SUPREME COURT
OF FLORIDA

No. 93,804

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

vs.

DR. L.B. PRICE, M.D.,
Defendant/Appellee.

AMICI CURIAE, ASSOCIATION FOR RESPONSIBLE MEDICINE, FLORIDA WOMEN'S CONSORTIUM, INC., AND FLORIDA SILVER HAIRED LEGISLATURE BRIEF ON THE MERITS IN SUPPORT OF PETITIONERS

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ASSOCIATION FOR RESPONSIBLE MEDICINE,
FLORIDA WOMEN'S CONSORTIUM, INC., AND
FLORIDA SILVER HAIRED LEGISLATURE
IN SUPPORT OF PETITIONERS

The ASSOCIATION FOR RESPONSIBLE MEDICINE, FLORIDA WOMEN'S CONSORTIUM, INC., and FLORIDA SILVER HAIRED LEGISLATURE, submit this Amici Brief simultaneously with their Motion for Leave to Appear as Amici Curiae and to File an Amici Curiae Brief.

STATEMENT OF INTEREST

ASSOCIATION FOR RESPONSIBLE MEDICINE

The ASSOCIATION FOR RESPONSIBLE MEDICINE (ARM), a not-for-profit Florida corporation, is a patients rights group established in 1994 as a 501(c)(4) non-profit corporation. The mission of ARM is to reduce medical mistakes which cause patient injury and death. ARM members believe that the more knowledge available to the medical consumer the better the chances of the consumer to avoid medical mistakes and the resulting injury and death, and to reduce health care costs.

ARM's thrust is education and legislation. It supports more open access to information on doctors and health plans, and stronger informed consent laws and other laws to inform and protect the medical consumer. It has maintained an Internet Web site since December 1, 1997, and within 6 months more than 15,000 people have clicked onto

it. It also publishes a quarterly newsletter, The Patient Advocate.

Ordinary, hardworking people formed ARM, and ordinary, hardworking people continue to join and actively support ARM. Its members believed that when they needed medical care, they would receive safe and adequate care but instead they or their loved ones became victims of medical mistakes. This is the common denominator among most ARM members -- they have experienced medical mistakes.

This common experience provides a strong impetus for them to reduce the epidemic of medical mistakes that the insurance and medical industries and the Florida Legislature, like most legislatures, prefer to ignore.

ARM continually attracts the mass support of national and local media. Yet, even with this media support, the Florida Legislature has drowned the voice of ARM. Simply put, ARM does not have the financial resources to be heard over the mega-dollars of the insurance and medical industries. For example, ARM has actively supported the repeal of section 768.21(8) of the Florida Statutes. Many of its members are the victims of § 768.21(8), and have testified before the Florida Legislature and the Constitutional Revision Commission on their victimization but to no avail. In fact, at this juncture, they cannot get a proposed bill to repeal § 768.21(8) on the legislative agenda due to the politically powerful insurance and medical lobbyists. The victims of § 768.21(8) effectively are locked-out of the legislative process.

The interest of ARM in this proceeding is quite clear. Since many of the members of ARM are victims of § 768.21(8), they have a personal, direct interest in this Court finding reversible error in the First District Court of Appeal decision and declaring that statutory section unconstitutional.

For some of these victims, their statute of limitations is running. For these victims, this Court's decision will determine whether they can hold the medical professional(s) and/or facility who negligently or willfully caused the death of their loved ones responsible for their acts. This Court's decision will further determine whether the life of their deceased loved one had meaning and value. These victims have an urgent and direct need for this Court to reverse the First District Court of Appeal decision and declare § 768.21(8) unconstitutional.

Even the victims whose statute of limitations has run and who are thus barred from filing a lawsuit still have a personal, direct interest in ensuring that the life of their deceased loved one killed by a medical mistake had meaning and value, that the medical professionals and/or facility who caused the death of their loved one are held accountable, that all medical mistakes are reviewed and prevented in the future, and that no other loved one or any other person becomes a victim of § 768.21(8). The interest of all these victims inures not only to themselves but to all future victims.

FLORIDA WOMEN'S CONSORTIUM, INC.

The FLORIDA WOMEN'S CONSORTIUM, INC. (FWC), is a network of organizations and individuals committed to achieving full equity and empowerment for women. Its primary goal is to enhance member communications and to facilitate the coordination of organizational action on issues which affect women and girls, including health care issues. In furtherance of that goal, FWC joins in this Brief requesting § 768.21(8) be declared unconstitutional.

FWC believes that § 768.21(8) raises issues which directly, concretely, and significantly impact women. Women are most often the primary caregivers of their children and of their elderly relatives, and women outlive their husbands.

Section 768.21(8) prevents the parents of an adult child killed by medical malpractice and the adult children of a parent killed by medical malpractice from holding accountable the negligent medical professional(s) and/or facility. Accountability is the cornerstone of quality healthcare. Accountability is an absolute necessity to ensure medical mistakes are reviewed and prevented from re-occurring. Accountability saves lives.

Given the status of women as caregivers, § 768.21(8) impacts negatively the members of FWC, because, despite a strong relationship to a medical malpractice victim, they cannot hold accountable a negligent medical provider when the victim is their elderly, single parent or adult, single child.

FLORIDA SILVER HAIRED LEGISLATURE

The Florida Silver Haired Legislature (FSHL), whose members are senior citizens, exists is to serve the entire senior citizen community in Florida by providing education to and advocating issues of concern to Florida citizens age 55 and over and, thus, joins in this Brief requesting § 768.21(8) be declared unconstitutional.

FSHL is a statewide non-partisan, not-for-profit 501(c)(3) organization with chapters in 11 districts outlined by the Florida Area Agency on Aging areas. It is one of over 20 national groups, and the second one created in this country in 1978.

Section 768.21(8) of the Florida Statutes directly and concretely impacts FSHL members -- the senior citizens of Florida -- because it absolutely bars nonpecuniary damages in a wrongful death/medical malpractice lawsuit when the decedent is 25 years of age or older and without a spouse or minor child. It is obvious that the largest group of people impacted by § 768.21(8) is the senior citizen population.

FSHL has found that § 768.21(8) denigrates the constitutional rights of the senior citizens in Florida by denying equal protection, due process, and access to court. For example, it unlawfully discriminates between victims whose family member has been wrongfully killed by medical malpractice and similarly situated victims whose family member has been wrongfully killed in any other negligent manner. It arbitrarily discriminates against senior citizens by prohibiting nonpecuniary damages based on

familial status and age when their loved one has been killed by medical malpractice. This prohibition closes the courthouse doors because legal representation is not available without the possibility of recovery for nonpecuniary damages. And, without the ability to access the courts, the medical professional(s) and/or facility who negligently or even willfully caused the death of their patient(s) escape total liability and accountability. This lack of liability and accountability does nothing to prevent further medical mistakes and, in fact, allows medical mistakes to continue resulting in more injury and death not only to the senior citizen but anyone who wrongfully dies from medical malpractice.

SUMMARY OF THE ARGUMENT

This Court is the final arbiter of whether a legislative enactment conforms to the Constitution. Before this Court is the constitutionality of § 768.21(8) of the Florida Statutes which Appellants and *Amici* in support of Appellants respectfully request be declared unconstitutional. In support thereof, *Amici* set forth arguments showing that § 768.21(8) violates the state and federal constitutional rights of Access to Court, Equal Protection, and Due Process. Any one of these violations is enough for this Court to declare § 768.21(8) unconstitutional. *Amici* will begin with the denial of Access to Court, and then proceed to Equal Protection and Due Process.

When the Florida Legislature enacted § 768.16, *et seq.*, Fla. Stat., they gave identified survivors the right to claim their pain and suffering as a result of the loss of the decedent through wrongful death. At the same time, this statutory scheme abated any action which was pending in a court and also abolished the right of the estate to make a claim for the pain and suffering the decedent experienced as a result of the negligent act which resulted in death.

This appears to be an even exchange of one cause of action for another as would be required to avoid violating Florida's Constitutional command to provide Access to Court, Art. I, §21. However, certain persons were eliminated from having standing to claim pain and suffering: adult children over 25 for purposes of their single, deceased

parents and parents of single children over 25. No one was identified as survivors of these persons.

In 1990, this constitutional deficiency was corrected, for all persons who die of wrongful death, unless as a result of medical malpractice. Under § 768.21(3) and (4), both minor and adult children of single parents can claim their personal pain and suffering at the loss of the parent; and, parents of an adult, single child can likewise make a claim for their personal pain and suffering at the loss of their child. But, § 768.21(8) then removes this right, if the cause of action for wrongful death was medical malpractice. Clearly, this is in violation of the requirement that when a cause of action exists either at common law, or where, as here, by statute, under the Florida Right to Access to Court, there must be a quid pro quo before the Legislature can abolish that cause of action. Florida's Survival Statute pain and suffering cause of action existed in 1968 when Florida's Constitution was reenacted, it was abolished in 1972 with the enactment of the current version of the Florida Wrongful Death Act, as amended. For certain persons no alternative cause of action was ever created.

Amici are aware that this Court has ruled that there was no common law right to wrongful death. Nonetheless, Amici urge this Court to revisit this position in light of the United States Supreme Court's criticism of and refusal to adopt the English case law upon which this position rests.

Section 768.21(8) violates not only the Right to Access to Court but also the Right to Equal Protection and Due Process. The Florida Legislature went beyond its authority under the police powers when it enacted § 768.21(8). The stated purpose of § 768.21(8) is "making medical malpractice insurance somewhat less expensive." This purpose does nothing to protect the health, safety, welfare, or morals of the public. It is an illegitimate benefit to the medical and insurance industries to the detriment of both the burdened Class and the general public. No evidence exists to show otherwise. In fact, the only evidence that exists is a 1989 letter from the Department of Insurance which is based on six assumptions. Assumptions are not facts, and cannot be used to form the basis of a law which discriminates on its face.

The argument that the purpose of the statute is to protect access to the health care system in Florida is pretextual. The fact is that, subsection (8) was enacted so that the medical and insurance lobbyists would not kill the passage of subsections (3) and (4) which furthers the purpose of the Florida Wrongful Death Act -- "to shift the losses resulting when the wrongful death occurs from the survivors of the decedent to the wrongdoers" -- and resolves the constitutional infirmity created when the Survival Statute merged into the Wrongful Death Act.

But, if this Court should find that the purpose of subsection (8) is to protect access to health care, a legitimate purpose within the purview of the police powers, subsection

(8) is not a rational or reasonable means to achieve that purpose. The striking of subsection (8) and leaving the remainder of § 768.21 in place will not impact the accessibility of health care to the people of Florida. In 1988, the Florida Legislature enacted major medical malpractice litigation reforms for the purpose of weeding out frivolous lawsuits and encouraging early resolution of disputes. The last ten years has shown that the reforms work.

Further, even if striking subsection (8) would slightly increase medical malpractice insurance rates, that must be weighed against the need to allow all victims of medical malpractice access to court where the medical mistakes are intensively scrutinized. This encourages safer medicine and prevents medical malpractice. Saving lives surely outweighs a slight increase in medical malpractice insurance rates.

ARGUMENT

I. BRIEF GUIDE TO LEGISLATIVE ACTIONS RELEVANT TO THIS COURT'S DETERMINATION OF THE CONSTITUTIONALITY OF § 768.21(8), FLA. STAT.

A. Since November 23, 1882, Florida has had some form of a Survival Statute in place. The most recent form of this Statute was passed in 1967. Laws 1967, c. 67-254 §2. This Statute states that "[n]o cause of action dies with the person. All causes of action survive and may be commenced, prosecuted, and defended in the name of the person prescribed." One of these causes of action which survived was the right to claim recovery for damages suffered by a victim of a wrongful death, including the victim's pain and suffering. *Smith v. Laskey*, 222 So. 2d 773 (Fla. 4th DCA 1969).

B. Since 1883, Florida also has had some form of wrongful death action available. Laws 1883, c. 3439, §§1 and 2.

C. As of 1968, Florida's Constitution was newly adopted. *See, generally,* Introduction to Constitution of the State of Florida, as revised in 1968.

D. In 1972, the Legislature enacted the Florida Wrongful Death Act, which abated the right to actions for personal injuries of a decedent, if one existed prior to death, but more importantly, this Act also abolished the cause of action under the Survival Statute for any decedent's personal injuries and created a right in certain statutory

survivors to claim their own pain and suffering. *Martin v. United Securities Services, Inc.*, 314 So. 2d 765 (Fla. 1975).

This statute states as its explicit purpose:

> **It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoers. Sections 768.16-768.27 are remedial and shall be liberally construed.**

§ 768.17, Fla. Stat. (1998) (originally, ch. 72-35, § 1, Laws of Fla.). The original 1972 enactment did not include adult children as survivors and thus the parent of an adult child/decedent[1] and/or an adult child of a parent/decedent had no state statutory right to recover for nonpecuniary damages stemming from the wrongful death by any tortfeasor.

E. In 1988, the Legislature enacted substantial reforms to the Medical Malpractice Act pursuant to the recommendations of the Academic Task Force for the Review of Insurance & Tort Systems. The purpose of these reforms was to eliminate the legislatively-found crisis in the area of medical malpractice insurance premiums.[2]

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[1] Minor children are defined as those under 25 years of age, notwith-standing the age of majority. §768.18(2), Fla. Stat. (1998).

[2] In 1988, the Legislature made the following findings which have not been revisited by the Legislature and have not been litigated for their accuracy. "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." § 766.201(a), Fla. Stat.

F. In 1990, the Legislature amended the Wrongful Death Act to include adult children as statutory survivors. § 768.18, Fla. Stat. (1998). At the same time, the Legislature further amended the damage section to allow nonpecuniary damages to be recovered by the parents of an adult child/decedent and also to be recovered by an adult child of a parent/decedent. § 768.21(3)(4), Fla. Stat. (1998). However, the Legislature excluded the medical industry from subsections (3) and (4) with the enactment of subsection (8). *See also* ch. 90-14, Laws of Fla. Section 768.21 of the Florida Statutes enumerates the available damages in a wrongful death action. The most relevant sections are:

> (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.
>
> (4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other

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(1998) (originally, ch. 88-1, § 48, Laws of Fla.). "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." § 766.201(b), Fla. Stat. (1998) (originally, ch. 88-1, § 48, Laws of Fla.) . "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.**" § 766.201(d), Fla. Stat. (1998) (originally, ch. 88-1, § 48, Laws of Fla.).

survivors.

* * *

> (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 by § 766.106(1).

§ 768.21(8), Fla. Stat. (1998).

G. The Legislature has not amended the Wrongful Death Act since 1990 although in 1995, 1996, and 1997, Senator Ginny Brown-Waite and Representative Mary Brennan sponsored bills to repeal § 768.21(8). All three attempts failed.

H. During the last Legislative session in 1999, the Legislature enacted major tort reforms but did not further reform the Medical Malpractice Act, nor amend the Wrongful Death Act.

II. VIOLATION OF FLORIDA AND FEDERAL RIGHT TO ACCESS TO COURT.

A. WHEN THE FLORIDA LEGISLATURE MERGED THE SURVIVAL STATUTE'S RIGHT TO RECOVER FOR THE PAIN AND SUFFERING OF A DECEDENT INTO THE WRONGFUL DEATH ACT, IT VIOLATED CERTAIN SURVIVORS' RIGHT TO ACCESS TO COURT UNDER THE FLORIDA CONSTITUTION.

When the legislature passed Florida's Wrongful Death Act, it abolished the Survival Statute's right to claim the pain and suffering of a decedent. Instead, the Wrongful Death Act recognized the right of specifically enumerated survivors to claim their own pain and suffering. Those survivors included the decedent's spouse, minor children, parents, and when partly or wholly dependent on the decedent for support or services, any blood relatives and adopted brothers and sisters. § 768.18(1), Fla. Stat. (1972).

These survivors were entitled to certain damages as outlined in then § 768.21, Fla. Stat. (1972). All survivors were entitled to lost support and services, if any. § 768.21(1). The surviving spouse could recover for companionship and his or her mental pain and suffering from the date of injury. § 768.21(2). Minor children[3] could recover for lost

[3] Defined as those under the age of 25 years. § 768.18(2), Fla. Stat.

parental companionship and their mental pain and suffering from the date of injury. § 768.21(3). Finally, a parent of a deceased minor child could recover for mental pain and suffering from the date of injury. § 768.21(4).

This configuration appears, at first glance, to assure that what was lost to the litigant from the Survival Statute was completely replaced in the Wrongful Death Statute, especially since the various survivors' pain and suffering went back to the date of the injury of the decedent and not just the death of the decedent.

Therefore, the reader of this statutory language might believe he or she has found the needed quid pro quo in order to constitutionally uphold this exchange as not being in violation of a person's right to access to court. *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

However, the observation is invalid. What happened is the Survival Statute's right to claim the damages for the decedent's pain and suffering in the name of the decedent's estate and therefore to the benefit of all lineal ascending and descending heirs was not completely subsumed. The rights of the adult child who would have been entitled to a share of the damages the decedent suffered were annulled. The rights of a parent who might have been entitled to share in the damages the decedent adult child suffered were also annulled. Nothing replaced these causes of action.[4]

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[4] Amici recognize that adult children of single parents and parents of single adult children do have the right, through the decedent's estate, to claim net accumulated estate, funeral expenses and medical expenses, subject to Florida

No statutory right was given to replace that which was lost until 1990 when a right was extended to adult children of single parents and parents of single adult children **unless the basis of a claim was for medical malpractice**.

Thus, the argument regarding the lack of access to court for these survivors remains as to medical malpractice wrongful death decedents. The exemption/exception found in § 768.21(8), Fla. Stat. (1997) is an unconstitutional deprivation of **these** survivors' right to access to court because it denies an alternative to them of the previously recognized, now abolished Survival Statute's right to sue for the pain and suffering of their deceased kin.

Specifically, adult children of deceased single parents and parents of deceased single, adult children have been precluded from their rightful, pre-existing right to a cause of action, and therefore, a redress of injury, which was in force at the time of the adoption

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collateral source rule, all of which in most cases amount to less than out-of-pocket expenses for a medical malpractice action. §768.21(6), Fla. Stat. (1998). Therefore, the value of cases which involve only the potential of recovering these damages are rendered nil to the legal community which normally takes such cases on contingency. The average cost of mounting a medical malpractice case is anywhere from $50,000 to $75,000 FRANK M. MACCLELLAN, MEDICAL MALPRACTICE: LAW, TACTICS, AND ETHICS 102 (1994). These costs are, of course, in addition to hundreds to a thousand or more litigation hours. *Good Samaritan Hosp. Ass'n v. Saylor*, 495 So. 2d 782 (Fla. 1986). The net result of the high cost of litigating a medical malpractice case coupled with the potential of a small award if limited to the decedent's net accumulated estate, funeral expenses and medical bills, subject to Florida's collateral source rule, is the lack of counsel to take such cases, particularly on contingency.

of the 1968 Constitution of the State of Florida. This outcome is completely proscribed by the case of *Kluger*, 281 So. 2d at 4.[5]

While *Kluger* recognized that a complete prohibition against legislative change cannot be required, nonetheless, if abolition is to be permitted, it can only occur upon a showing of an "overpowering public necessity" and that "no alternative method of meeting such public necessity can be shown." *Id.*

This "overpowering necessity" test in *Kluger* has also been referred to as requiring a "compelling" necessity, *Sunspan Engineering & Constr. Co. v. Spring-Lock Scaffolding Co.*, 310 So. 2d 4 (Fla. 1975), before a right to access can be abolished or restricted. *Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987).

Under the instructions of *Kluger*, this Court has held a number of statutes unconstitutional as in violation of Florida's Right to Access to Court. In *Kluger*, the Court invalidated a statute requiring a minimum of $550 property damages arising from an automobile accident before bringing an action. Although the majority in *Kluger* does

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[5] Until now, Amicus ARM had acquiesced in the principle that without a common law right to a particular cause of action, the legislature could give and could take away any other cause of action. Amicus ARM now realizes and asserts that such is false. When a statutory right was established prior to the 1968 Florida Constitution, that statutory right would extend until 1999 under Florida's Constitutional revision scheme. Amici FWC and FSHL join ARM in this position that the same rule that applies to common law, applies with equal force to statutory law, under these circumstances.

not address in any detail what prompted the questioned statute, the minority opinion offers some insight: "This Court is compelled to take notice of the controversy which existed for long years, relating to insurance rates and practices." *Kluger*, 281 So. 2d at 10. (Boyd, J. dissenting). Justice Boyd went on to state that he saw the Florida fault-based system as cumbersome thus justifying a switch to a no-fault insurance statute, including the section which was challenged.

In the instant case, much has been made about a "projected" increase in medical malpractice insurance.[6] It appears that such a consideration was of no moment in *Kluger*, as the majority did not even address it, except to state: "The legislature has not presented [a public necessity] in relation to the abolition of the right to sue an automobile tortfeasor for property damage." *Id.* at 5.

On the subject of "public necessity" and as an overriding policy consideration, this Court should keep in mind that the victims of medical malpractice are not the doctors or the medical community. The true victims are the individuals who rely on these professionals for competent medical care. For the past 25 years, beginning with legislative changes in medical malpractice law in 1975, the emphasis has been shifted to

[6] Amici takes serious exception to the foundation and "assumptions" upon which these "projected" increases were made as argued in Section IV. B. of this Brief.

the rights of the wrongdoer from the rights of the victims,[6] a skewed perspective at best; and a serious violation of the entire concept of the foundation of tort law at worst.[7]

Section 768.21(8) merely continues this miscreant approach by creating more victims, just the opposite of showing that the legislature had a compelling interest for this exemption/exception.

There are no less than three categories of such persons as a result of this medical malpractice exception/exemption: those who are deceased for whom no one can viably make a claim for malpractice in any court in Florida which renders their lives meaningless; those who are the survivors of these deceased persons who cannot hold accountable the medical processional(s) and/or the facility who negligently or willfully caused the death of their loved one; and, finally, those persons who may tomorrow die as a result of medical malpractice because the law provides no incentive nor deterrent to avoid such malpractice.

It has long been recognized that potential for redress of a wrong in a court of law

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[6] Kenneth Kranz, *Tort Reform 1997-98: Profits v. People*, 25 FLA. ST. U. L. REV. 161, 163 (1998).

[7] One only need examine the preamble to the Florida Wrongful Death Act to see that this focus should be upon the victim. This preamble clearly announces the need to shift the loses as a result of wrongful death from the survivors to the wrongdoer and instructs the courts that because this law is remedial in nature it should be liberally applied; PAUL C. WEILER, et al., A MEASURE OF MALPRACTICE 14 (1993).

provides incentive to persons and corporations not to commit the wrong lest one be sued. In fact, the area of malpractice of medicine is no exception to this incentive. No less than five credible sources support this conclusion. First, Professor Patricia Danzon, who in 1983 reviewed an earlier study in California, estimated that the economic costs of physician-caused injuries may be 10 times the total cost of malpractice premiums, or about $50 billion per year in 1990. Taking these figures, Danzon concluded that from a purely economic consideration, the tort liability system would justify its costs even if it deterred only ten percent of medical injuries. Patricia M. Danzon, "The Medical Malpractice System: Facts and Reforms," in *Brookings Dialogues on Public Policy: The Effects of Litigation on Health Care Costs*, Ed. By M.A. Baily and W.J. Cikins 28-35 (Wash., D.C.: Brookings Institution, 1985); testimony of Patricia M Danzon, before the Committee on Labor and Human Resources, U.S. Senate, July 10, 1984, printed in Committee on Labor and Human Resources, U.S. Senate, *Defensive Medicine and Medical Malpractice*, 98th Cong., 2nd sess., (Wash., D.C.: U.S. Government Printing Office, 1984).

The Congressional Budget Office also concluded that the "current tort liability system may deter some medical injuries, thereby tending to lower spending on health care. If so, changing the system could raise national health expenditures and other costs associated with medical injury." Statement of Robert D. Reischauer, Director, Cong.

Budget Office, before the Committee on Ways and Means, U.S. House of Representatives, March 4, 1992, p. 32.

Even a former president of the Federation of State Medical Boards conceded in 1984 that "It is sad but true that many physicians practice more carefully than they did in the past because they have one eye on the potential litigant." Robert C. Derbyshire, "Malpractice, Medical Discipline, and the Public," *Hospital Practice* 209, 216 (Jan. 1984).

The United States General Accounting Office concluded that "[c]oncerns about the threat of malpractice claims and associated financial losses have been motivating force in the development of quality assurance activities." Statement of Lawrence H. Thompson, Assistant Comptroller General, U.S. General Accounting Office, on "Medical Malpractice: Experience with Efforts to Address Problems," before the Subcommittee on Health, Committee on Ways and Means, U.S. House of Representatives, May 20, 1993, p. 7.

Finally, an expert from the Harvard School of Public Health stated in 1993 that there is proof that malpractice laws discourage malpractice.

> [R]ecent empirical analyses demonstrate that at the level of the hospital, as claims *increase* per 1,000 discharges, the risk of negligent injury to patients *decreases.* This is the first statistically significant evidence that there is a *deterrent* effect associated with malpractice litigation. It suggests that tort litigation with all of its warts, nonetheless

> accomplishes the task for which it is primarily intended, that is the prevention of medical injury.

Testimony of Dr. Troyen A. Brennan, Harvard School of Public Health, on "Medical Malpractice and Health Care Reform," before the Subcommittee on Health and the Environment, Committee on Energy and Commerce, U.S. House of Representatives, Nov. 10, 1993, p. 9 (emphasis added).

Because of the §768.21(8) exception/exemption, this admirable goal of tort law is completely lost in relation to these victims, again, just the opposite of having a legislatively demonstrated "public necessity" in order to justify a denial of Access to Court under Florida law.

Simply put, the very foundation of American tort law is directly violated, discounted and trashed because of the exception. This has occurred absent any actual justification other than to assure that the chosen medical profession does not suffer a possible increase in medical malpractice premiums. This is the equivalent of passing legislation which is purely economic protectionism, a practice which has been condemned by both the United States and Florida Supreme Courts. *Hegeman Farms Corp. v. Baldwin*, 294 U.S. 158 (1934); *Liquor Store, Inc. v. Continental Distilling Corp*., 40 So. 2d 371, 375 (Fla. 1949).

This protectionism is particularly egregious in the face of the negative impact on

the general welfare of the public who are exposed to medical mistakes being made as a result of lack of deterrence and accountability.[8] Because there is no incentive or need to correct these mistakes, mistakes can be made over and over, and all Floridians and persons who visit Florida are exposed to this continued risk if they are over 25 and single, without minor children.

Lest appellees argue that these adult children and parents of adult children still have access for limited damages, one need only look to *Psychiatric Assoc. v. Siegel*, 610 So. 2d 419 (Fla. 1992). In *Psychiatric Assoc.,* this Court held a bond-posting requirement before a party could bring an action against someone who participated in a medical review board process unconstitutional under Art. I, §21, Fla. Const. *Psychiatric Assoc.*, 610 So. 2d at 424. Despite the findings of a medical malpractice crisis by the Governor's Task Force on Medical Malpractice in 1985, the bond requirement still failed the second prong of the *Kluger* test because the record did not show that the requirement

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[8] A Florida study found that, between 1975 and 1980, 3 percent of medical specialty physicians accounted for more than 85 percent of the payments to malpractice victims on behalf of that group of doctors; 6 percent of obstetrics-anesthesiology physicians accounted for more than 85 percent of that group's payments; and 7.8 percent of the surgical physicians accounted for 75 percent of that group's payments. Frank A. Sloan, *et al. Medical Malpractice Experience of Physicians: Predictable or Haphazard?,* J. OF THE AM. MED. ASS'N , Dec. 15, 1989, at 1282, 1287. At the same time, a recent Tufts University study showed that insurance companies impose sanctions on doctors at a rate four times higher than do state medical boards. *Keeping Doctors Honest: Most Medical Boards Fail the Test*, Public citizen Heath Research Group Health Letter, 6 (Mar. 1993).

was the only method of meeting the crisis and encouraging peer review. *Id.* at 425.

Applying *Psychiatric Assoc.* to the case at hand, even if there is some finding of a compelling interest for purposes of negating pain and suffering claims of adult children of single parents and parents of single, adult children who are victims of medical malpractice wrongful death, there is no showing that the legislature even considered whether this absolute bar is the only method of meeting that interest.

Psychiatric Assoc. is also important because the Court acknowledged that, as in the instant case, the bond requirement was not a total abrogation of a plaintiff's Right to Access to Court, but did create an impermissible restriction on access. *Id.* at 424.

Based on the foregoing, it is clear that § 768.21(3) and (4) have served to correct a serious constitutional flaw in Florida's Wrongful Death Act. But the attending exemption/exception found in § 768.21(8), Fla. Stat., continues to violate a pre-1968 Florida Constitution statutory right by virtue of having **no** alternative given to these survivors once the right afforded under the Florida Survival Statute was subsumed by the Florida Wrongful Death Act. For this reason, § 768.21(8) must be declared unconstitutional, leaving intact §768.21(1)-(7).

B. COMMON LAW RIGHT FOR "WRONGFUL DEATH" DOES EXIST

Amici are aware that this Court has ruled that a common law right to wrongful death does not exist. However, Amici ask that this Court revisit this conclusion and

present the following argument.

In 1968, the Florida Supreme Court responded negatively to a certified question presented by the United States Fifth Circuit Court as to whether there was a claim for unseaworthiness under the Florida Wrongful Death Statute. *Moragne v. State Marine Lines, Inc.*, 211 So. 2d 161 (Fla. 1968)(*Moragne I)*. In making this determination, this Court stated that "[n]either the maritime law nor the common law recognized a cause of action for wrongful death," *id.*, thus, arguably equating the two conclusions of law.

Eventually, when *Moragne v. State Marine Lines, Inc.*, 393 U.S. 375 (1970)(*Moragne II*) reached the U.S. Supreme Court, compelling criticisms were made of the common law rule which denied wrongful death actions.

The U. S. Supreme Court overruled *The Harrisburg*, 119 U.S. 199 (1886), which case traced its roots back to *Insurance Co. v. Brame*, 95 U.S. 754 (1878), which, in turn, was decided at a time when the Federal Court, under *Swift v. Tyson*, 16 Pet. 1 (1842), expounded a federal common law.

Moragne II acknowledged the "merger doctrine" which has been accepted as a basis for the opinion of Lord Ellenborough in *Baker v. Bolton*, 1 Campb 439, 170 Eng Reprint 1033 (1808) which has served as the source of this lack of a common law foundation for wrongful death. Commentators have criticized the mischief done by *Bolton*, HOLDSWORTH, *The Origin of the Rule of Baker v. Bolton*, 32 L. Q. REV. 431

(1916); SPEISER, RECOVERY FOR WRONGFUL DEATH, § 1:2 (1966); LEO ALPERT, *The Florida Death Acts*, 10 U. Fla. L.R. 153 (Summer 1957)("the shamefulness, as Justice Holmes once said, of any ruling based on nothing more than 'it was once so decided.'"); PROSSER, TORTS §121 (1971 4th ed.)(Prosser referred to Lord Ellenborough as a judge "whose forte was never common sense," stating that as a result of our courts' adoption of *Baker*, "it is more profitable for the defendant to kill the plaintiff than to scratch him.").

The U.S. Supreme Court stated that Ellenborough's opinion cited no authority, gave no supporting reasoning, and did not refer to any supporting theory in announcing that "in a civil Court, the death of a human being could not be complained of as an injury." *Moragne II*, 398 U.S. at 383. The Court stated further:

> The historical justification marshaled for the rule in England never existed in this country. In limited instances American law did adopt a vestige of the felony-merger doctrine, to the effect that a civil action was delayed until after the criminal trial. However, in this country the felony punishment did not include forfeiture of property; therefore, there was nothing, even in those limited instances, to bar civil suits.

Moragne II, 398 U.S. at 384.

Amici found no court which has ever offered a satisfactory justification for adopting the *Baker v. Bolton* rule. Even the Florida Supreme Court apparently had misgivings when, in *Florida E. C. R.R. v. McRoberts*, 111 Fla. 278, 285, 149 So. 631,

633 (1933) it suggested that it might not have decided that no common law cause of action existed had it not been for the accretion of over a hundred years.

Given this complete lack of justification and foundation for adopting this rule that there is no common law right to Wrongful Death, given the reasoning of *Moragne II*, and given the serious criticism of *Bolton*, Amici urge this Court to re-examine this blind adherence to this rule.

If that re-examination shows that Lord Ellenborough's statement was without legal support, then the only conclusion is the opposite: a common law remedy for wrongful death did exist at least at the time of the re-ratification of Florida's Constitution which would result in yet another basis for ruling that §768.21(8) denies adult children of single parents and parents of single adult children who are victims of medical malpractice wrongful death their Access to Court with no reasonable alternative in violation of Florida's Constitution.

C. The Burdened Class is Denied Access to the Courts Under the Federal Due Process Clause.

The Federal Due Process clause provides a Right of Access to the Court. *Boddie v. Connecticut,* 401 U.S. 371 (1971) (finding state may not foreclose party's access to court for divorce, a statutorily-created right, by imposing court fee indigent cannot afford); *United States v. Kras,* 409 U.S. 434 (1973) (upholding filing fee in bankruptcy, a

statutorily-created right, which indigent could not afford since other alternatives exist to restructure debts).

A key to understanding the fact that §768.21(8) bars the burdened Class from Access to the Court under the Federal Due Process clause is that even the burdened Class has Access to Court for some damages, small though they may be.[9] Having given this access, it is then as if the Florida Legislature, by creating the unlawful exception/exemption for the medical profession in Wrongful Death actions, has imposed an arbitrary penalty upon persons standing in the shoes of the burdened Class and not any one else. Under *Kras*, such a penalty may be upheld if it is rational.[10] Here, as will be explained, the exception/exemption is wholly irrational, in violation of the Federal Equal Protection, *see supra* at Section IV, and as such is irrational under the Federal Due Process clause.

Section 768.21(8) is not only an unlawful discrimination, it is also a sham. It is designed only to protect the economic interests of the insurance and medical industries, arbitrarily penalizing the Class members. This is evident on its face. The penalty

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[9] Estate's P.R. may recover net accumulated estate and funeral expenses, and possibly medical expenses, which, in most cases, amount to less than out-of-pocket expenses for a medical malpractice action. §768.21(6), FLA. STAT.

[10] Under *Boddie*, the court determined obtaining a divorce was connect-ed to constitutional right to family association.

prohibits a Class member from recovering nonpecuniary damages which effectively and completely forecloses the Class member's Access to Court because of the unusually high cost of litigating a medical malpractice case,[11] in violation of the Federal Due Process clause.

As stated earlier, §768.21(8) renders the potential value of these cases nil to the legal community which normally takes such cases on contingency. Few attorneys will engage in the costly presuit notice filing. No attorney[12] will sign onto civil litigation under the limited recovery potential faced by these survivors. This is an exact parallel to *Boddie* — a statutory right exists but due to the exception/ exemption for the medical profession for nonpecuniary damages in Wrongful Death actions, the Class members cannot achieve access to their statutory right.[13] And, as required by *Kras*, no alternative

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[11] A cost-benefit analysis always dictates against litigating a Wrongful Death claim based on medical malpractice when non-pecuniary damages are barred because of the extremely high cost of medical malpractice litigation. *See supra* notes 4 and 9.

[12] A possible exception is counsel who wants to challenge a statute implicated in the action. Furthermore, if a Class member is wealthy enough to afford a significant negative financial return, then that wealthy member could fund the litigation and thus would have Access to Court. So, in essence, only the poor and middle-class are denied Access which is unlawful discrimination based on wealth. *See Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974).

[13] "*Boddie*. . . safely rests on only one crucial foundation -- that the civil courts . . . belong to the people . . . no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a

remedy is available to the Class members in any other forum.[14] To give a right without a remedy is against the foundation of our democratic society. This Court can, and should, correct this egregious wrong, by declaring section 768.21(8) unconstitutional under the Federal Due Process clause.

III. THIS COURT HAS THE AUTHORITY AND DUTY TO REVIEW THE LEGISLATIVE ENACTMENT OF SECTION 768.21(8), INCLUDING THE FACTUAL FINDINGS, TO DETERMINE WHETHER THE STATUTE VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FLORIDA AND FEDERAL CONSTITUTION.

A. REVIEW UNDER THE POLICE POWERS.

"Police power is the sovereign right of the State to enact laws for the protection of lives, health, morals, comfort, and general welfare. [cite omitted] The State may enact laws whenever demanded by public interest, and large discretion is vested in the Legislature to determine public interest and measures for its protection." *Holley v. Adams*, 238 So. 2d 401, 407 (Fla. 1970).

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penalty, or afford to hire an attorney." *Huffman v. Boersen*, 406 U.S. 337 (1972) (Douglas, J., concurring).

[14] House attempted to create a private right within professional disciplinary process to no avail. Besides, proposed approaches did not permit recovery for pain and suffering, nor funding for expenses. House Committee, 03/11/97.

However, "the police power of the state is not absolute. It is subject to controlling provisions of the federal [and state] constitutions."[15] *Trustees of Tufts College v. Triple R. Ranch*, Inc., 275 So. 2d 521, 525 (Fla. 1973). **This Court is "the final arbiter as to whether the act conforms to its own constitution,"[16]** *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So. 2d 371, 375 (Fla. 1949) (emphasis added), whether "the exercise of the state's police powers [can] reasonably be construed as expedient for the protection of the public safety, welfare and health or morals." *Pacheco v. Pacheco*, 246 So. 2d 778, 781 (Fla. 1971). "'[T]he test, when such regulations are called in question, is whether they have some actual and reasonable relation to the maintenance and promotion of the public health and welfare, and whether such is in fact the end sought to be attained.'" *Eelbeck Milling Co. v. Mayo*, 86 So. 2d 438, 439 (Fla. 1956).

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[15] "The legislative power of the state shall be vested in a legislature of the State of Florida, consisting of a senate composed of one senator elector from each senatorial district and a house of representatives composed of one member elected from each representative district." Art. III, § 1, Fla. Const. (1968). Under this provision the legislature may exercise any lawmaking power that is not for-bidden by the organic law of the land. The constitution does not grant particular legislative powers, but contains specific limitations of the general lawmaking power of the legislature." *Stone v. State*, 71 Fla. 514, 71 So. 634 (Fla. 1916).

[16] "To the extent, . . ., that such an Act violates express or clearly implied mandates of the Constitution, the Act must fall -- not merely because the court so decrees, but because of the dominant force of the Constitution, an authority superior to both the legislature and judiciary." *Amos v. Mathews*, 99 Fla. 65, 126 So. 308, 315 (Fla. 1930).

B. REVIEW UNDER HEIGHTENED RATIONAL SCRUTINY.

The United States Supreme Court jurisprudence on the questions of equal protection and due process[17] has applied a heightened rational scrutiny test when the democratic process will not eventually rectify the improvident decision of the legisla-ture. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). The two-part test remains the same: (1) does the statute serve a legitimate state purpose, and (2) is the statute rationally related to achieve that legitimate state purpose. What changes is the examination by the Court -- rather than using a mere "Can You Conceive" standard, Heightened Rational Scrutiny allows the Court to examine: (1) the purpose of the legislative objective for its legitimacy, including motive and intent; (2) type of class burdened and whether subjected to tradition of disfavor by our laws; (3) burdens on class and their impact; (4) justifications for burdening the class; and (5) likelihood law will achieve the legislative objective. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Zobel v. Williams*, 457 U.S.

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[17] Section 768.21(8) is being challenged not only under the Florida Constitution but also the Federal Constitution which requires this Court to deter-mine this case both under Florida and Federal case law. '"This Court is not bound to follow the Supreme Court of the United States when construing the provisions of our State Constitution, but we are of course bound by the decisions of the emin-ent tribunal construing the meaning and affect of Acts of Congress and those pro-visions of the National Constitution which restrict the powers of the States. . . ."' *Scarborough v. Webb's Cut Rate Drug Co.*, 150 Fla. 754, 765, 8 So. 2d 913 (Fla. 1942).

55 (1982); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438-42 (1982); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973).

At times, this Court has also used the Heightened Rational Scrutiny test in reaching a decision although not labeling it as such. *See, e.g., Shriners Hospitals for Crippled Children v. Zrillic*, 563 So. 2d 64, 69-72 (Fla. 1990); *State v. Powell*, 497 So. 2d 1188, 1190 (Fla. 1986) ("In determining whether a permissible legislative objective exists, we must review the evidence arising from the record in this case."); *State v. Lee*, 356 So. 2d 276 (Fla. 1978); *Soverino v. State*, 356 So. 2d 269 (Fla. 1978); *In re: Reed's Estate*, 354 So. 2d 864 (Fla. 1978); *see also, Pinillos v. Cedars of Lebanon Hosp. Corp*., 403 So. 2d 365, 370 (Fla. 1981) (Sundberg, C.J. *dissenting)*. These cases provide ample authority for this Court to review whether the stated purpose for the enactment of § 768.21(8) is legitimate under the police powers; and if so, will the statute (classification) rationally/reasonably achieve that purpose. In other words, does a rational/reasonable relationship exist between the ends and means--does a nexus exist between the ends and means?

IV. SECTION 768.21(8) OF THE FLORIDA STATUTES VIOLATES THE

EQUAL PROTECTION[18] AND DUE PROCESS[19] CLAUSES OF THE FLORIDA AND FEDERAL CONSTITUTION.

A. SECTION 768.21(8) DOES NOT SERVE A LEGITIMATE PURPOSE UNDER THE POLICE POWERS.

The stated purpose of § 768.21(8) is "making medical malpractice insurance somewhat less expensive." *Garber v. Snetman*, 712 So. 2d 481 (Fla. 3d DCA 1998) (Schwartz, C.J., *concurring*), which is supported by a close examination of the legislative history and the timing of the enactment. The medical malpractice reforms had been in place for two years before § 768.21(8) was enacted -- the concerns of the legislative findings enumerated in § 766.201 were being addressed.

Most important, § 766.201 cannot control the purpose of § 768.21(8) because subsection (d) of § 766.201 explicitly mandated "the preservation of the right of either

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[18] "[W]ithout 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." *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 251 (Fla. 1987). "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." *The Fla. High School Activities Ass'n, Inc. v. Thomas*, 434 So. 2d 306, 308 (Fla. 1983).

[19] "The test to be used in determining whether an act is violative of the due process clause is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive." *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 15 (Fla. 1974).

party to have its case heard by a jury." Section 768.21(8) foreclosed that right to the burdened class, so how can § 766.201 control the purpose of § 768.21(8)? Simply put, it cannot!

Any scant references in the legislative history to the statutory purpose being to assure the general public's access to a health care delivery system in Florida are pretextual. In fact, as Appellants herein/Plaintiffs below stated in their Supplemental Memorandum in Support of Plaintiffs' Motion to Declare Unconstitutional Section 768.21(8), Florida Statutes, at p.2 (attached hereto as Appendix Exhibit 1):

> On information and belief, Plaintiffs would represent that there was an informal agreement between the medical lobby and the Academy of Florida Trial Lawyers that the lobby would not oppose the 1990 inclusion of adult children so long as medical malpractice actions were excluded and so long as the Academy would not litigate the constitu-tionality of this exclusion; in this light, the vocal support for this legis-lation by the Academy's lobbyist, Mr. Paul Jess, as reflected in the legis-lative history provided earlier by Defendant, is more understandable.

In other words, the medical lobbyists won out over the trial bar -- § 768.21(8) was enacted so the medical lobbyists would not kill subsections (3) and (4). This is political deal-making without any real consideration of the adverse impact to the burdened Class and the public as a whole. No discussion appears in the legislative record regarding the adverse impact from the enactment of subsection 8, nothing regarding the detriment to the burdened Class and further detriment to the general public. Nor, does anything appear

in the record regarding an adverse impact on the delivery of health care if subsection 8 was not enacted. Time has shown that this was political deal-making gone bad -- the medical and insurance industries got what they wanted to the detriment of the general welfare of the public.

Protecting the profits of business entities is not a legitimate purpose. *See, e.g.*, *Hegeman Farms Corp. v. Baldwin*, 294 U.S. 158 (1934); *McBride v. GMC*, 737 F. Supp. 1563 (M.D. Ga. 1990); *Primary Care Physicians Group v. Ledbetter*, 102 F.R.D. 254, 256 (N.D. Ga. 1984). "[O]ne economic group may not have the sovere-ign power of the state extended to it and use it to the detriment of other citizens," *Liquor Store, Inc*., 40 So. 2d at 375, which is what the Florida Legislature did for the powerful medical and insurance industries with their mega-dollars to the detriment of all persons in Florida, as Amici have previously shown in Section II.A., *supra*.

Thus, this Court should find the stated purpose -- to keep medical malpractice insurance premiums from increasing -- does not come within the purview of the police powers is impermissible. This Court then should stop the analysis. If the statute does not have a legitimate state purpose, it is unconstitutional. This Court can and should declare § 768.21(8) unconstitutional under both the equal protection and due process clauses of the Florida and Federal Constitution.

B. SECTION 768.21(8) IS NOT RATIONALLY OR REASONABLY RELATED

TO ACHIEVING ANY CONCEIVABLE LEGITIMATE STATE PURPOSE.

But, if this Court should make the leap[20] which has no factual predicate in the legislative record of ch. 90-14, Laws of Fla., that the legitimate state purpose is to guarantee access to health care in the State of Florida, then it should find that the Statute is not rationally or reasonably related to achieving that purpose.

No basis in fact exists in the legislative record to show that if § 768.21(8) did not exist that health care would be in a state of disarray. In fact, the 1988 medical malpractice litigation reforms were enacted to prevent just such a scenario, and all evidence shows they are working. So, any discussion of the legislatively-found medical malpractice insurance crisis in the mid-1980's is a red-herring. The most critical areas where reform appeared necessary- - obstetrics and frivolous suits were addressed. Birth-related injuries were put into a no-fault plan and many pre-suit changes were installed to assure that bad suits were "weeded out." It just does not matter if a crisis existed prior to 1988 because

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[20] "This Court will not sustain legislative classifications based on judici-al hypothesis, but must ascertain clearly enunciated purposes to justify the contin-ued existence of the legislation." *Rollins v. State*, 354 So. 2d 61, 64 (Fla. 1978) (finding no reasonable relation -- "no practical differences between billiards played in a billiard parlor and billiards played in a bowling alley sufficient to warrant a special classification, subjecting only appellant to arrest, fine or imprisonment for allowing minors to play billiards"). And, "the court, in construing a statute, may not invade the province of the legislature and add words which change the plain meaning. [cite omitted] Furthermore, courts may not vary the intent of the legislature with respect to the meaning of the statute in order to render the statute constitutional." *Metropolitan Dade County v. Bridges*, 402 So. 2d 411 (Fla. 1981).

that is when the reforms were put in place for the purpose of eliminating any medical malpractice insurance crisis.

Moreover, no factual predicate for § 768.21(8) is conceivable which is evidenced by the March 30, 1989 letter from William T. Bodiford (Actuarial Analyst, Bureau of Rates, Office of the Treasurer, Department of Insurance) to Richard Hixson (Staff Director, Committee on Judiciary, House of Representatives), and attached hereto as Appendix Exhibit 2. THIS is the letter from which the medical malpractice insurance rate increase of 4.5% was gleaned.

THIS bootstrapping letter is based on six assumptions -- "An estimate of this subset using the 1980 census data was made using the following [six] assumptions." It is beyond belief that assumptions, which are without any factual foundation, would be used to justify the use of the Legislature's police powers and place a burden on a class of people which further burdens the general welfare of the public.

Even more unbelievable is that the underlying data for THIS letter is based on the 1980 census and closed claim data prior to 1989. Just how relevant the 1980 census is, Amici cannot say. But, what Amici can unequivocally assert is that the closed claim data prior to 1989 clearly has no rational or reasonable relation to determining the impact of § 768.21(8) on medical malpractice insurance rates because the 1988 medical malpractice reforms that addressed the legislatively-found medical malpractice crisis had just gone

into effect and had not yet had time to impact on any claims. Basing the reasonableness of a statute on claims which were based on a medical malpractice statute which no longer existed, which had been repealed, is inconceivable and certainly does not produce any factual predicate whatsoever.

The bottom line is that at the time § 768.21(8) was enacted no data with any factual basis existed. There was nothing to show that allowing parents of single, adult children or adult children of single parents to recover nonpecuniary damages in medical malpractice, wrongful death action would have any impact on medical malpractice premiums, or if an increase occurred, such increase would adversely impact the delivery of adequate health care to the people of Florida. Even today, no viable data on the impact of § 768.21(8) exists.

However, this Court can judicially note that the 1988 medical malpractice reforms have been in place for more than 10 years. These reforms surely curbed the legislatively-found mid-1980's crisis. The Legislature during the last session enacted major tort reform but medical malpractice was not included in that reform. Amici assert that is because the medical malpractice "crisis" has long since past.

If this Court finds that this constitutional challenge to § 768.21(8) turns on whether a crisis exists, and needs to make such findings with empirical data, then this Court should remand this case back to the trial court for further hearings. The judiciary has the

authority to determine whether times have changed, whether a crisis which once existed still exists. *See, e.g., Leary v. United States*, 395 U.S. 6, 38 n.68 (1969); *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935); *The Fla. Bar*, 429 So. 2d 311 (Fla. 1983) (*citing*, *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48 (1924) and *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934)); *Pinillos v. Cedars of Lebanon Hosp. Corp*., 403 So. 2d 365, 369 (Fla. 1981)(Sundberg, C.J. *dissenting*); *Aldana v. Holub*, 381 So. 2d 231, 237 (Fla. 1980); *Gammon v. Cobb*, 335 So. 2d 261, 264-65 (Fla. 1976); *Conner v. Cone*, 235 So. 2d 492, 498 (Fla. 1970); *Georgia S. & Fla. Ry Co. v. Seven-Up Bottling Co. of S.E. Ga.*, 175 So. 2d 39, 40 (Fla. 1965); *Beyel Brothers Crane & Rigging Co. v. Ace Transportation*, 664 So. 2d 62, 64 (Fla. 4th DCA 1995); *Boucher v. Sayeed*, 459 A.2d 87 (R.I. 1983)

But, Amici's position is that the constitutionality of § 768.21(8) does not turn on whether a crisis still exists but rather on the basis that the face of the statute shows that it is an arbitrary, discriminatory law which falls outside the scope of the police powers, denigrates the explicit legislative intent of the Florida Wrongful Death Act, denies Equal protection, Due Process, and Access to Courts, and allows medical malpractice to continue resulting in injuries and death. **No other state in our country has such an arbitrary and capricious 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.

V. THE UNCONSTITUTIONAL EXCEPTION/EXEMPTION FOR THE MEDICAL PROFESSION CAN AND SHOULD BE STRICKEN FROM SECTION 768.21 OF THE FLORIDA STATUTES.

Upon this Court declaring § 768.21(8) unconstitutional, this Court can and should sever subsection (8) from the remaining parts of § 768.21. *Waldrup v. Dugger*, 562 So. 2d 687 (1990); *State v. Lee*, 356 So. 2d 276, 283 (Fla. 1978); *Cramp v. Board of Pub. Instruc. of Orange County*, 137 So. 2d 828, 830 (Fla. 1962). "When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided:

> (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987). The unconstitutional exception/exemption for the medical profession easily passes this test.

First, § 768.21 currently consists of eight separate and distinct subsections so no problem exists as to severing subsection (8) from the remaining seven subsections.

Second, the legislative purpose of the Florida Wrongful Death Act can be accomplished independently of § 768.21(8). This is so because subsection actually

denigrates the explicitly stated legislative intent: "to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoers." § 768.17, Fla. Stat. (1998) (originally, ch. 72-35, § 1, Laws of Fla.). Thus, the purpose of the Florida Wrongful Death Act would actually be better served with the striking of subsection (8).[21]

Third, the good and bad features are not so inseparable in substance that it can be said that the Legislature would have passed subsections (3) and (4) without subsection (8). Subsection (8) is the only bad, unconstitutional feature, and is easily separated from §768.21. That is the bottom line, and all that is relevant to this Court's determination of severability. However, *Amici* have heard the argument that subsection (8) cannot be severed from subsections (3) and (4) because those subsections would not have been enacted but for subsection (8), and if subsection (8) is stricken, subsections (3) and (4) also should be stricken. *Smith v. Department of Insurance* shows the lack of merit in

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[21] With the 1990 enactment of §§ 768.21(3)(4), the Florida Legislature finally recognized what the people of Florida always felt and knew -- the bond between the parent and child grows as the child grows from the helpless infant into the "terrible twos" and then emerges as the happy pre-school child into the inquisitive school child who blossoms into the pre-teen and then the challenging and, perhaps, defiant teenager who transforms into the young, intelligent adult and, finally, the faithful, mature adult companion. This transformation from infancy to mature companion commits the heart and soul of both the parent and child to a life-long bond which is broken only upon the death of the parent or child. The breaking of the bond results in wrenching heart-felt pain at whatever point on the life-line the bond breaks.

that argument.

"We are not, however, competent or authorized to base our decision on our analysis of the subjective political views of the individual members of the legislature or the pressure groups which lobby the legislature." *Smith*, 507 So. 2d at 1090. Although *Smith* and the instant case may not be completely analogous, they are so close that *Smith* provides sufficient guidance for this Court to decide that **when political deal-making works an unconstitutional deal, the deal itself should be ignored as to severability**.

(4) The Florida Wrongful Death Act including § 768.21 remains complete in itself after the removal of §768.21(8). This Court striking the unconstitutional exception/exemption for the medical profession ensures that the general welfare of <u>all</u> people in the state of Florida will be protected.

Ultimately, as to the third prong of this test: the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other, this Court must recognize one very serious concern. Since the 1990 amendment to the Wrongful Death Act actually corrected for some what was a denial of the Right to Access to Court as argued in Section II. A. above, then §768.21(3) and (4) must be kept, no matter the motivation for their passage. The severance of subsection (8) is completely in order because the net effect will be to fully and finally correct the Constitutional error committed in the 1972 enactment of the Wrongful Death

Act which prohibited actions for pain and suffering to parents of single, adult children and adult children of single parents. No harm will be done. Lasting constitutional good will be accomplished. This Court is the place where this must take place.

CONCLUSION

For the foregoing reasons and for any additional reasons which may be presented at oral argument, *Amici Curiae*, ASSOCIATION FOR RESPONSIBLE MEDICINE, FLORIDA WOMEN'S CONSORTIUM, INC., and FLORIDA SILVER HAIRED LEGISLATURE respectfully request that this Court find that the Fourth District Court of Appeal committed reversible error in holding section 768.21(8) of the Florida Statutes constitutional, and further request that this Court declare section 768.21(8) unconstitutional in its entirety or, in the alternative, remand to the trial court for a full evidentiary hearing to determine whether a legitimate purpose and/or a rational basis existed in fact for the enactment of section 768.21(8), and if so, whether that legitimate purpose and/or rational basis still exists in fact today.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Amici* Brief in Support of Appellants has been served by depositing same in U.S. Mail on this 1st day of July, 1999, to: ESTHER E. GALICIA, of George, Hartz, Lundee, Flagg, & Fulmer, Counsel for Appellees/Defendants, 524 South Andrews Ave., 333 Justice Building East, Fort Lauderdale, Florida 33301.

_____

HARRIET RAE FREEMAN

SUPREME COURT
OF FLORIDA

No. 93,804

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

vs.

DR. L.B. PRICE, M.D.,
Defendant/Appellee.

AMICI CURIAE, ASSOCIATION FOR RESPONSIBLE MEDICINE, FLORIDA WOMEN'S CONSORTIUM, INC., AND FLORIDA SILVER HAIRED LEGISLATURE APPENDIX TO BRIEF ON THE MERITS IN SUPPORT OF PETITIONERS

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