IN THE SUPREME COURT
OF FLORIDA

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NO. 93, 804

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JEAN STEWART and KATHRYN REYNOLDS,
Co-Personal Representatives of the Estate of MABEL PITTMAN, Deceased,

Petitioners

vs.

DR. L.B. PRICE, M.D.,

Respondent.

–

AMICI CURIAE, FLORIDA LEAGUE OF HEALTHSYSTEMS, FLORIDA HOSPITAL ASSOCIATION, FLORIDA MEDICAL ASSOCIATION, AND THE ASSOCIATION OF COMMUNITY HOSPITALS AND HEALTH SYSTEMS OF FLORIDA BRIEF ON THE MERITS IN SUPPORT OF RESPONDENT

–

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IN SUPPORT OF RESPONDENT

The Florida League of Health Systems, Florida Hospital Association, Florida Medical Association and Association of Community Hospitals and Health Systems of Florida (collectively referred to herein as "*Amici*") respectfully submit this Brief as Amici Curiae in support of Respondents. Pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure, *Amici* file this Brief simultaneously with their Motion for Leave to Appear as Amici Curiae and to File an Amici Curiae Brief.

STATEMENT OF INTEREST

Florida League of Health Systems

The Florida League of Health Systems (FLHS) is a Florida non-profit organization, whose address is 301 South Bronough Street, Suite 210 Tallahassee, Florida 32301. FLHS is organized and maintained for the benefit of the ninety (90) investor-owned hospitals which comprise its membership. One of the primary purposes of the Florida League of Health Systems is to act on behalf of its members by representing their common interests before various governmental entities of the state. All members of the FLHS are Florida hospitals, which are licensed by the Agency for Health Care Administration pursuant to Part I, Chapter 395, Florida Statutes. As such, each of the

hospitals which is a member of the FLHS, as well as the Florida League of Health Systems itself as their duly designated representative, is substantially affected by state statutes, rules, regulations and policies applicable to medical negligence claims.

Florida Hospital Association

The Florida Hospital Association (FHA) is the primary organization of hospitals in the State of Florida, with its membership including approximately 230 hospitals, varying in size and forms of ownership. The principal objective of the FHA is to promote its members' ability to provide comprehensive, efficient and high-quality health care to the people of Florida. As such, its members are substantially affected by state or national statutes, rules, regulations and policies applicable to medical negligence actions.

Florida Medical Association

The Florida Medical Association (FMA) is a not-for-profit corporation, which is organized and maintained for the benefit of the approximately sixteen thousand (16,000) licensed Florida physicians who comprise its membership. The FMA was created and exists for the purpose of securing and maintaining the highest standards of practice in medicine and to further the interests of its members. One of the primary purposes of the FMA is to act on behalf of its members by representing their common interests before the courts of the State of Florida. Members of the FMA are also substantially affected by

state or national statutes, rules, regulations and policies applicable to medical negligence actions.

The Association of Community Hospitals and Health Systems of Florida, Inc.

The Association of Community Hospitals and Health Systems of Florida, Inc. (CHHS) is a not-for-profit association composed of more than 90 public hospitals and private, not-for-profit hospitals in Florida. All of the members of CHHS are qualified as tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code. The members of CHHS are located in every area of the state and provide more than 85% of all of the indigent and charity care in this state. The outcome of this appeal has the potential to affect the interests of every member of CHHS.

Each of the organizations participating as amici curiae in these cases also benefits the interests of both citizens and visitors to the State of Florida. Participating amici attempt to assure that Florida's hospitals and other health care providers furnish comprehensive, efficient, high-quality and affordable health care. Any legislation or judicial decision impacting the delivery of high-quality health care is of substantial interest to participating amici.

SUMMARY OF ARGUMENT

Florida Statute § 768.21(8) must be declared constitutional on its face and as applied. For the reasons set forth, § 768.21(8) does not violate the Florida or the Federal

Constitution. Awarding nonpecuniary damages to adult children or parents of adult children would not deter medical negligence from occurring.

The Florida legislature has refused to pass several bills calling for the repeal of Fla. Stat. § 768.21(8) which have been filed in at least two past sessions. Unless Legislation duly passed be directly contrary to some expressed or implied prohibition embraced in the State Constitution, the courts have no authority to proclaim the Legislation invalid. The Legislature, and not the judiciary, is in the best position to decide the appropriate legislative action needed to facilitate the provision of efficient and affordable health care within the state. Additionally, the Legislature is in the best position to determine whether the previously recognized medical malpractice crisis has abated. Consequently, this Court should not invade the province of the legislature by determining whether sufficient external facts exist to justify the repeal of Fla. Stat. § 768.21; thus this Court should not sit as a "super legislature."

The precedent upon which this Court is to rely in determining the constitutionality of a statute, unequivocally establishes that § 768.21(8) continues to be a valid and a constitutional approach for inhibiting the cost of healthcare. When faced with a challenge to the statute's constitutionality, as here, there are certain "cardinal principles" which must be utilized in ascertaining the constitutionality of a statute. The burden is upon him who assails the constitutional validity of a statute. It is presumed that the Legislature intended

a valid constitutional enactment, and when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one which it would be unconstitutional and the other it would be valid, it is the duty of the Court to adopt that construction which will save the statute from constitutional infirmity. Furthermore, to overcome any presumption of validity, Petitioners must demonstrate that § 768.21(8) conflicts with the Equal Protection Clause of the Florida and the Federal Constitutions beyond a reasonable doubt. To this end, § 768.21(8) should be afforded the presumptions of validity and constitutionality.

Awarding recognized nonpecuniary damages to adult children and parents of adult children of those whom have died as the result of medical negligence would not prevent medical negligence from occurring nor would it directly punish practitioners found to be negligent. Rather, the cumulative costs will only be passed on to other practitioners and, ultimately, to medical consumers.

The recognized goals of reducing medical malpractice claims, increasing claims predictability and insurance availability, while assuring adequate, available and affordable health care, are clearly being achieved. Medical malpractice is best deterred through disciplinary action against the practitioner's license and the peer review process. Medical malpractice liability does not necessarily improve the quality of health care rendered and may instead, have the opposite effect, while increasing costs to all medical consumers and

decreasing the availability of care. Further, the value of one's life is not diminished because no monetary damages can be awarded to their survivors or loved ones, nor does the receipt of these damages by the adult children or the parents of adult children attach value or meaning to the deceased.

I. SECTION 768.21(8) OF THE FLORIDA STATUTES IS RATIONALLY RELATED TO ACHIEVING A LEGITIMATE STATE INTEREST

The key issue before this Court centers on the basis for the passage of Fla. Stat. § 768.21(8) (1990) by the Florida legislature, as well as of Fla. Stat. § 766.201 (1988). This latter statute codified the legislative findings of fact used by the legislature in passing § 768.21(8).

The legislature's findings of fact which formed the basis for the legislation in question are at issue in this constitutional attack. In the lower court, the First District Court of Appeals upheld the constitutionality of § 768.21(8). In authoring the opinion, Judge Van Nortwick based his findings on Florida Statute § 766.201 (1990), which states that:

> (1) The Legislature makes the following findings:
>
> (a) Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in an increased cost for most patients and functional availability 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.

* * *

(d) The high cost of medical malpractice claims in the state can be substantially alleviated . . . by imposing reasonable limitations on damages. . . .

Stewart v. Price, 718 So. 2d 205, 210 (n.4)(Fla. 1st DCA 1998).

The Florida legislature recognized as fact the existence of a "medical malpractice crisis" in this state in 1988. *See,* Fla. Stat. § 766.201 (1988). This fact was found to exist by the legislature based upon findings of the Academic Task Force for Review of Tort and Insurance Systems, which was created by the 1986 legislature when it enacted the Tort Reform and Insurance Act of 1986.[1] With sweeping legislation in 1986 and 1988, the legislature sought to control the cost of medical negligence claims in an effort to assure the continuity of quality medical services throughout the state. [App. A]; Chapter 766, Fla. Stat. (1988). These facts remain undisturbed to date, and are bolstered by the only significant study conducted since this legislation went into effect. [App. A].

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1 *See,* James Studnicki, Sc.D., *Malpractice Claims Closed Against Hospital Defendants in Florida: 1986-1993,* Journal of Healthcare Risk Management, Vol. 16, No. 3, at 7-16, (Summer 1996). A copy of this article may be found at Appendix "A".

As recently as 1995, the United States Senate recognized that the costs associated with medical malpractice continue to have an "adverse impact on the availability of, and access to health care services and the cost of health care in this country." S. Rep. No. 104-83 (1995), 1995 WL 311930. According to facts submitted to the United States Senate Committee, experts estimate that "defensive medicine" costs as much as $25 billion annually. S. Rep. No. 104-83, at 7, 1995 WL 311930.

Despite tort reform in many states (including Florida), nationally "both the amount of total indemnity (verdicts and settlements) and the average indemnity more than doubled between 1985 and 1993." S. Rep. No. 104-83, 1995 WL 311930 (*citing* data from Physician Insurers' Association of America Data Sharing Project). This national trend is echoed in the only study published [App. A], which establishes several critical facts for this Court to consider.[2] In the years after the tort reform in question, hospital malpractice claims-closed went down between 1986 and 1993, from 1756 to 507, respectively. [App. A at 7]. Claims receiving payment increased from 35 percent to 67

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2 This Court need not challenge the legislative findings of Florida Statutes Chap. 766, and Section 768.21(8). These statutes have passed constitutional muster several times. *See, e.g.,* Stewart v. Price, 718 So. 2d 205 (Fla. 1st DCA 1998); Bassett v. Merlin, Inc., 335 So. 2d 273 (Fla. 1976); Capiello v. Goodnight, 357 So. 2d 225 (Fla. 2d DCA 1978); White v. Clayton, 323 So. 2d 573 (Fla. 1975); Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365 (Fla. 1981); and University of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993). However, if this court chooses to exercise "judicial scrutiny" as urged by former Chief Justice Sundberg, dissenting in Pinillos, 403 So. 2d at 369, it is clear that the same facts and circumstances exist today, not only in Florida, but nationally, and justify this legislation.

percent during the same years. [App. A at 7]. The average payment on hospital malpractice claims increased from $94,000.00 to $212,000.00 (71 percent after adjustment for inflation). [App. A at 7]. 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 1986-88. [App. A at 8]. What is abundantly clear from this study is that tort reform measures like Chapter 766 and Section 768.21(8) are weeding out the frivolous claims, while still assuring fair compensation for claimants affected by medical negligence. [App. A at 10, 14]

("...[T]his 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. Clearly, a rational basis existed, and remains to this date, for the legislation before this Court. The goals of reducing medical malpractice claims, increasing claims predictability and insurance availability, while assuring adequate, available and affordable health care, are clearly being met by statutes such as § 768.21(8). *See,* Pinillos, 403 So. 2d at 367.

II. EXPANDING THE LIABILITY SYSTEM WOULD NOT IMPROVE THE QUALITY OF HEALTH CARE, WHILE OTHER METHODS OF IMPROVING HEALTH CARE HAVE BEEN ENACTED BY THE LEGISLATURE

Awarding nonpecuniary damages to adult children and parents of adult children of those alleged to have died as the result of medical negligence would not prevent medical negligence from occurring nor would it directly punish practitioners found to be negligent (since the practitioner's insurer, and not the practitioner himself, often pays for the claim). Rather, the cumulative costs will only be passed on to other practitioners and, ultimately, to medical consumers.

As the United States Senate recently found in 1995, there is "so little correlation between the filing of lawsuits and negligent behavior, it is clear that the current medical liability system is not effective in deterring medical injury or negligence." S. Rep. No. 104-83(relying in part on Harvard Medical Malpractice Study, "Patients, Doctors and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York," New England Journal of Medicine, July 25, 1991, and U.S. Agency for Health Care Policy study finding "no relationship between prior malpractice claims experience and technical quality of practice by Florida obstetricians.") Rather, as the Senate points out, state licensing and disciplinary boards, peer review and risk management do much more to improve the quality of services. S. Rep. No. 104-83 (1995), 1995 WL 311930.

In Florida, Medical malpractice is deterred through disciplinary action against the practitioner's license as well as through the peer review process. Practitioners who have been found negligent are still held responsible for their negligent acts through complaints

filed against the practitioner's license with the Board of Medicine and corrective action taken by hospitals against the practitioner's hospital staff privileges through peer review proceedings.

The Florida Legislature enacted Florida Statute § 395.0193 which requires that hospitals investigate and discipline physicians in order to "secure the provision of quality medical services to the public" and to "reduce morbidity and mortality and to improve patient care" at the hospital. Fla. Stat. §§ 395.0193(1) (1998), 395.0193(2)(g) (1998). Each licensed facility is required to develop written, binding procedures for conducting peer review of health care providers with privileges. Fla. Stat. § 395.0193(2) (1998). In addition, Florida Statute § 395.0193(3) allows hospitals to "suspend, deny, revoke, or curtail the privileges . . . of any staff member or physician" after a final determination by the hospital's peer review panel that the physician was either incompetent or committed an act of medical negligence, even if that act did not result in any liability. Fla. Stat. §395.0193(3) (1998). Furthermore, Florida Statute § 458.331 authorizes the Board of Medicine to take disciplinary action to revoke or suspend the license of a physician who does not practice in accordance with accepted standards. Fla. Stat. § 458.331 (1998); *See also*, Fla. Stat. § 459.015 (1998).

Florida Statute § 395.0197 requires all Florida hospitals to establish internal risk management programs. As part of the risk management program, all "adverse incidents",

must be reported to the Agency for Health Care Administration (AHCA), which regulates hospitals in the State of Florida pursuant to Fla. Stat. § 20.42 (1998). *See,* Fla. Stat. § 395.0197 (1998). The term "adverse incident" means any event over which health care personnel could exercise control and which is associated in whole or in part with medical intervention, rather than the condition for which such intervention occurred, and which results in death; brain or spinal damage; permanent disfigurement; fracture or dislocation of bones or joints; limitation of neurological, physical, or sensory function which continues after discharge from the facility; any condition that required specialized medical attention or surgical intervention resulting from nonemergency medical intervention, other than an emergency medical condition, to which the patient has not given his or her informed consent; or any condition that required the transfer of the patient, within or outside the facility, to a unit providing a more acute level of care due to the adverse incident, rather than the patient's condition prior to the adverse incident. Fla. Stat. § 395.0197. The statute also requires reporting when surgery is performed and A) is the wrong procedure, B) is on the wrong patient, C) is on the wrong site, D) is unrelated to the patient's diagnosis, medical needs being fit or medical condition, E) repairs damage not recognized as a specific risk of the procedure, and F) when surgery is performed to remove unplanned foreign objects remaining from a surgical procedure. Fla. Stat. § 395.0197. Lastly, the value of one's life is not diminished becauseno monetary damages

can be awarded to their survivors or loved ones. Russell, Inc. v. Trento, 445 So. 2d 390, 392 (Fla. 3d DCA 1984). Nor does the receipt of money damages by the adult children or the parents of adult children add value or meaning to the life of the deceased. Id. The suggestion that Fla. Stat. § 768.21(8) renders the life of each Class member (sic, the Class member's decedent) meaningless because a surviving adult child or parent will not be permitted to collect nonpecuniary damages is specious at best. In fact, Florida's courts have noted that "the value of a human life is not an element of damages and not a proper subject for argument in a wrongful death action." Russell, 445 So. 2d at 392. Many persons who allegedly die as the result of some medical malpractice are gravely ill and, despite the best efforts of health care providers, are not saved. Medical malpractice liability does not improve the quality of health care rendered and may, instead, have the opposite effect by increasing costs to all medical consumers and decreasing the availability of care.

III. THE LEGISLATURE IS IN THE PROPER POSITION TO DETERMINE WHETHER A MEDICAL MALPRACTICE CRISIS STILL EXISTS

It is axiomatic that both the Florida and Federal Constitutions established each respective government to contain three branches: judicial, legislative and executive, each with its own realm of power. Art. II, § 3, Fla. Const.; U.S. Const. Art. III, § 2. "No

branch of state government can arrogate to itself powers that properly inhere in a separate branch." State v. Ashley, 701 So. 2d 338, 342 (Fla. 1997). Consequently, this Court should not invade the province of the legislature by determining whether sufficient external facts exist to justify the repeal of Fla. Stat. § 768.21(8). This Court must not sit as a "super legislature." State v. Wershow, 343 So. 2d 605, 607 (Fla. 1977).

In the recent past, several bills calling for the repeal of Fla. Stat. § 768.21(8) have been presented to the Florida Legislature. *See, e.q.,* Fla. S.B. 40 (1997); Fla. H.B. 25 (1997). The Legislature has, thus far, refused to repeal it. "[U]nless legislation duly passed be clearly contrary to some expressed or implied prohibition contained [in the State Constitution], the courts have no authority to pronounce [the Legislation] invalid." City of Miami Beach v. Crandon, 35 So. 2d 285, 287 (Fla. 1948).

The boundary between adjudicating and legislating can be blurred when dealing with policy issues determined to be of great public importance. However, as this Court stated in the case of Holley v. Adams, 238 So. 2d 401 (Fla. 1970), the "basic principles of constitutional construction" which must be followed are:

> First, it is the function of the Court to interpret the law, not to legislate.
>
> Second, courts are not concerned with the mere wisdom of the policy of the legislation, so long as such legislation squares with the constitution.
>
> Third, the courts have no power to strike down an act of the Legislature unless the provisions of the act, or some of them, clearly violate some express or implied inhibition of the Constitution.

> Fourth, every reasonable doubt must be indulged in favor of the act. If it can be rationally interpreted to harmonize with the Constitution, it is the duty of the Court to adopt that construction and sustain the act.
>
> Fifth, to the extent that such an act violates expressly or clearly implied mandates of the Constitution, the act must fail, not merely because the courts so decree, but because of the dominant force of the Constitution, an authority superior to both the Legislature and the Judiciary.

citing Amos v. Mathews, 99 Fla. 1, 126 So. 308 (Fla. 1910).

The Florida Legislature utilized data compiled by the Academic Task Force for Review of Tort and Insurance Systems in finding that a medical malpractice crisis existed in Florida when it enacted Florida Statutes Chapter 766. 1998 Fla. Sess. Law Serv. 88-1. The Legislature's factual findings in turn were relied upon for the enactment of § 768.21(8).

Arguably, Florida Statute § 768.21(8) is an enactment of social legislation. In Adams v. Miami Beach Hotel Ass'n, 77 So. 2d 465 (Fla. 1955), this Court found that a "legislative finding that . . . a requirement is in the public interest concludes the matter." The legislation at issue in the cause *sub judice* falls within the ambit of social legislation, since its goal is to control the costs of defending medical malpractice actions in the interest of the recognized need for uninterrupted quality medical services. Fla. Stat. § 766.201(1)(c) (1998). Therefore, the Legislature's findings regarding the need for the implementation of tort reform justify the implementation of § 768.21(8), and end this Court's inquiry into the propriety of the enactment. Adams, 77 So. 2d at 468.

The Legislature, and not the judiciary, is in the best position to determine both the appropriate legislative action needed to facilitate the provision of efficient and affordable health care within the state, and whether the previously recognized medical malpractice crisis has abated. The Legislature determined that tort reform was necessary to curb the costs associated with medical malpractice so as to ensure affordable health care to all. Fla. Stat. § 766.201(1)(1998).

IV. FLORIDA STATUTE § 768.21(8), IS VALID AND CONSTITUTIONAL

The precedent upon which this Court is to rely in determining the constitutionality of a statute, unequivocally establishes that § 768.21(8) continues to be a valid and constitutional means for limiting the cost of providing health care. When faced with a challenge to the constitutionality of a statute, as here, there are certain "cardinal principals" which must be utilized in determining the constitutionality of a statute. These include the following:

1. The burden is upon him who assails the constitutional validity of a statute,

2. It is presumed that the Legislature intended a valid constitutional enactment, and

3. When the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one which it would be unconstitutional and the other it would be valid, it is the duty of the Court to adopt that construction which will save the statute from constitutional infirmity.

Boynton v. State, 64 So. 2d 536, 546 (Fla. 1953). Therefore, in delving into a determination of the validity of a legislative enactment, this Court has stated on countless occasions that, "there is a presumption of constitutionality inherent in any statutory analysis." Gardner v. Johnson, 451 So. 2d 477 (Fla. 1984), *citing* Scullock v. State, 377 So. 2d 682, 683-4 (Fla. 1979); *see also,* Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879 (Fla. 1983); Rich v. Ryals, 212 So. 2d 641 (Fla. 1968). Consequently, "this statute [Fla. Stat. § 768.21(8)] comes before [the] Court clothed with a presumption of constitutionality." Sanford-Orlando Kennel Club, 434 So. 2d at 881, *citing* In re: Estate of Caldwell, 247 So. 2d 1 (Fla. 1971).

To overcome this presumption of validity, Petitioners must demonstrate that § 768.21(8) conflicts with the Equal Protection clauses of the Florida and/or Federal Constitutions **beyond a reasonable doubt**. Metropolitan Dade County v. Bridges, 402 So. 2d 411 (Fla. 1981). This Petitioners cannot do.

The first two requirements from Boynton, in effect, work together to place the burden upon those challenging the constitutionality of a statute.[3] Behind these presumptions of validity and constitutionality is the underlying theory that the Legislature would not knowingly enact an unconstitutional measure. Wright v. Board of Public

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3 Boynton v. State, 64 So. 2d at 546 (requiring that burden rest with the assailant of constitutionality and containing presumptions of validity and constitutionality).

Instruction of Sumter County, 48 So. 2d 912, 914 (Fla. 1950). To this end, § 768.21(8) should be afforded the presumptions of validity and constitutionality.

In the instant case, the constitutionality of § 768.21(8) is challenged by Equal Protection arguments. Stewart v. Price, 718 So. 2d 205 (Fla. 1st DCA 1998). The First District noted that under the common law, an adult who has not been dependent on a parent was not entitled to recover damages for the wrongful death of a parent. Id., *citing* U.S. v. Durrance, 101 F.2d 109 (5th Cir. 1939); Louisville & N.R. Co. v. Jones, 45 Fla. 407, 34 So. 246 (Fla. 1903). Equal protection guarantees of the Florida and Federal Constitutions were not violated by the statute precluding recovery of nonpecuniary damages by a decedent's adult children where the cause of death resulted from medical malpractice. Fla. Stat. § 768.21 (8); Mizrahi v. North Miami Med. Ctr., Ltd., 712 So. 2d 826, 829 (Fla. 3d DCA 1998) *petition for cert. Filed (*No. 93, 649). In addition, the statute did not implicate a suspect class and the statute's disparate treatment of medical malpractice wrongful deaths bore rational relationship to a legitimate state interest of curtailing skyrocketing medical malpractice insurance premiums. Id.

Petitioners go to great lengths, as so their Amici, to attempt to cloud the fact-finding conclusions of prior state legislatures. *See* Petitoner's Intitial brief on the Merits, pp. 19 - 40. Petitioners urge this Court

> "...to see if it [§ 768.21 (8)] has some rational connection to a legitimate state interest...(to) look beyond the mear (sic) words of one of the

> classifications (sic) proponents, to the meat underneath, to see if, in fact, it is rational."

[App. B at 240] This clearly is an invitation to this Court to sit as a "super legislature". Instead of measuring the statute by the facts found to exist for a rational basis test, Petitioners urge this Court to construe reports and fact-finding materials differently than the legislatures who studied this measure over many months. In short, this Court is urged to find legislative facts differently, twelve years after the fact, than the legislative body in question. As noted by many decisions from the courts of this state, subjecting the statute to a different interpretation at this stage will not render it unconstitutional. Boynton v. State, *supra*; University of Miami v. Echarte, *supra*; Mizrahi, *infra*.

In upholding the constitutionality of § 768.21(8), the Third District Court of Appeal in Mizrahi observed that the implementation of Chapter 90-14, Laws of Florida which afforded minor children the opportunity to recover for nonpecuniary damages resulting from the death of a parent in § 768.21(3), created a new right rather than eliminated any extant remedy. Mizrahi, 712 So. 2d at 828. This is important from a constitutional perspective.

> 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, 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 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).

We find that the statute's disparate treatment of medical malpractice wrongful deaths does bear a rational relationship to the legitimate state interest of ensuring the accessibility of medical care to Florida residents by curtailing the skyrocketing medical malpractice insurance premiums in Florida. See §§ 766.201(1), Fla. Stat. Obviously, these escalating insurance costs adversely impact not only physicians but also, ultimately, their patients through the resultant increased cost of medical care. Mizrahi, 712 So. 2d. at 828. (Footnote omitted).

The rational basis supporting the constitutionality of Fla. Stat. § 768.21 (8) has been recognized as valid by this Court already. *See,* University of Miami v. Echarte, 618

So. 2d 189, 191 (Fla. 1993). This Court recognized the validity of the findings of the Academic Task Force for Review of the Insurance and Tort Systems; in particular, this Court recognized the fact of a "financial crisis in the medical liability insurance industry" and the resultant need to deal with this "medical malpractice crisis." Echarte, 618 So.2d at 191 - 192, 197 (n.12). No evidence or compelling fact, beyond and to the exclusion of any reasonable doubt, has been demonstrated by Petitioners to override the facts which have been recognized as valid by the legislature and by this Court in Echarte. Belk-James, Inc. v. Nazum, 358 So. 2d 174 (Fla. 1978). The constitutional attack of Petitioners must fail.

CONCLUSION

Florida Statute § 768.21(8) clearly passes constitutional muster. As a primary concern, this Court must give great deference to legislative enactments, because they are presumptively constitutional and valid. This is especially true in light of the theory that the Legislature would not knowingly enact an unconstitutional measure. Likewise, § 768.21(8) must be considered valid and constitutional unless and until the Petitioners demonstrate "beyond a reasonable doubt" that the subject statute violates some provision of the Florida or Federal Constitutions. Furthermore, expanding the liability system certainly does not improve the quality of health care.

This Court should again defer to the Legislature's reasons for the enactment of §

768.21(8), codified in Fla. Stat. § 766.201(1), since the Court is to resolve doubts in favor of constitutionality. There is ample factual support demonstrating the rational basis for this statute. Absent compelling factors demonstrating otherwise beyond a reasonable doubt, the lower court decision must be affirmed by this Court.

STATEMENT OF CERTIFICATION

I, Douglas M. McIntosh, Counsel for Amici Curiae, in accord with Rule 9.210(a)(2), hereby certify that the size and style of type used in the attached Brief On The Merits In Support of Respondents (Times New Roman 14cpi) is proportionately spaced, and is in compliance with this Court's Administrative Order of July 28, 1998.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amici Curiae, FLORIDA LEAGUE OF HEALTH SYSTEMS, FLORIDA HOSPITAL ASSOCIATION, FLORIDA MEDICAL ASSOCIATION and THE ASSOCIATION OF COMMUNITY HOSPITALS AND HEALTH SYSTEMS OF FLORIDA, in Support of Respondents was served by U.S. Mail on this 25th day of August, 1999 to all attorneys on the attached counsel of record list.

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