IN THE SUPREME COURT FOR THE STATE OF FLORIDA

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

Petitioners,

vs.

DR. I.B. PRICE, M.D.

Respondent.

Case No.: 93,804
District Court Case No.: 95-00996

PETITIONERS' INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In conformity with the advisory committee notes accompanying Rule 9.210, Fla. R. App. P., Petitioners Jean Stewart and Kathryn Reynolds, co-personal representatives of the Estate of Mabel Pittman and Plaintiffs in the trial court, will be referred to collectively as, "the plaintiffs", "the daughters", "the co-personal representatives" or individually by name as the context requires. Mabel Pittman, the Estate's decedent, will be referred to as Mrs. Pittman or by full name. Respondent, I. B. Price, M.D., the defendant below, will be referred to as, "Dr. Price" or "the defendant".

The symbols "R" followed by a page citation, will refer to the trial court record on appeal. The two volume appendix accompanying this brief will be referred to first as "A.", then "Vol. I or II" as required, followed by a "T." for Tab and number 1 - 15, concluding with a page citation. Documents included in the appendix at Tabs 3 - 15, are part of the record at R 285 - 1337. The symbols "R.S.Ct." followed by a page citation refers to the Florida Supreme record.

The trial of this case took place on October 10 - 11, 1994, and January 17 - 20, 1995. Due to the inconsistent pagination of the trial transcript volumes for October 10 - 11, 1994, references to those trial proceedings will be made by date (e.g., "10/11/94" for October 11, 1994) followed by "Tr." and the page number. Further, since the two

volumes comprising the trial date of October 10, 1994, are not paginated sequentially, a further designation of "V. I" or "V. II" will be added for that date. Thus, the expression "(10/10/94, V. II, Tr. 3)" corresponds to page 3 of volume II of the trial transcript of October 10, 1994. But the similar expression "(10/10/94, V. I, Tr. 3)" corresponds to page 3 of *volume I* of the October 10, 1994 transcript. The pagination for the trial dates January 17th through January 20th, 1995, is consistent, and references will merely be to the date, followed by "Tr." and the page number. All emphasis has been supplied, unless otherwise indicated.[1]

STATEMENT OF CASE AND PROCEDURAL HISTORY

This Court is being asked to review that portion of the First District Court of Appeal's decision that expressly declares § 768.21(8), Florida Statutes (1991)[2], constitutional on its face and as applied. In addition, the Estate of Mabel Pittman raised nine other issues in its briefs before the First District Court of Appeal. The opinion of the First District addressed, and disposed of, those nine issues and they are

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[1]The undersigned certifies, pursuant to this Court's Administrative Order of July 28, 1998, that this brief uses 14 point Times Roman Font.

[2]§768.21(8), Florida Statutes (1991), provides: "The [wrongful death] damages specified in subsection (3) [lost companionship] shall not be recoverable by adult children and the damages specified in subsection (4) [parent's mental pain and suffering] shall not be recoverable by parents of an adult child with respect to claims for medical malpractice as defined by S. 766.106(1)."

now subject to review by this Court as well. In regard to the issue of the trial court's exclusion of the testimony of Plaintiffs' expert in internal medicine, Paul Bader, M.D., the First District held that constituted reversible error and remanded the case for a new trial. As to the other eight issues raised by the co-personal representatives, the First District found them, without opinion, to be "without merit". *Stewart v. Price*, 718 So.2d 205, 210 (Fla. 1st DCA 1998).

A. Factual and Procedural Background

> [Mrs.] Pittman began seeing Dr. I.B. Price at least monthly commencing June 6, 1985. She was treated for a wide variety of ailments. In March 1987, [Mrs.] Pittman complained of redness and blistering on her right leg and cortisone was prescribed by Dr. Price. Thereafter, [Mrs.] Pittman's right great toe became swollen and she noticed, according to her videotaped deposition, a small, whitish lesion under the toenail. Dr. Price prescribed fungal cream for the toe. On subsequent visits, [Mrs.] Pittman continued to complain about the toe, which had continued to swell and cause her significant pain. In February 1989, [Mrs.] Pittman sought treatment regarding her toe from another physician and she was eventually referred to Dr. Evans who performed a biopsy of the lesion. Laboratory tests revealed melanoma cancer and, as a result, [Mrs.] Pittman's toe was amputated. By the time of the amputation, however, the cancer had metastasized. Although repeated surgical interventions were undertaken in attempt to control the cancer, Mabel Pittman died on May 15, 1991. The pathologist who performed the autopsy testified that massive gastro-intestinal bleeding was the cause of death, with cirrhosis and cancer as the contributing factors. Dr. Evans testified that cancer was the cause of death.
>
> Before her death, [Mrs.] Pittman filed suit against Dr. Price alleging negligent diagnosis and treatment, intentional misrepresentation and concealment of the condition, and negligent care and treatment of cirrhosis. After [Mrs.] Pittman's death, her daughters and co-personal representatives,

> the appellants, were substituted as plaintiffs and the complaint was amended to include four additional tort claims and a challenge to the constitutionality of section 768.21(8), Florida Statutes (1991)....
>
> At trial, appellants sought to call Paul Bader, M.D., as an expert in internal medicine. Dr. Bader is a medical doctor board certified in internal medicine. Upon the appellee's objection, the trial court prohibited any testimony from Dr. Bader regarding the standard of care for internists on the rationale that Dr. Price is a general practitioner or provided only general practitioner care to [Mrs.] Pittman. Accordingly, the lower court ruled that Dr. Bader did not satisfy the expert witness requirements of section 766.102(2)(b), Florida Statutes (1991)....

Stewart v. Price, 718 So.2d 205, 207 (Fla. 1st DCA 1998).

Plaintiffs also called defendant Dr. Price as a witness at trial. (1/17/95, Tr. 139) He testified that he had done an internship and residency in both internal medicine and cardiology, (1/17/95 Tr. 143-144); but that he was never board certified in internal medicine because he could not pass the orals. (10/10/94,V. I. Tr. 136 - 137 (proffer); *see also* 10/11/94, Tr.12 (statement of defense counsel that, "[h]ere's a doctor who failed an exam").) It was also undisputed that the sign outside of Dr. Price's office read, "Internal Medicine", (R. 3182); and that his letterhead read: "Dr. Price, M.D., P.A., Internal Medicine and Cardiology." (10/10/94, V.I.. Tr.24,31; Pltfs. Ex. Nos. 3 & 4). Furthermore, Dr. Price admitted at trial that he considers himself, "an internal medicine specialist." (1/17/95, Tr. 152.)

The trial court, however, ruled *in limine* that Plaintiffs were not permitted to

question Dr. Price on the fact that he had failed to pass the board examinations in internal medicine. (10/11/94, Tr. 12-13.) Secure in this ruling *in limine,* Dr. Price freely boasted at trial that he was a specialist in internal medicine:

> Q. Based on your letterhead, these prescriptions and your sign, did you hold yourself out as a specialist in internal medicine?
>
> A. Well, yes. Basically I considered myself an internal medicine specialist; . . .

(1/17/95, Tr. 152.)

At the close of Plaintiffs' evidence, the trial court granted a directed verdict as to the cause of Mrs. Pittman's death; and ruled that Mrs. Pittman died of malignant melanoma, not upper gastrointestinal bleeding, despite the conflict in testimony, noted earlier, between the pathologist who performed the autopsy, and Dr. Evan's, Mrs. Pittman's surgeon.[3] (1/20/95, Tr. 1075.) With this ruling, the Court effectively held that this was an action for wrongful death only. The jury returned a verdict that Dr. Price did not cause Mrs. Pittman's death. (1/20/95,Tr. 1362)

However, on appeal from the adverse jury verdict and final judgment, the First District Court of Appeal granted Plaintiffs a new trial on the basis of the reversible error previously noted; and, accepted their invitation to address the constitutionality of

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[3] Previously, counsel for defense conceded that the testimony of Dr. Evans would, "give some opinion testimony and enough to beat me on DV." (10/11/94, Tr. 110.) The Court nonetheless granted the motion for directed verdict.

§ 768.21(8), Fla. Sta. (1991), despite the absence of a liability determination, because of the reasonable likelihood that the issue would again surface on retrial. The First District Court of Appeal then held § 768.21(8), Fla. Stat.(1991), of the Florida Wrongful Death Act, valid on its face, and as applied. They specifically held § 768.21(8), Fla. Stat. (1991), constitutional on its face, and as applied, on the grounds that it did not violate the federal or state constitutional guarantees of either the equal protection or due process clauses; and did not infringe upon the Florida constitutional guarantee of access to courts under Art. I, § 21, Fla. Const. *Stewart at 209.* They then denied Plaintiffs' Motions for Rehearing and Certification of the question of the constitutionality of § 768.21(8), Fla. Stat. (1991), as a matter of great public importance. (R.S.Ct. 29 and A.,Vol. I, Tab. 2, p. 14).

Mrs. Pittman's co-personal representatives then filed a notice to invoke the Discretionary Jurisdiction of this Court, requesting review of the First District's decision under Art. V, § 3(b)(3), Fla. Const., asserting that the decision of the First District was expressly and directly in conflict with the decisions of the Third District in *Mizrahi v. North Miami Medical Center, LTD.*, 712 So.2d 826 (Fla. 3rd DCA 1998) and *Garber v. Snetman*, 712 So.2d 481 (Fla. 3rd DCA 1998); and also expressly declared valid a state statute. This Court accepted Discretionary Jurisdiction.

SUMMARY OF ARGUMENT

Plaintiffs suggest to this Court that both the trial court and the First District Court of Appeal committed reversible error in finding Section 768.21(8), Florida Statutes (1991), constitutional both on its face and as applied. For the reasons set forth below this Court should: find that the First District Court of Appeal committed reversible error in holding §768.21(8), Fla. Stat. (1991), constitutional; hold the subject section ***unconstitutional***; and quash that portion of the First District's opinion which holds to the contrary.

Section 768.21(8), Fla. Stat. (1991), denies plaintiffs a fundamental right, serves no legitimate state interest and creates an arbitrary and irrational classification which treats the survivors of persons killed by medical malpractice differently from the survivors of persons killed by all other torts. It offends the following three constitutional projections, both on its face and as applied: (1) the fundamental right of access to courts under Art. I, § 21, Fla. Const.; (2) the state and federal constitutional rights of equal protection; and (3) the state and federal constitutional rights to due process.

First, the statute offends the constitutional imperative that "[t]he courts shall be open to every person for redress of any injury." Art. I, § 21, Fla. Const. It denies the plaintiffs access to the courts for the redress of their harm which predated Florida's

Declaration of Rights and the 1968 Florida Constitution. *Kluger v. White*, 281 So. 2d 1,4 (Fla. 1973). The legislature cannot eliminate an established right without providing a suitable alternative. *Martin v. United Security Services, Inc.*, 314 So.2d 765 (Fla.1975).

Second, §768.21(8) of the Florida Wrongful Death Act violates the state and federal equal protection clauses because it serves no legitimate state interest and creates an arbitrary and irrational distinction between the survivors of persons killed by medical malpractice and the survivors of persons killed in all other tort cases. Given that the statute comes down most heavily on the elderly poor (who have no "lost earnings" or "net accumulations" to speak of, and who can be killed most cheaply by malpractice), this classification does not "apply equally and uniformly to all persons within the class" and further bears no "reasonable and just relationship to a legitimate state objective." *State v. Leicht*, 402 So. 2d 1153, 1155 (Fla. 1981). The act also effectively distributes "funds arbitrarily and discriminatorily to a special limited class of private individuals" in the manner disapproved of in *State v. Lee*, 356 So. 2d 276, 279 (Fla. 1978) (striking good driver's incentive fund in Tort Reform Act of 1977).

Third, the statute offends notions of federal and state due process, *see* Art. I, § 9, Fla. Const.; U.S. Const. Amend XIV, in that it bears no "reasonable relation to a permissible legislative objective." *Lasky v. State Farm Insurance Co.*, 296 So. 2d 9

(Fla. 1974). It is not disputed that the Legislature has the power to address a medical malpractice crisis (real or perceived); however, Section 768.21(8) is not reasonably related to a legitimate state purpose. It simply excludes a class of potential plaintiffs based not on the merits of their claim, but rather on the happenstance of their injury and their economic situation. The statute is also arbitrary, *see Psychiatric Assoc. v. Siegel*, 610 So. 2d 419, 425 (Fla. 1992), since it discriminates against poor elderly patients, depriving them, and their survivors, of any redress for even the most flagrant mistreatment.

Plaintiffs further suggest to this Court that, although the First District reached a correct result in finding that the trial court committed reversible error when it excluded the testimony of Dr. Bader, plaintiffs' expert on internal medicine; it committed reversible error when it failed to find fault with the trial court's rulings excluding evidence that Dr. Price failed his internal medicine board examination, and granted a directed verdict on the issue of Mrs. Pittman's cause of death. These issues will come up again on retrial, and that portion of the First District 's opinion failing to find merit in these arguments should be reversed and the case should be remanded for a new trial.

ARGUMENT

I. SECTION 768.21(8), FLORIDA STATUTES, IS UNCONSTITUTIONAL

Plaintiffs suggest to this Court that both the trial court and the First District Court of Appeal committed reversible error in finding Section 768.21(8), Fla. Stat. (1991), constitutional both on its face and as applied. For the reasons set forth below this Court should: find that the First District Court of Appeal committed reversible error in holding §768.21(8), Fla. Stat. (1991), constitutional; hold the subject section ***unconstitutional***; and quash that portion of the First District Court of Appeals opinion which holds to the contrary.

A. Section 768.21(8) Deprives the Adult Children of Person's Killed by Medical Malpractice Their Fundamental Right of Access to Florida's Courts.

Plaintiffs maintain that Section 768.21(8), Fla. Stat. (1991), violates their fundamental right of access to Florida's courts guaranteed under Art. I, § 21, Fla. Const., and under the Sixth and Fourteenth Amendments to the United States Constitution, and is unconstitutional on its face and as applied. Article I, § 21, Fla. Const, provides that, "The courts shall be open to ***every*** person for redress of ***any*** injury." Art. I, § 21, Fla. Const.

The benchmark case on this provision, that sets forth what plaintiffs suggest is the two part test by which legislation challenged under Art. I, § 21, Fla. Const. is to be

examined by thus court, is *Kluger v. White*, 281 So.2d 1 (Fla. 1973).[4] In *Kluger* this Court declared unconstitutional that portion of the Florida Automobile Reparations Act which abolished a right of action in tort for property damage arising from an automobile accident. Just as in this case, the statute at issue there ***exempted*** from tort liability for damages those persons who were ***legally*** responsible for the damage. Justice Adkins, in writing for the *Kluger* Court set out the test as follows:

> We hold, therefore, that ***where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida***, or where such right has become a part of the common law of the State pursuant to Fla. Stat.. s 2.01, F.S.A., ***the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity*** for the abolishment of such right, ***and no alternative method of meeting such public necessity can be shown***.

Id. at 4.

Thus, under *Kluger*, this Court must begin any analysis of § 768.21(8) in this case by answering the following question:

> 1. Did the right to redress for a particular injury, that the statute in question is seeking to abolish, exist at common law, ***or*** in statutory law, before the adoption of the Declaration of Rights of the Constitution of the State of Florida?

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[4] The First District Court of Appeal did not find that §768.21 (8), Fla. Stat.(1991), eliminated an existing remedy. However, it noted that if it had, it would have been required to engage in a different analysis under *Kluger*. *Stewart v. Price*, 718 at 209.

If the answer is "no", then under *Kluger* the analysis stops. The statute is constitutional. But if the answer is "yes", then the statute in question may only constitutionally eliminate that right of access to redress the particular injury, without providing a reasonable alternative, ***if*** the Legislature can establish:

a. an overpowering public necessity for the elimination of such right

and

b. that no alternative method of meeting that public necessity exists.

Id. at 4.

In regard to the first prong of the *Kluger* analysis, while it is true that the common law did not recognize actions for wrongful death;[5] *Stewart v. Price*, 718 So.2d 205(1998), Florida has had a long tradition of allowing statutory survival actions and statutory wrongful death actions. Indeed, even Florida's Territorial Legislature provided for such relief back in 1828:

> *Be it further enacted,* That hereafter, **all actions for personal injuries**, shall die with the person, to wit, assault and batteries, slander, false imprisonment and malicious prosecutions; all other actions **shall and may be maintained in the name of the representative of the deceased**.

An Act Regulating Judicial Proceedings, § 30 at 34, Acts of the Legislative Council of

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[5] *See, e.g.*, *Higgins v. Butcher*, Yelv. 89, 80 Eng. Rep. 61 (K.B. 1607) (right of action died with victim); *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (N.P. 1808) (relatives of victim had no cause of action for loss of financial support, emotional loss).

the Territory of Florida (1828). *Accord* Fla. Rev. St. § 989 (1892); Fla. Gen. Stat. § 1375 (1906); Fla. Rev. Gen. St. § 2571 (1920); Fla. Comp. Gen. Laws § 4211 (1927); Laws of Fla. c. 26541 § 1 (1951); Fla. Stat. § 45.11 (1965), *amended and codified at* § 46.021, Fla. Stat. (1967).

Current § 46.021, reads, "***Actions; surviving death of party.*** No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted and defended of the person prescribed by law." §46.021, Fla.Stat. (1967)[6].

Thus, the answer to the first question in this case, under the *Kluger* analysis, is "Yes". Under the first part of the *Kluger* test, Mrs. Pittman's daughters, as co-personal representative of her Estate, clearly had a right to bring a survival action in Florida's courts under §46.021, Fla. Stat. (1967). This action was filed by Mrs. Pittman on March 15, 1991, while she was still alive. (R.35, 85.) Her initial Complaint asserted causes of action for medical malpractice against Dr. Price and sought damages for her pain and suffering. (R.35.) After she died, May 15, 1991, her daughters, as co-personal representatives of her Estate, were substituted in as parties (R. 104). Clearly,

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[6] In the First District Court of Appeal's opinion the court, at footnote 2, does acknowledged that the language of "§ 46.021, Florida Statutes, [did] provide that no cause of action dies with the claimant"; but it refused to acknowledge that the wrongful death statute eliminated that cause of action by asserting that it merely "limits the category of damages recoverable by the decedents estate" and cites *Martin* as direct authority. This analysis ignores the basic legal principle that **damages** is an element of every legal cause of action. If plaintiffs cannot prove damages no cause of action exists. Therefore, by limiting the category of damages the wrongful death statute abolishes a cause of action and denies access to courts under Art. I, §21, Fla. Const.

under § 46.021, Fla. Stat.(1967), as it existed prior to the 1968 Declaration of Rights, they had a right to seek redress for Mrs. Pittman's death and her pain and suffering **from her date of injury to her date of death** which was caused by Dr. Price's negligent failure to diagnose, and properly treat the cancerous lesion on her toe, **regardless** of whether her death was caused by Dr. Price's negligence or some other cause; and any damages recovered by them for the Estate would have to be shared between them as Mrs. Pittman's survivors and beneficiaries. *See Smith v. Laskey*, 222 So.2d 773 (Fla. 4th DCA 1969). *See also H. E. Wolf Construction Co. v. Parks*, 129 Fla. 50, 175 So 786 (1937). It was only with the enactment of §768.16 - 768.27, Fla. Stat. (1972),.[7] and the repeal of §768.01 - §768.03, Fla. Stat. (1953), that their right of access to Florida's courts was abolished without providing for a reasonable alternative. *Kluger*, 281 So.2d at 4.

The next step in the *Kluger* analysis is for this Court to determine if the legislative history for §768.21(8), Fla. Stat.(1991) can establish: (1) an overpowering public necessity to eliminate the rights of adult children of person's killed by medical malpractice to redress their parent's pain, suffering and death; **and** establish that no alternative method of meeting that public necessity was available. *See Kluger* 281 So.2d at 4.

By implication, this part of the *Kluger* analysis for the original sections of the 1972 Florida Wrongful Death Act was first dealt with in *Martin v. Security Services,*

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[7] Ch. 72-35, Fla. Laws 1972.

Inc., 314 So.2d 765 (Fla. 1975). In *Martin* this Court was specifically "asked to determine whether the new [Wrongful Death] Act has constitutionally eliminated claims under the survival statute, Section 46.021, Florida Statutes (1973)." *Martin, supra,* at 767. While the *Martin* Court answered that question in the affirmative, it did so ***with a very specific proviso***, based on the legislature's stated "intent to merge the survival action for personal injuries and the wrongful death action into one lawsuit." *Martin* 314 So.2d at 768. Justice Overton, writing for the Court stated:

> We hold that Sections 768.16 - 768.27, Florida Statutes, are constitutional ***to the extent that they consolidate survival and wrongful death actions and substitute for a decedent's pain and suffering the survivors' pain and suffering*** as an element of damages.

Martin, Supra, at 767.

By holding these new Florida Wrongful Death statutes constitutional ***to the extent that they . . . substitute for a decedent's pain and suffering the survivors' pain and suffering***, under *Kluger,* this implies that the *Martin* Court, after reviewing *The Florida Law Revision Commission, Recommendations and Report on Florida Wrongful Death Statutes (December 1969)*[8] found no "over-powering public

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[8] The Florida Law Revision Commission was created by the 1967 Legislature (§§ 13.-90-13.996, F.S.). Section 13.96 provides that the functions of the counsel are to:

> "(1) Examine the common law, constitution and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms;

necessity for the elimination of such right", *Kluger*, 281 So.2d at 4, because they specifically based their holding on the Act's **substitution** of one right for another.

Although never specifically challenged by persons similarly situated to Mrs. Pittman's daughters, plaintiffs would suggest to this Court that under the *Kluger* test and the *Martin* application of that test, the original enactment of §768.16 - 768.27, Fla. Stat. (1972), (which collapsed into one lawsuit their survival action under §46.021 for Dr. Price's negligence which caused Mrs. Pittman's pain and suffering for the date of her injury to the date of her death, and the wrongful death action under §768.01 - §768.03, Fla. Stat. (1953)), does not pass constitutional muster. It denied Mrs. Pittman's daughters, and similarly situated persons, their right of access to Florida's courts under Art. 1, § 21, Fla. Const. The new Florida Wrongful Death Act of 1972 only allowed for the recovery by minor children under twenty-one, or other blood relatives when they were dependant on the decedent; and did not provide for a reasonable alternative for the abolition of their right to recover under §46.021, Fla.

"(2) Recommend, from time to time, such changes in the law as it deems proper to modify or eliminate antiquated and inequitable rules of law, and to bring the law of the state into harmony with modern conditions;
"(3) Conduct such surveys or research of the law of Florida as the legislature may request." *Martin*, 314 So.2d at 768, note 15.

Stat. (1967).[9] *See* §768.18, Fla. Stat. (1972); See Nancy Ann Daniels, Comment, *Florida's Wrongful Death Act Is Constitutional and Permits Punitive Damages - Martin v. Security Services, Inc.,* 314 So. 2d 765 (Fla. 1975), 4 Fla. St. U. L. Rev. 394, 100-401 (1976).

After eighteen years, with the enactment of §768.21(3), Fla. Stat. (1991), this constitutional infirmity for the adult children of wrongful death victims (where there was no surviving spouse) was finally curred. *See* A.,Vol. I, Tab.6, p.46. Under *Kluger* and *Martin* their pre Declaration of Rights right of access to Florida's courts under §46.021 for the redress of their loved one's pain and suffering had finally been replaced with a "reasonable alternative" -- a right to recover for their own "loss of parental companionship, instruction and guidance and for mental pain and suffering ***from the date of injury.*** §768.21(3), Fla. Stat.(1990).

Unfortunately, at the same time the Legislature curred one constitutional infirmity, it created yet another with the enactment of §768.21(8), Fla.

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[9] *Also see* A., Vol. I, Tab 6, pp. 45-71. While all these pages are enlightening on deficiencies of § 768.21, Fla. Stat.(1972), plaintiffs note this particular excerpt here for emphasis. During the Senate Committee Hearing on the 1990 amendments to §768.21(3),(4) and (8), April 4, 1990, Senator Weinstein specifically notes that current § 768.21, Florida Statutes,(excluding adult children, and parents of adult children, from recovering for their pain and suffering from the loss of their adult loved ones) amounted to an "artificial cut-off of rights" which was "artificial, arbitrary and capricious." A.,Vol. I, Tab 6., p. 69.

Stat..(1991).[10]/[11] As noted earlier, prior to the Declaration of Rights, adult children had a cause of action and a right to recover for their parent's pain and suffering **from the date of injury to the date of death** under §40.021, Fla. Stat. (1967). The legislative history for §768.21(8), Fla. Stat.(1991), clearly ***does not*** establish: (1) an **overpowering public necessity** to eliminate those rights of access for the adult children of those person's killed by medical malpractice. *Kluger* 281 So.2d at 4. *See also* A.Vol. I & II, Tabs 1-15, pp. 1-1110. Section 768.21(8) violates plaintiffs' Art. I, § 21, Fla. Const., right of access to courts under *Kluger* and *Martin,* both on its face and as applied. This Court should so find and quash that portion of the First District Court of Appeal's opinion that holds to the contrary.

B. Section 786.21(8) Violates Equal Protection.

Plaintiffs maintain that Section 768.21(8), Fla. Stat. (1991), also violates their right to equal protection under Art. I, § 9, Fla. Const., and the Fourteenth Amendment

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[10] Ch. 90-14, Fla. Laws 1990.

[11] As James A. Dixon, executive director of the Florida Defense Lawyer's Association, so accurately put it at the April 4, 1990, meeting of the House Committee on Court Systems, Probate and Consumer Law, on House bill 709 (the amendments to §767.21(3), (4) and (8), passed in 1990): "We oppose the Bill. . . One particular concern is the political reality of the exemption of the medical profession. Why not exempt ambulance attendants and EMTs? For that matter, why not exempt lawyers? It just is not a realistic approach, and I think in the long run, ***will be found to be discriminatory and unconstitutional***. *See* A.., Vol. I, Tab 6, p.53.

to the United States Constitution; and is unconstitutional on its face and as applied.

The Third District Court of Appeal in *Mizrahi v. North Miami Medical Center*, 721 Fla.2d 826 (Fla. 3rd DCA 1998), on review Supreme Court Case No.97-353, and *Garber v. Snetman*, 712 So.2d 481 (Fla. 3rd DCA 1998), on review Supreme Court Case No.93-650, recently held constitutional §768.21(8), Fla. Stat. (1991), on an equal protection analysis, but both courts certified the following question, as one of great public importance, to this Court:

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

Mizrahi at 827-828; *Garbe*r at 482.

The First District Court of Appeal in this case also held §768.21(8), Fla. Stat. (1991), constitutional under an equal protection analysis.[12] Plaintiffs requested the First District certify a question similar to the one in *Mizrahi* and *Garber* to this Court, but they declined to do so (R.S.Ct. 29, A.,Vol. I, Tab. 2, P. 14). As a result, Plaintiffs asserted conflict with *Mizrahi* and *Garber* and this Court has accepted discretionary

[12] The First District Court of Appeal in this case also held §768.21(8), Fla. Stat. (1991), constitutional under an access to courts challenge and a due process analysis. *Stewart v. Price*, 718 So.2d at 209.

jurisdiction.

In holding §768.21(8), Fla. Stat. (1991), constitutional under the state and federal equal protection clauses the First District began its analysis by recognizing 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. *U.S. v. Durrance,* 101 F.2d 109 (5th Cir.1939); *Louisville & N.R. Co. v. Jones,* 45 Fla. 407, 34 So. 246 (1903)", *Stewart* at 209. Plainitffs do not dispute this.

However, the First District glossed over § 46.021, Fla. Statutes (1967), except in a footnote, and summarily concludes:

> We do not find that an equal protection violation is presented by this separate treatment. Had the legislature eliminated an existing remedy, we would be required to employ a different constitutional analysis. See *Kluger v. White*, 281 So.2d 1 (Fla.1973). **Because no statutory or common law right existed for the adult children** of persons who wrongfully died as a result of medical malpractice . . . *Stewart* at 209.

Foot number two (2) reads as follows:

> > While section 46.021, Florida Statutes, does provide that no **cause of action** dies with the claimant, the wrongful death statute specifically ***limits the category of damages recoverable by a decedent's estate***. § 768.20, Fla. Stat.; see *Martin v. United Sec. Serv.,* 314 So.2d 765 (Fla.1975).

Id.

This statement draws an artificial distinction between the " ***causes of action***" in § 46.021, Fla. Stat. (1967), and "***damages recoverable***" in § 768.21(8), Fla. Stat.,

(1991). In both statutes it is the personal representative who brings the action. In both it is the personal representative who must establish the five elements of a tort --- duty, breach of duty, actual cause, proximate cause and harm. Under § 46.021, Fla. Stat. (1967), the personal representative established damages of the victims pain and suffering and losses to the estate, and those monies recovered, if any, are ditributed to the decedent's beneficiaries and survivors, whether a minor or an adult, under the estate. Under the Florida Wrongful Death Act the person representative also brings the action for the benefit of the survivors and the estate. *See* § 768.20, Fla. Stat. But instead of seeking recovery for the decedent's pain and suffering, he or she seeks recovery for the pain and suffering of the statutory survivors and economic damages for the estate. §768.20, Fla. Stat. (1972). ***Those may or may not be the same people.*** Under *Martin v. United Security Services, Inc.*, 314 So.2d 765 (Fla.1975), this "***consolidation***" of damage the elements was only held constitutional to ***"to the extent that"*** that it ***"substituted"*** the decedent's pain and suffering for the survivors pain and suffering. *Martin*, 314 So.2d at 767. Therefore, under *Martin* and *Kugler*, to the extent that the classification in §768.21(8), Fla. Stat. (1991), draws a distinction between the adult children of persons killed by medical malpractice and the adult children of those killed by all other torts, and leaves out persons entitled to damages under §46.021, Fla. Stat. (1967), it is an unconstitutional denial of the fundimental

right of access to Florida's courts and violates Art. I, § 21, Fla. Const., both on its face and as applied.[13]

Mrs. Pittman's daughters ,however, accept the fact that the one who asserts the unconstitutionality of a statute bears the burden of proving that it conflicts with a constitutional provision, and all doubts are to be resolved in favor of the statute's constitutionality. *Robinson v. Florida Dry Cleaning and Laundry Board*, 194 So. 269 (1940). In addition, they conceed that, "[w]hen an equal protection challange is brought before a court of law, that court must, from the outset, determine the appropriate level of judicial scrutiny to be applied to the state regulation under attack." *Florida High School Activities Ass'n, Inc. v. Thomas*, 434 So.2d 306, 308 (Fla. 1983). If the suspect statute abridges a fundimental right, or adversly impacts upon some suspect classification, such as race or national origin, then the appropriate test for the court to apply is "strict scrutiny". *Doe v. Bollton*, 410 U.S. 93 S.Ct.739, 67 L.Ed.2d 201 (1973); *In re Estate of Greenberg*, 390 So.2d 40 (Fla. 1980) *appeal dismissed sub. nom., Pincus v. Estate of Greenberg*, 450 U.S. 961, 101 S.Ct. 1475,

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[13] This result in *Martin* was probably the result of a simple judicial oversight. Section 768.18(1) of 1972 Florida Wrongful Death Act which excluded recovery of the pain and suffering of the decedunt's adult children was not directly before the Court. The case was there on the issue of whether §768.16 - 768.27 (1972) ***in general***, eliminated claims under the survival statute, § 40.021, Fla. Stat. (1973) for (1) the decedent's pain and suffering and (2) punitive damages. *Martin*, 314 So. 2d at 767.

67 L.Ed.2d 610 (1981). If the statute in question does not involve a fundimental right, or suspect classification, then the appropriate test is rational basis. That test only requires that "a statute bear a rational and reasonable relationship to a legitimate state interest" such as protecting the health, safety and welfare of its citizens. *In re Estate of Greenberg*, 390 So.2d at 42. To be held unconstitutional under this test it must create a wholly aritrary classification. *Id.*

Mrs. Pittman's daughters have previouly suggested to this Court that §768.21(8), Fla. Stat. (1991), violates their fundimental right of access to Florida's courts under Art. I, § 21, Fla. Const. They argue that under Florida's survival statute, § 46.021, Fla.Stat. (1967), they had a right to recover damages for their mother's pain and suffering caused by the negligence of Dr. Price from the date of her injury to the date of her death **regardless of whether or not Dr. Price's malpractice caused her death**. They have further suggested to this Court that their fundimental rights, to redress their mother's harm in court, were originally unconstitutionally abolished, althought never actually challenged, under the test set forth in *Kluger v. White*, 281 So.2d 1 (1973) and analysis the of *Martin v. United Security Services, Inc.*, 314 So.2d 765 (1975), with the enactment of the Florida Wrongful Death Act, §§ 768.16 - 768.27 (Supp.1972). The right of access however was finally given back to them with the enactment of § 768.21(3), Fla. Stat. (1991), only to be unconstitutionally,

simultaneously, again abolished for the adult children of persons killed by medical malpractice with the enactment of §768.21(8), Fla. Stat. (1991).

Section 768.21(8) thus treats, or classifies, the adult children of persons who are killed by medical malpractice differently than the adult children of persons killed by all other torts. One group has access to Florida's courts, and one does not, soley on the basis of the status of the wrongdoer. If Dr. Price had run over Mrs. Pittman with his car her daughters would have access to Florida's courts; but because he may have killed her through medical negligence they do not. This is in clear violation of the legislative intent of the Florida Wrongful Death Act, §§ 768.16 - 768.27 (Supp. 1972) which reads: "It is the public policy of the state to shift the losses resulting resulting when wrongful death occurs from the survivors of the decedent to the wrong doer. Sections 768.16 - 768.27 are remedial and shall be liberally construed". §768.17, Fla. Stat. (1972).

Should this Court agree with plaintiffs previous arguments, that §768.21(8), Fla. Stat. (1991), denies their fundimental right of access to Florida's courts, then under an equal protection analysis, strict scrutiny is the appropriate test to be applied by this Court, and this classification clearly fails. A review of the legislative history, attached as A., Vol. I & II, Tabs 3-15, pp.1 - 1110, reveals that this statute was not enacted for any substantial and compelling state interest in the further of the health,

safety or welfare of Florida's citizens; but was inacted simply to keep malpractice insurance rates for healthcare providers down. *State v. Dodd*, 561 So.2d 263 (Fla. 1990); *In re Estate of Greenberg*, 390 So.2d 40 (Fla.1980), *appeal dismissed sub nom., Pincus v. Estate of Greenberg*, 450 U.S. 961, 101 S.Ct. *1475, 67 L.Ed.2d 610 (1981); Florida High School Activities Ass'n, Inc. v. Thomas*, 434 So.2d 306, 308 (Fla. 1983).

However, assuming arguendo, that this Court finds that the distinction drawn in §768.21(8), Fla. Stat.(1991), between adult children of persons killed by medical malpractice and the adult children of persons killed by all other torts, does not violate Mrs. Pittman's daughters' fundimental right of access to Florida's courts under Art. I, § 21, Fla. Const., and is, therefore, not subject to a strict judical scrutiny judicial analysis, plaintiffs suggest to this court that the classification created by §768.21(8), still violates the Mrs. Pittman's daughters' rights to equal protection under Art. I, § 9, Fla. Const., and the Fourteenth Amendment to the United States Constitution, and is still unconstitutional on its face and as applied even under a rational basis analysis.

It is undisputed that §768.21(8), Fla. Stat. (1991), treats the adult children of persons who are killed by medical malpractice differently than the adult children of persons killed by all other torts. To be constitutionally permissible under a rational basis analysis the, "classification must apply equally and uniformly to all persons

within the class and bear a reasonable and just relationship to a legitimate state objective." *State v. Leicht*, 402 So.2d 1153, 1155 (Fla. 1981).

The state also has the right through, its police powers, to pass laws relating to public health and welfare, but not for the welfare of a particular group.

> The state's police powers, however, are not absolute and any legislation resting on the police power, to be valid, must serve the **public welfare as distinguished from the welfare of a particular group or class**. *United Gas Pipe Line Co. v. Bevis*, 336 So.2d 560 (Fla. 1976); *Liquor Store, Inc. v. Continental Distilling Corporation*, 40 So.2d 371 (Fla. 1949).
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> * * *
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> We recognize that legislation is not always invalid because it benefits a limited group. . . [But] The state's police power cannot be invoked to distribute collected funds arbitrarily and discriminatorily to a special limited class of private individuals.

State v. Lee, 356 So.2d 276, 279 (Fla. 1978).

In *Lee*, the Florida Supreme Court agreed that the sections of the Tort Reform Act of 1977 establishing a "Good Drivers Incentive Fund" were an unconstitutional violation of equal protection.

> The classic criterion for assessing the validity of a statutory classification is whether that classification rests upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. See *Ohio Oil Co. v. Conway*, 281 U.S. 146, 50 S.Ct. 310, 74 L.Ed. 775 (1929). Stated another way "in order for a statutory classification not to deny equal protection, it must rest on some difference that bears a just and reasonable relation to the statute in respect to which the classification is proposed." *Gammon v. Cobb*, 335

> So.2d 261, 264 (Fla. 1976). Accord, *Rollins v. State*, 354 So.2d 61 (Fla. 1978).

Lee at 279-80.

The *Lee* Court concluded that the "arbitrary classification of drivers" bore "no reasonable relation" to the statutory purpose.

As previously noted the Third District has also recently held that § 768.21(8) passes the rational basis test and is constitutional under an equal protection analysis in two cases, *Mizrahi v. North Miami Medical Center*, 721 Fla.2d 826 (Fla. 3rd DCA 1998), on review Supreme Court Case No.97-353, and *Garber v. Snetman*, 712 So.2d 481 (Fla. 3rd DCA 1998), on review Supreme Court Case No.93-650. In holding §768.21(8), constitutional the Third District in *Mizrahi* discussed the legislative history of that section and found the following:

> . . .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) (emphasis added).
>
> We find that the statute's disparate treatment of medical malpractice

wrongful deaths does bear a rational relationship to the legitimate state interest of ensuring the accessibility of medical care to Florida residents by curtailing the skyrocketing medical malpractice insurance premiums in Florida. See § 766.201(1), Fla. State. (1995). Obviously, these escalating insurance costs adversely impact not only physicians but also, ultimately, their patients through the resultant increased cost of medical care.

The legislature's purpose in creating the challenged classification is crystal clear and certainly qualifies as a "legitimate state interest". In 1986, the legislature created an Academic Task Force for the Review of Tort and Insurance Systems. This Task Force was directed to investigate the effect of increasing medical malpractice insurance premiums on medical costs to patients; its investigation revealed a crisis in the cost of medical care in Florida. The Task Force's findings were incorporated into a 1988 change to Florida's medical malpractice statutes, specifically enacted as section 766.201, which states:

> (a) Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased medical care costs for most patients and functional unavailability of malpractice insurance for some physicians .... (c) The average cost of defending a medical malpractice claim has escalated in the past decade to the point where it has become imperative to control such cost in the interest of the public need for quality medical services. § 766.201, Fla. Stat. (1995).

In 1990, the legislature again referred to and discussed the medical malpractice crisis--specifically its adverse impact on the accessibility of health care for Florida residents--during the passage of section 768.21 of the Wrongful Death Act. The exclusion of adult children of persons whose death had been caused by medical malpractice, contained in subsection (8), was expressly linked to the same rationale expressed in section 766.201, cited above. See Act Relating to Wrongful Death: Hearings on S. 324 Before Fla. Senate, Fla. Senate, 1990 Session (Apr. 17, 1990); Hearings on H. 709 Before Fla. House Judiciary-Civil Comm., Fla. House, 1990 Session (Apr. 16, 1990).

> In our view, it is clear that medical malpractice wrongful deaths are in a different category than wrongful deaths caused by other forms of negligence. The difference is this--medical malpractice wrongful deaths adversely impact upon medical malpractice premiums in Florida and, ultimately, upon the accessibility of health care to Florida citizens, whereas wrongful deaths caused by other forms of negligence simply do not impact these "crisis" areas. This distinction is precisely the one upon which the legislature's classification in section 768.21(8) is drawn.

Mizrahi at 828-829.

In *Garber v. Snetman*, 712 So.2d 481 (Fla. 3rd DCA 1998), on review Supreme Court Case No.93-650, the Third District , without any discussion of the legislative intent or legislative history of § 768.21(8), Fla. Stat. (1991), simply affirmed the judgment of the trial court that the subject statute was constitutional on tje authority of the *Mizrahi* and *Stewart.* However, Chief Judge SCHWARTZ, , specially concurring stated:

> I concur because I am bound to do so by *Mizrahi.* See In re Rule 9.331, 416 So.2d 1127 (Fla.1982). However, as I have previously indicated, *see Diaz v. CCHC-Golden Glades, Ltd.*, 696 So.2d 1346, 1347 n. 3 (Fla. 3d DCA), review denied, 703 So.2d 475 (Fla.1997), cert. denied, --- U.S. ----, 118 S.Ct. 1797, 140 L.Ed.2d 938 (1998), I believe that it is contrary to the requirements of substantive due process and equal protection to discriminate between survivors of the victim of a wrongful death on the basis of their age only to accomplish the stated purpose of making medical malpractice insurance somewhat less expensive. To my mind, it is no less "unreasonable, arbitrary, capricious, discriminatory [and] oppressive", 10 Fla.Jur.2d Constitutional Law § 427, at 740 (1997), and cases cited, to restrict the right to recover on this basis than it would be for the legislature to do so as to survivors with blue eyes or--heaven forfend!--of less than a certain height.

Garber, 712 So.2d at 482.

The First District in this case also ignored the legislative history of §768.21(8). However, it cited the legislative intent for the 1988 Medical Malpractice Reform Act, §766.201, Fla. Stat. (1995), cited *supra,* for their conclusion that:

> [t]he legislature's choice to exclude from such right adult children of persons who wrongfully died as a result of medical malpractice **bears a rational relationship to the legitimate state interests of limiting increases in medical insurance costs**. See § 766.201(1), Fla. Stat. (1995).

Stewart, 718 So.2d at 210.

It would thus appear, from an analysis of the authorities noted above uphold-ing §768.20(8), Fla. Stat.(1991), that it survives an equal protection challenge for three reasons: (1) There exists **some** rational relationship to a legislatively stated purpose; (2). The preamble to §766.201, Fla. Stat. (1988), recognizes a malpractice crisis (whether real or imaginary) and a need for the reform; and (3) That the reason for excluding medical malpractice claims from the challenged statute is that the Legislature had a rational basis (i.e., limiting malpractice insurance premiums to control medical costs for the benefit of the public.).

While at first glance it would appears that the Third District has thoughtfully, logically and consisely traced the legislative history of the several enactments so that

its opinion is based upon a plethera of legislative concerns that create a rational basis of §768.21(8), Fla. Stat.(1990), a close reading of those authorities leads to the opposite conclusion.

As the Third District has correctly noted, the 1986 the Legislature created an Academic Task Force to review the tort and insurance systems; and that task force was directed to investigate the effect of increasing medical malpractice insurance premiums on medical costs to patients. That Task Force generated four reports: (1) Preliminary Fact-Finding Report on Medical Malpractice, Aug. 14, 1987; (2) Medical Malpractice Reform Alternatives, Oct. 2, 1987; (3) Medical Malpractice Recommendations, Nov. 6, 1987; and (4) Final Recommendations, March 1, 1988. *University of Miami v. Encharte,* 618 So.2d 189,191 (Fla. 1993). *See also* (A.,Vol. II, Tabs 13 - 15, p.471 -1110.) The legislature enacted the 1988 Medical Malpractice Reform Act and adopted those Academic Task Force's findings directly into Ch. 88-1, Laws of Fla. (1988) and §766.201 (Supp. 1988). *Id.* at Footnotes 12 & 13, 192. Thus, the four reports from 1987 & 1988, noted above, form the core legislative basis for §766.201, Fla. Stat. (1988), and the *Mizrahi, Garber* and *Stewart* courts' findings of the existance of ***some*** rational connection to a legitimate state purpose in upholding the constitutionality of §768.21(8), Fla. Stat. (1991).

But a close analysis of those documents reveals that, in reality, they **cannot**

form any type of basis, rational or otherwise, for the 1990 enactment of §768.21(8).. First, the Task Force's Preliminary Fact-Finding Report on Medical Malpractice, Aug. 14, 1987, uses six items on which that report is based: (1) the closed claims data from 1975 - 1986; 2) a survey of doctors; 3) a survey of insurance companies 4) a survey of lawyers, 5) data from A.M. Best on insurance company finances; and 5) some analysis of Florida civil litigation rates. (A.,Vol. I, Tab13, p.478.)

The survey of the doctors was not an imperical data study, but simply a questionaire prepared by the Staff of the Academic Task Force!!! ***They simply sent out questionaires[14] to 1500 randomly selected Members of the Florida Medical Society; and obtained responsed from only 609 doctors, a response rate of only 40.6%!!!!*** *See* Footnote 1 to the Preliminary Fact-Finding Report on Medical Malpractice, Aug. 14, 1987. (A., Vol. II, Tab 13, p.740.) And it is from just these 609 responses that all of the statistical data and analysis extrapulated on physicians responses to the survey contained in the 4 Task Force reports. (See A.,Vol. I & II, Tabs 12 - 15, p145 - 1110.) This low response rate of less than half, in and of itself, clearly calls the legitimacy of the Task Force reports into question. In addition, as the

[14] It shoud be noted that the "questionaire" sent to the physicians, on which **all** of the statistical data in the 4 reports of Academic Task Force is based is NOT part of the any of the Task Force reports. Therefore, it is impossible to establish the neutrality of the survey based on what questions were presented, or how they were presented, which also brings the legitimacy of the survey into question.

body of the Preliminary Fact-Finding Report on Medical Malpractice, Aug. 14, 1987 Task Force report so aptly points out, ***"a survey format is not a particularly good way to evaluate such comples responses, since respondent sincerity problems [could] be especially severe."*** (A.,Vol. II, Tab 13, p.735). This places the surveys of the insurance companies and lawyers in question as well.

Thus, by implication, the 1988 Medical Malpractice Reform Act was based on the random responses to unscientific questionaires by 609 disgruntaled physicians!!!! To put these Task Force reports and figures into perspective, when the Academic Task Force reported to the legislature in its April 14, 1987, report that, "[s]ixty-six percent of the physicians responding to the Task Force survey indicated that they increased increased their fees in response to increased liability premiums , or concerns over medical malpractice claims", what were talking about is 405 who felt strongly enough about a preceived "malpractice crisis" to answer and return the survey, and indicate that they had concerns about malpractice insurance rates.!!! And only if you had this April 14, 1987, study would you know that the statistical sample was so small as the number of doctor's surveyed does not appear in any of the other reports!!!.

However, on the issue of malpractice insurance the Academic Task Force report of April 14, 1987, did go on to point out that "[t]he Task Force [h]ad not discovered any indications that medical malpractice insurance has been absolutely

unavailable in recent years." (A.,Vol. II, Tab 13, p.512) It also addressed the concern over the potential physician shortage due to high liability premiums by stating,

> **Data from recent years is not available**; however, for the period of 1971 - 1981 the influx of physicians into the state, including high risk specialties such as OB/GYN, orthopedics and neuro surgery was at a rate greater than the population growth. The Governor's Task Force on medical malpractice concluded that no physician shortage existed in Florida, even among high risk specialties. Academic Task Force report of April 14, 1987. (A.,Vol. II, Tab 13, p.734)

Also the fact that the Task Force reports were all based on closed claims data from 1975 - 1986, defeats the status of those reports as stating a rational basis for § 768.21(8). The data in all of those reports pre-dates the 1988 medical malpractice Reform Act which substantually revised the malpractice procedures and "provided a plan for prompt resolution of medical negligence claims. . . .consisting of two separate components, presuit investigation and arbitration". § 766.201, Fla. Stat. (1988)!!! *University of Miami v. Encharte,* 618 So.2d 189,191 (Fla. 1993). *(See also* A.,Vol. II, Tabs 13 - 15, p.471 -1110.)

The Academic Task Force reports, thus, measures claims under a statute that did not provide any remedy for the mental pain and suffering of any adult child of a wrongful death victim. It, therefore, could not possibly form a rational basis for a classificationin §768.21(8), Fla. Stat. (1991) as it would not have been addressed..

Further, all of the Legislative Accademic Task Force reports and their findings

were specifically incorporated into the 1988 change to Florida's medical malpractice act and set forth as its legislative finding and intent in § 766.201. In addition, the legislature had before it the Florida Medical Malpractice Reform and a Review of Court-Ordered Arbitration, By the Staff of the Florida Senate Committee on Commerce, January 1988. That report summarizes the entire history of Florida medical malpractice and reviews all of the recommendations of the various Academic Task Force reports. Specifically the authors make the following pertenant observations:

> .... the Task Force concluded that the availability of medical malpractice insurance does not pose a serious problem in Florida at the present time
>
> ***
>
> ....the Task Force then attempted to ascertain the cause or causes of increased costs for medical liability insurance. The Task Force investigated four factors as potential causes of increased malpractice costs: (1) trends in loss payments, (2) insurance company profitability, (3) the insurance industry underwriting cycle, and (4) the insurance company risk classification system.
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> ***
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> Another component of increased loss payments examined by the Task Force was the number of physicians with multiple paid claims. From Florida Department of Insurance information, the Task Force found that 4 percent of the number of physicians practicing in Florida were responsible for 42.2 percent of the total dollars paid out during 1975-1986. An analysis by speciality concluded that obstetrics and gynecology cases were the most frequent when two and four or more claims are involved and were second most frequent when three claims were involved...of such findings, according to the Task Force, is the "significant potential for reducing paid

claims by controlling multiple losses generated by physicians with multiple claims."

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Regarding the relation of an expansion of tort liability rules to an increase in malpractice liability insurance costs, the Task Force found, that although there is a logical relationship between the two, too many variables exist to demonstrate a casual connection between specific legal changes and medical malpractice liability insurance costs.

***

It examined Florida medical malpractice closed claims data and found that legal defense fees for medical malpractice more than tripled during the period of 1975 through 1984. Aggregate legal defense costs for medical malpractice claims in Florida have increased 543 percent since 1975.

***

2,696 physicians had a paid claim closed for 1982-1986. From this, the Task Force concluded that the disparity "at least suggests that the regulatory process may not be providing adequate incentives to deter medical malpractice."

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The Task Force found, for the policy year 1986/87 the mean medical liability premium was 11.7 percent of the physician's annual gross revenues from the practice of medicine....The Task Force did not survey the physicians' net incomes; therefore, it was not possible to determine the success of cost-shifting to patients. Sixty-six percent of physicians responded that they had increased their fees due to liability insurance costs.

***

Florida Medical Malpractice Reform and a Review of Court-Ordered Arbitration, By the Staff of the Florida Senate Committee on Commerce, January 1988. (See A.. Vol. I, Tab 12, p. 200 - 215.)

The courts in *Garber, Mizrahi* and *Stewar*t have all relied on the legislative intent of §766.201, Fla. Stat.(1988), which incorporates the Academic Task Force Reports discussed above, and the Florida Medical Malpractice Reform and a Review

of Court-Ordered Arbitration, By the Staff of the Florida Senate Committee on Commerce, January 1988, to form their conclusion that some rational relationship between the legislature's decision to exclude adult children of persons killed by medical malpractice all persons killed by other torts for their legitimate state interest of limiting increases in malpractice insurance costs.

However, plaintiffs submit to this Court that none of Accademic Task Force reports, or the legislative intent of §766.201, support either of the prongs of the rational basis test. There is no legitimate state interest, supported in the legislative history, in limiting medical malpractice insurance rates; and, even if that is a legitimate state interest, there is no evidence in the legislative history that there is any kind of **rational connection** between that state interest and excluding adult children of persons killed by malpractice and this Court should so hold. Nowhere in the reports of the Academic Task Force does it provide the legislature with a clear legislative intent that there is some rational relationship between the classifications made by §768.21(8) to uphold its constitutionality. Nowhere in those documents did the Legislauture determine that the solution to the (real or perceived) malpractice crisis would be to eliminate causes of action, restrict access to the courts, or to allow negligent acts to go without recourse.

Plaintiffs would also submit to this Court that during the 1990[15] legislative house and senate committee meetings and proceedings (A., Vol. I, Tabs 6- 11, p.45 - 144.), on what later came to be § 768.21(8), Fla. stat. (1990), there was also never given a rational basis for that statutory classification that excluded adult children of person's killed by medical malpractice; or that it bore any rational relationship to a ligitimate state purpose. During the April 4, 1999 proceedings of the House committee on the judiciary Representative Davis questioned the logic of the exclusion of malpractice providers from § 768.21(3), and was advised that it was simply "**political reality"**.[16] Paul Jess of the Accademy of Florida Trial Lawyers

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[15] The same bill was presented in 1989 but died on the calendar when the legislature adjjourned *sine die*. But in 1989 the legislators had before them an April 12, 1989, Senate Staff Analysis and Economic Impact Statement (A. Vol. I, Tab 4, p.19) This included the Department of Insurance's estimates on the economic impact on medical malpractice liability insurance rates of the proposed amendments to Section 768.21(3) and (4) to include all children, without the proposed exclusion of Section 768.21(8) for medical malpractice. These estimates were based on **the 1980 census and various closed claims data collected by the Department of Insurance.** It estimated that medical malpractice insurance rates would not increase for several years after passage; and then only approximately 4.5%, just 2% above its 2.5% estimated increase for all other forms of liability insurance from the proposed amendments without the exclusion of 768.21(8)..

[16]Rep. Davis: I would like to understand what logic is behind excluding certain medical providers from the application of the bill.
Rep. Lippman: **Political reality.**
CHAIRMAN: When there's no logic, always check the political considerations.

attempted to reassure Representative Davis and offered, a March 30, 1989, letter to Richard Hickson from William Bodiford, an Actuarial Analyst, with the Department of Insurance, Burea of Rates. That letter indicated that Mr. Bodiford and one other gentleman, had sat down and "looked at" the 1980 census, and various closed claims data, and made 6 assumptions, because ther was "no data [they] had seen showed exactly how many people have no spouse, and from that extrapolated the effect on insurance rates for the proposed changes to the medical malpractice statute. This inference on an inferance extrapolation then produced a 4.5% increase in liability surance premiums for malpractice and a 2.5% omcrease for all liability insurance which was less than the rate of inflation in 1989!!!

Plaintiffs would submit to this Court.that under its responsibility to analize the classification of persons under §768.21(8), to see if it has some rational connection to a legitimate state interest. This court must also look beyond the mear words of one of the classifications proponents, to the meat underneath, to see if in fact it is rational.

C. Section 768.21(8) Denies Due Process.

Mrs. Pittman's daughters again suggest to this Court that both the trial court and the First District committed reversible error in finding Section 768.21(8), Fla. Stat. (1991), constitutional under and state and federal due process analysis, both on its face and as applied. And again, Mrs. Pittman's daughters do not doubt the general police

power of the state to address insurance issues, or that the state may legitimately take an interest in the subject. But such aphorisms do not show how § 768.21(8) bears a *"reasonable relation* to a permissible legislative objective." *Lasky v. State Farm Insurance Co.*, 296 So. 2d 9 (Fla. 1974) . In this regard, the daughters do not have an insurmountable burden, since the nonsurvival rule itself constitutes, "one of the least rational parts of [English] law." FREDERICK POLLOCK, THE LAW OF TORTS 53 (14th ed. 1939).

Section 768.21(8) does not meet the bare minimum for due process and this Court should so hold, since it does not substantially relate to perceived problems with malpractice insurance. Instead, it simply denies recovery to those who die from medical negligence, but permits recovery if the medical negligence merely maims and wounds. To that extent, the statute also arbitrarily discriminates, *see Psychiatric Assoc. v. Siegel*, 610 So. 2d 419, 425 (Fla. 1992), against poor elderly patients, depriving them of any redress for even the most flagrant mistreatment. *Cf. State v. Leicht*, 402 So. 2d 1153, 1155 (Fla. 1981) (stating that legislation creating classifications must have a "reasonable and just relationship to a legitimate state objective").

The final matter under any constitutional challenge concerns the question of whether §768.21(8) may properly be severed from the remaining portions of §768.20.

In resolving this issue of serverability, this Court has consistently applied the four part test set forth in *Cramp vs. Board of Public Instruction of Orange County,* 137 So.2d 828 (Fla. 1962):

> When a part of a statute is declared unconstitutional the remainder of the act wil be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remianing valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independantly of those which are void, (3) the good and the bad features are not so inseparable in sustance 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 ... 137 So.2d 830.

From the forgoing it is abundantly clear that the test in *Cramp* can be met . By severing §768.21(8) you cure the constitutional infermity created with the 1972 Wrongful Death Act. The section can be severed out, and the expressed purpose of the wrongful death act, as set forth in §768.17 , to shift the loss to the wrong doer and will be met. Finally, because this severance removes the constutional infermity to the origional act the good and the bad features are not inseverable and the remainder of the act can stand alone.

II. THE FIRST DISTRICT COURT OF APPEAL PROPERLY HELD THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCLUDING EXPERT TESTIMONY

The First District Court of Appeal properly held that the trial court committed reversible error when it excluding certain testimony of plaintiffs' expert in internal

medicine, Paul Bader, M.D. Mrs. Pittman's co-personal representatives accept and adopt the logic, reasoning and holding of the First District Court of Appeal on that issue, and request this Court affirm their decision. As Judge Van Nortwick so sucsinctly put it:

> Section 766.102(1) requires that a party seeking damages based upon death or personal injury resulting from the negligence of a health care provider must establish that negligence based upon proof that the health care provider breached the prevailing standard of care that is recognized by reasonably prudent "similar health care providers" as acceptable and appropriate. Section 766.102(2)(b) provides in pertinent part that if a health care provider who is alleged to have been negligent "holds himself out as a specialist," a similar specialist may testify as to the standard of care.[17]... In the instant case, there is no dispute that Dr. Bader is a specialist in internal medicine. Thus, should Dr. Price be considered as a specialist in internal medicine, under section 766.102(2)(b) Bader would qualify to testify as to the standard of care for internal medicine specialists. The salient question then becomes whether Price held himself out as a specialist in internal medicine. Our review of the undisputed facts in the record convinces us that he did.

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[17] FN1. Section 766.102(2)(b) provides:
If the health care provider whose negligence is claimed to have created the cause of action is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a "similar health care provider" is one who:
1. Is trained and experienced in the same specialty; and
2. Is certified by the appropriate American board in the same specialty.
However, if any health care provider described in this paragraph is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a "similar health care provider." *Stewart v. Price,* 718 So.2d 205, 298 at [FN1].

Although the admissibility of expert testimony is generally within the discretion of the trial court, see *Ortagus v. State*, 500 So.2d 1367, 1371 (Fla. 1st DCA 1987), because the statutory criteria under section 766.102 were met, the trial court below abused its discretion by precluding the testimony of a "similar health care provider." The determination as to whether a health care provider "holds himself out as a specialist" under the statute is a fact question for the trial court. Accordingly, here, where the trial court found that Dr. Price was a family practitioner and not an internal medicine specialist, our scope of review is whether the trial court's finding is supported by competent substantial evidence in the record. *See Florida East Coast Ry. Co. v. Department of Revenue*, 620 So.2d 1051 (Fla. 1st DCA), *rev. denied*, 629 So.2d 132 (Fla.1993).

It is not disputed that the sign outside of Dr. Price's office states "Internal Medicine." In addition, his letterhead reads: "Dr. Price, M.D., P.A., Internal Medicine and Cardiology." Furthermore, Dr. Price admitted at trial that he considers himself "an internal medicine specialist." There is no basis in the record for finding that Dr. Price represented himself to the public as a general practitioner, as found by the lower court. The fact that Dr. Price did not represent that he is "certified" in internal medicine is not dispositive for determining the defendant's status under section 766.102(2)(b). Any finding that Dr. Price only rendered care to Pittman at the level of a general practitioner, despite the fact that Dr. Price otherwise held himself out as a specialist in internal medicine, is also without support in the record. The relevant inquiry of the trial court for determining the required specialist training and qualifications of an expert is whether the defendant physician, during the course of medical treatment, satisfied any of the three prongs of section 766.102(2)(b). Here, the undisputed facts in the record establish that Dr. Price held himself out as a specialist in internal medicine. It was thus error to exclude Dr. Bader's testimony.

Further, we cannot agree with appellee that this error is harmless. During his deposition, Dr. Bader plainly testified that an internist should examine his patients from head to toe on a yearly basis. This portion of the deposition was proffered, but was denied admission into evidence by the trial court. Dr. Price testified at trial that Pittman never complained

> to him about her toe (the cortisone prescription refills were for her legs, claimed Price), and so he never examined the toe. Obviously, there is a question as to whether Dr. Price breached the standard of care owed to his patients, and Dr. Bader's testimony is highly relevant to that question.
>
> Appellee suggests that any error in failing to admit the expert testimony of Dr. Bader regarding the standard of care for internists was cured by the admission of the testimony of Dr. Evans. We cannot agree. Among other things, Dr. Evans testified at trial that, if Dr. Price had performed a complete "head- to-toe" physical examination on Pittman sometime between 1986 and 1989, then Dr. Price would have satisfied the standard of care governing a "general medical practitioner" or "a family practice physician." The record reflects that Dr. Price did do a "head-to-toe assessment" in October 1987 of Pittman prior to her admission into Gadsden Memorial Hospital.
>
> The appellants' claim, however, was premised upon the standard of care owed by internal medicine specialists, not general or family practitioners. Dr. Bader's testimony of the standard of care governing a specialist in internal medicine would have supported a finding that an annual examination was required by the specialist's standard of care. We cannot conclude that under the circumstances of the instant case exclusion of the appellants' primary expert constitutes harmless error, especially since this case, as many medical malpractice cases, was necessarily a "battle of the experts." *See Cenatus v. Naples Community Hosp., Inc.*, 689 So.2d 302 (Fla. 2d DCA 1997).

Stewart v. Price, 718 So.2d 205, 207 - 209 (Fla. 1st DCA 1998).

III. DR. PRICE'S FAILURE TO PASS HIS BOARD EXAMS WAS RELEVANT .

The First District Court of Appeal committed reversible error when it found plaintiffs' argument, on the impropriety of the trial court's exclusion of evidence on Dr. Price's failure to pass his board examinations, to be without merit. The trial court's

Court's improperly interpreted § 766.102. *Medical negligence, standards of recovery.*, when it ruled[18] *in limine* preventing any mention of the fact that Dr. Price failed his board exam in internal medicine. (10/11/94, Tr. 12-13.) A proffer showed that Dr. Price "couldn't pass the orals." (10/10/94, V. I, Tr. 137) (reading Dr. Price's deposition statement); *see also* 1/17/95, Tr. 146).) As aptly put by defense counsel, "[h]ere's a doctor who failed an exam." (10/11/94, Tr. 12.) Secure in this ruling *in limine,* Dr. Price freely boasted at trial that he was a specialist in internal medicine:

> Q.Based on your letterhead, these prescriptions and your sign, did you hold yourself out as a specialist in internal medicine?
> A.Well, yes. Basically I considered myself an internal medicine specialist; . .

(1/17/95, Tr. 152.)

The Court's ruling *in limine* prevented counsel from asking Dr. Price if he in fact had flunked his internal medicine exam. (*See* 1/17/95, Tr. 147, 151) (limited to

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[18] In ruling *in limine* on Dr. Price's failure to pass the medical boards, the trial court asked plaintiffs' counsel: "Are you familiar with 580 So 2d 814? You should read that case." (10/11/94, Tr. 13.) To the contrary, the trial court should more closely "read that case", since *Catron v. Roger Bohn, D.C., P.A.*, 580 So. 2d 814 (2d DCA), *rev.denied*, 591 So. 2d 183 (Fla. 1991), in fact gives a generous reading to the phrases "similar health care provider" and "related fields of medicine". *See* 580 So. 2d at 817 ("It is quite obvious that the term ['medical specialty'] is used to apply to specialists in the whole spectrum of health care providers."). But unfortunately, the trial court wasn't in a mood to consider any case law, at least under § 766.102. As the trial judge advised plaintiffs' counsel the day before: "It won't do you any good to give me one of those [§ 766.102] cases." (10/10/94, V. I, Tr. 154-55.)

question re: board certification). This was reversible error and the First District Court of Appeal should have so held.

> The evidence showing Dr. Price's failure to pass the exam was admissible as it tended to, "prove or disprove a material fact," § 90.401, Fla. Stat. (1993)--that is, that Dr. Price, "breach[ed] . . . the prevailing professional standard of care. . . . [as determined by] that level of care, *skill,* and treatment" owed to the patient. §766.102(1), Florida Statutes(1993); see also *State v. Taylor*, 648 So. 2d 701, 704 (Fla. 1995) ("The concept of 'relevancy' has historically referred to whether the evidence has any logical tendency to prove or disprove a fact.") (quoting without footnotes CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 401.1 at 95-96 (1994)). Flunking a board certification exam certainly shows a lack of "skill" under Section 766.102(1). *See generally Porter v. Rosenberg*, 650 So. 2d 79, 83 (Fla. 4th DCA 1995) (suggesting that in most cases "the predominant purpose of the physician-patient relationship . . . is the provision of medical services based upon the physician's medical judgment, *skill, or expertise, . . . "*) (emphasis added). The jury (and the public at large) had a right to know this about Dr. Price, who advertises himself as proficient and specialized in "internal medicine," even though he failed the boards. A new trial is required to submit the doctor to a proper examination.

IV. THE TRIAL COURT IMPROPERLY GRANTED A DIRECTED VERDICT ON THE ISSUE OF MRS. PITTMAN'S CAUSE OF DEATH.

The First District Court of Appeal committed reversible error when it found plaintiffs' argument on the impropriety of the trial court granting defendant's motion for a directed verdict on the isue of the cause of Mrs. Pittman's death, to be without merit. At trial, at the close of plaintiffs' evidence, the trial court ruled that Mrs. Pittman died of malignant melanoma, not upper gastrointestinal bleeding. (1/20/95, Tr. 1075.) This was

reversible error.

The standard for granting a directed verdict is very familiar to this Court: such motions must be denied if *any evidence* could support the non-moving party. *Schultz v. Johnson*, 654 So.2d 567 (Fla. 1st DCA 1995) ; *Pritchett v. Jacksonville Auction, Inc.*, 449 So.2d 364 (Fla. 1st DCA 1984). Orders directing a verdict may stand only when, after indulging every inference in favor of the non-moving party, there is a complete absence of conflicting evidence. *Schultz*, *supra* at *2 (citing *Kirby v. OMI Corp.*, 561 So.2d 666 (Fla. 1st DCA 1990)); *Reeder v. Edward M. Chadbourne, Inc.*, 338 So.2d 271 (Fla. 1st DCA 1976); *Woods v. Winn Dixie Stores, Inc.*, 621 So.2d 710 (Fla. 3d DCA 1993); *Cowan v. Thornton*, 621 So.2d 684 (Fla. 2d DCA 1993).Observance of this stringent standard guards against a judge's invasion of the jury's fact-finding role, and prohibits a judge from passing on the credibility of witnesses. *Phillips v. Van's Electric of Lake Worth, Inc.*, 619 So. 2d 253 (Fla. 4th DCA 1993); *Lupoletti v. Miller*, 269 So.2d 67 (Fla. 4th DCA1972).

At the close of Plaintiffs' evidence, the jury had before it conflicting evidence on the cause of Mrs. Pittman's death. Dr. Carroll, the pathologist wh performed Mrs. Pittman's autopsy, said that hemorrhaging esophageal varicies (the GI bleeding)*probably* caused Mrs. Pittman's death. (1/19/95 Tr. 886-87.) Similarly, she thought the melanoma was only a *possible, not probable,* cause of death. (Id. at 887, 898.) Dr. Evans, on the

other hand, thought Mrs. Pittman died of the melanoma, (1/18/95, Tr. 417), though he admitted that because of his lack of experience in pathology, he would defer to Dr. Carroll's findings. (*See id*. at Tr.. 416, *see also id.* at Tr. 526-27 (objections)).

These conflicting accounts of Mrs. Pittman's death raised the following question: did the melanoma kill her, or was it the GI bleeding? This dispute as to causation--a quintessential jury issue--couldn't be resolved by a court. *E.g.*, *Ramsby v. DeAnsz Group, Inc.*, 596 So.2d 151 (Fla. 2d DCA 1992) (causation a jury issue). Indeed, even the Court agreed that "[t]he most there could possibly be, even in the light of most favorable, would be *some inference."* (1/20/95, Tr. 1081) Since the directed verdict was improper, *Compare* (*id*. (Court finding that there's "some inference" in Plaintiffs' favor) *with Schultz*, 654 So.2d 567, at *2 (inferences preclude directed verdict), a new trial is required. *Jones v. Heil Co.*, 566 So.2d 565 (Fla. 1st DCA 1990) (appellate court must reverse if there is some evidence or reasonable inference to support the position of the party against whom a directed verdict has been granted).

CONCLUSION

Section 768.21(8), Fla. Stat. (1991), denies plaintiffs a fundimental right, serves no legitimate state interest and creates an arbitrary and irrational classifcation which treats the survivors of persons killed by medical malpractice differently from the survivors of persons killed by all other torts. It offends three constitutional

protections, both on it's face, and as applied: (1) the right of access to courts under Art. I, § 21, Fla. Const; (2) the state and federal constitutional rights of equal protection; and (3) the state and federal constitutional rights to due process. Plaintiffs request this Court hold: that the First District committed reversible error in holding §768.21(8), Fla. Stat. (1991), constitutional; that the subject section is ***unconstitutional***, both on its face and as applied; and that that portion of the District Court opinion which holds to the contrary should be quashed.

The District Court did, however, reached a proper result in holding that the trial court committed reversible error by excluding the testimony of plaintiffs' expert in internal medicine, and that portion of the opinion shoud be affirmed. But this Court should hold that the District Court committed reversible error when it held that plaintiffs' arguments, on the admissablity of evidence that Dr. Price had failed his boards, and on the trial court improperly directing a verdict as to Mrs. Pittman's cause of death, were without merit. That portion of the opinion should also be quashed.

Respectfully submitted this 2nd day of July, 1999.

Tari Rossitto - Van Winkle
Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been

furnished by (X) U.S. Mail, ( ) Hand Delivery, ( ) Fax, to:

Esther E. Galicia, Esquire
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on this 2nd day of July, 1999.

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