

WRONGFUL DEATH MEDICAL MALPRACTICE EXCLUSION  
HELD CONSTITUTIONAL  
By Ted Babbitt

Prior to 1990 only minor children were able to recover damages for pain and suffering as a result of the wrongful death of their parents. In that year the Legislature extended the definition of a survivor in Florida Statute 768.21(3) to include adult children of parents who lost their lives through negligence as well as the parents of adult children when those children were killed as a result of a tort. When that amendment became law, an exception was carved out for cases where the wrongful death was caused by medical malpractice.

Two sets of plaintiffs challenged the portion of the law which excluded recovery for medical malpractice victims. In Mizrahi v North Miami Medical Center, Ltd., 712 So.2d 826 (Fla. 3<sup>rd</sup> DCA 1998), the adult children of plaintiff's decedent brought an action for medical malpractice seeking the same elements of damages available to every other litigant whose cause of action for wrongful death was not based on medical malpractice. In Garber v Snetman, 712 So.2d 481 (Fla. 3<sup>rd</sup> DCA 1998), an adult child of plaintiff's decedent sought recovery for intentional infliction of emotional distress and for mental pain and suffering as a result of the death of her mother. Both cases resulted in summary judgments which were affirmed by the Third District.

The concurring opinion of Judge Schwartz in Garber v Snetman, supra,

became a rallying cry for those seeking to overturn what appeared to be an arbitrary exception.

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 forbid! – of less than a certain height.

In Stewart v Price, 718 So.2d 205 (Fla. 1<sup>st</sup> DCA 1998) the First District was faced with the same question. That Court held that the exception did not deny equal protection under either the Florida or United States Constitution.

The Supreme Court has now made a final determination of the issue in the case of Mizrahi v North Miami Medical Center, Ltd., 25 F.L.W. S302 (Fla. April 20, 2000). A somewhat divided Court found that the legislative determination that an insurance crisis existed in 1990 justified the exclusion of medical malpractice victims from this aspect to the Wrongful Death Act. At page 303 the Court holds:

The First District then concluded that the '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).’ *Id.* at 210.

In support to this rationale, the Legislature referred to and discussed the medical malpractice crisis and its adverse impact on the accessibility of health care during the passage of section 768.21. Legislators expressly linked the exclusion of adult children of medical malpractice decedents contained in section 768.21(8) to the health care crisis rationale expressed in section 766.201. 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); *Mizrahi*, 712 So.2d at 829. Clearly, limiting claims that may be advanced by some claimants would proportionally limit claims made overall and would directly affect the cost of providing health care by making it less expensive and more accessible.

Accordingly, the instant statute which created a right of action for many while excluding a specific class from such action, and which exclusion is rationally related to controlling healthcare costs and accessibility, does not violate the equal protection guarantees of either the United States or Florida Constitutions.

Justice Pariente dissented and Justice Quince joined in that dissent. Justice Pariente points out that no one has revisited the question of whether an insurance crisis still exists in the State of Florida (if it ever existed at all). She questions whether the Supreme Court has to blindly accept the Legislative

determination ten years ago for justification that an arbitrary class of individuals are denied rights. At page 303 she concludes:

In sum, there is no indication that the distinction drawn by the statute bears a reasonable relationship to a legitimate state interest associated with ensuring accessible health care. Further, there is no indication that the medical malpractice crisis that formed the basis for treating this class of survivors differently than all other adult children even continues to this day.

This aspect of medical malpractice law has received very little attention by the media until recently. Many lawyers don't know that this exception even exists. When a prospective client is told that despite clear negligence having caused a death there is no cause of action in Florida because a special exception exists on behalf of doctors and hospitals, they do not believe that this could be the law. Florida is the only state in the country that has this kind of exception. Despite Justice Pariente's plea in her dissenting opinion that the Legislature reconsider this issue, it is likely, based upon the current makeup of the Legislature, that this law will be with us for a long time.

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