing reasonable in allowing professionally negligent doctors to be immune from suit when non-professionally negligent doctors can be sued and the stated justification for the distinction involves a "swing" of 2% in insurance premiums. It is simply not reasonable, not plausible, not logical and not fair and this Court should so hold.

At pages 11 and 12 of their brief defendants assert:

> "An equal protection argument similar to that raised by the petitioners in this case, i.e., that the statute impermissibly makes a distinction between personal injury tort plaintiffs and medical malpractice tort plaintiffs, was raised before the Florida Supreme Court in University of Miami v. Echarte (citation omitted) and HCA Health Services of Florida, Inc. v. Branchesi, (citation omitted). The Supreme Court in Echarte and Branchesi rejected this argument and upheld the constitutionality of Section 766.207 and 766.209, Florida Statutes, which limit non-economic damages and require arbitration in certain medical malpractice claims..."

With all due respect to the defendants' right to present an argument, neither the subject issue nor an argument "similar" was involved as suggested above. This is so because neither the task force nor the Florida Legislature (even in the face of a

"crisis") had then advocated keeping a class of persons from being able to file a lawsuit. All persons could sue, some merely had more strict requirements before their lawsuits could be filed. These plaintiffs see a clear distinction between complying with a series of pre-suit requirements and then being allowed to sue and not being allowed to sue at all. In the instant cause plaintiffs' equal protection rights are being violated.

At page 17 of the defendants' brief defendants again quote from the Third District's opinion. Plaintiffs will not unduly lengthen this brief by repeating what is quoted thereat. Plaintiffs will again remind this Court that the Third District apparently could not, in good conscience, talk about "the numbers." It basically bypassed the sole justification for the subject enactment and attempted to "link" the subject enactment to the prior wholesale revision. However, in so doing, the Court clearly ignored the fact that in advocating wholesale revision neither the task force nor the Legislature sanctioned any enactment that would preclude persons from being able to seek redress where they have sustained damages as a consequence of negligence.

In affirming the summary final judgment appealed the Third District in this case "found:"

> "...that the statute's disparate treatment of medical malpractice

> wrongful deaths does bear a rational relationship to the legitimate state interests of insuring the accessibility of medical care to Florida residents by curtailing the skyrocketing medical malpractice insurance premiums in Florida..."

The plaintiffs must respectfully disagree with the conclusion reached by the Third District. Plaintiffs do not believe that it is rational (for anyone) to conclude--after the Florida Legislature commissioned a task force to identify a problem, said task force identified the problem, recommended a plan to solve the problem, and the Legislature implemented the plan recommended (which plan did not include any recommendation that kept any injured citizen from suing to collect damages for injury or death attributable to any source whatsoever)--that an isolated enactment of the Legislature implemented some two years after "wholesale revision of the tort system" which precludes certain types of lawsuits can remotely justify its constitutionality on a "finding" that it furthers the task force's recommendations. Such conclusion mirrors the best slight of hand machinations that Houdini ever considered possible. The challenged enactment is not "tied into" either the task force recommendations or the Legislature's wholesale revision of the tort system. The statute, as enacted, arose some two years after "tort reform." In truth, when push came to shove, not even the Third District could discuss as justification for enactment the "two percent solution." The Court merely concluded that the statute

was constitutional and "tied in" the challenged enactment to the overall tort reform. The result reached should not be allowed to stand.

C.

At pages 10-11 of the brief of amicus curiae Association for Responsible Medicine, filed in support of these petitioners, in speaking about the subject enactment, it is stated:

> "NO OTHER STATE IN OUR COUNTRY HAS SUCH AN ARBITRARY, DISCRIMINATORY LAW, ONE THAT ALLOWS THE MEDICAL PROFESSION TO ESCAPE TOTAL LIABILITY FOR ITS OWN NEGLIGENT AND WILLFUL ACTS WHILE SUBJECTING ALL OTHER INDIVIDUALS, PROFESSIONALS, AND ENTITIES TO LIABILITY FOR NEGLIGENT AND WILLFUL ACTS. Florida stands alone in declaring that the class of persons burdened by Section 768.21(8) has no value–emotional or financial. Amicus urges this Court to give value and meaning to the life of all people who live, work, and vacation in the State of Florida..."

These plaintiffs join in such urgings. Plaintiffs add to amicus pleas the observations made by this Court in UNIVERSITY OF MIAMI v. ECHARTE, 618 So. 2d 189 (Fla. 1993) at page 191:

> "The 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. 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)."

Given that the task force was created to research the situation and did so and then formulated a plan specifically designed to stabilize and reduce medical liability premiums, which plan did not include "lawsuit preclusion," plaintiffs again inquire: how could the Third District rationally conclude that the justification for the subject enactment was "tied into" the reform package when the reform package itself did not recommend that a certain class of people not be allowed to sue!

Plaintiffs end this brief as they began their main brief, by suggesting that the subject enactment is simply a bad piece of legislation which cannot pass constitutional muster. In PALM HARBOR NEW S. P. FIRE CONTROL DISTRICT v. KELLY, 516 So. 2d 249 (Fla. 1987) it was noted 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. These plaintiffs do not believe there is involved herein a legitimate state objective. If there existed any state objective at all, it was purely and totally illegitimate in that it enacted legislation for the benefit of the health care industry. Assuming the legitimacy vel non of the stated objective, given the task force's recommendations and the resultant wholesale revision of the Florida statutes, which did not preclude injured persons

from suing, this Court should find, and so hold, there is no "just" or "reasonable" relationship between the subject enactment and the task force recommendations subsequently implemented by the Florida Legislature.

This Court should find, and so hold, that there exists no legitimate state objective connected to the challenged enactment. This Court should further hold, assuming the legitimacy vel non of the stated objective, that there exists no "just" or "reasonable" connection between the challenged enactment and any legitimate state objective.

D.

Plaintiffs adopt herein all alternative arguments advanced by amicus curiae, Association for Responsible Medicine, which filed its brief in support of these petitioners.

III.

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 Reply Brief of Petitioners was mailed to the following counsel of record as well as all counsel for amicus curiae this 14th day of January, 1999.

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