THE RIGHT CASE AWAY FROM ELIMINATING A SEPARATE CLASS OF CITIZENRY IN FLORIDA WRONGFUL DEATH CASES

by Lauren Gallagher and Jed Kurzban

John, 34 years old, is the manager of your favorite local restaurant. Ten years ago, John started at the local restaurant as the weekend bouncer and has worked his way up to management. As the manager of this local restaurant, he makes around $60,000 per year. Four years ago, John saved enough money to buy a home with his fiancée. John and his fiancée are also very excited to get married and start their family and life together after being together for seven years.

John is known and loved by everyone; he was a friend to all, and a man dearly loved by his community. John's pictures are spread all over the walls of the local restaurant he managed. He even has a bar stool and signature drink named after him. Can you imagine a man like that bleeding out in the emergency room from a nosebleed?

Last year John was taken to the emergency room for a nosebleed. With proper medical care, John's nosebleed could have been treated and he would have left the hospital healthy. However, doctors left John unattended and untreated for many hours, causing him to lose a significant amount of blood and suffer from cardiac arrest. John died while in the emergency room.

Under Florida law, who can recover for John's death? Since John was not married and had no children at the time of his death, the only survivors who can recover damages are his parents. However, the State of Florida has determined through lobbyists that because John's death *was a result of medical negligence*, his parents cannot recover for their pain and suffering from losing their son. According to Florida's Wrongful Death Act, John's estate can only recover for his lost net accumulation.

On the other hand, take Tim. Tim, 42 years old, is the manager of your favorite local supermarket. Tim also makes $60,000 per year. The only difference between Tim and John is that Tim's wrongful death was not a result of medical negligence. Tim was killed in a motor vehicle accident due to the fault of another, even though he was intoxicated from celebrating his job promotion. Under these circumstances Tim's estate can recover for his lost net accumulation and for the pain and suffering of Tim's parents. Under Florida law, the possible recovery by his parents for the loss of Tim's life is millions of dollars, while John's parents may recover only a few thousand.

Florida's Wrongful Death Act

Why are some people treated differently? Florida's Wrongful Death Act specifies what damages may be recovered by a decedent's personal representative on behalf of the decedent's estate, as well as by the survivors.[1] The plain language of Florida's Wrongful Death Act provides that only the surviving spouse, minor children of the decedent, parents of a minor child, and parents of an adult child *whose claim is not for medical negligence* may recover pain and suffering.[2]

Section 768.21(8) of the Florida Wrongful Death Act imposes two restrictions on the right to recover damages:

1. Adult children of a decedent, when there is no surviving spouse, cannot recover for lost parental companionship, instruction, and guidance and for mental pain and suffering with respect to claims for medical negligence, and
2. Parents of an adult decedent, when there are no other survivors, cannot recover damages for mental pain and suffering with respect to claims for medical negligence.

This article addresses section 768.21(8) of Florida's Wrongful Death Act, analyzes the constitutionality of the statute's restrictions on the recovery sought by parents of an adult decedent in a medical

negligence case, and concludes that Fla. Stat. section 768.21(8) is unconstitutional in light of the Supreme Court of Florida's decision in *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014).

Why Florida's Wrongful Death Act Is Unconstitutional

Florida's Wrongful Death Act section 768.21(8) is unconstitutional because it creates a secondary class of citizens (victims) by prohibiting recovery of pain and suffering damages for parents of adult children with respect to claims for medical negligence, and *medical negligence only*. This directly violates the Equal Protection Clause of the Florida Constitution. At a time when equal protection is more important than ever, now is the time for change.

Legislative History of Florida's Wrongful Death Act section 768.21(8)

As stated above, the Florida Wrongful Death Act specifies what damages may be recovered by a decedent's personal representative on behalf of the decedent's estate, and by the survivors. The plain language of Florida's Wrongful Death Act provides that only the surviving spouse, minor children of the decedent, parents of a minor child, and parents of an adult child *whose claim is not for medical negligence* may recover pain and suffering.[3]

Originally, under section 768.21(3), only minor children could recover damages for their pain and suffering upon the wrongful death of a parent.[4] Thereafter, the Legislature enacted chapter 90-14, which amended section 768.21(3), to expand the definition of "survivors" who may recover for the wrongful death of a parent. Consequently, now all children of the decedent, even adult children, can recover for lost parental companionship, instruction, and guidance and for mental pain or suffering. However, in chapter 90-14, "the Legislature precluded the application of this expanded 'survivors' definition to adult children where the cause of the wrongful death is the result of medical malpractice."[5] Thus, chapter 90-14 "treated adult children of a person who dies as a result of medical malpractice differently than adult children whose parent dies as a result of a cause other than medical malpractice" due to no fault of their own.[6] Prior to the Supreme Court of Florida's decision in *McCall*, Florida courts dealt with the first restriction imposed by section 768.21(8) — recovery sought by adult children of a decedent. Regardless, the cases discuss the validity of section 768.21(8) as a whole based on current case law.

The Constitutionality of Florida's Wrongful Death Act section 768.21(8)

Since its enactment, numerous courts have addressed the constitutionality of Florida's Wrongful Death Act. In *White v. Clavton*, 323 So. 2d 573, 575 (Fla. 1975), the Florida Supreme Court held that the Act's preclusion of non-lineal decedents from recovering for loss of support and services did not violate the Equal Protection Clause. The Court noted that since the purpose of the Act was to provide recovery to those survivors who need it, "[d]istinguishing rights of recovery for a surviving spouse and lineal descendants from those who are collateral descendants is not an unreasonable classification."[7]

Subsequently, the Court in *Bassett v. Merlin*, 335 So. 2d 273 (Fla. 1976) held that the Wrongful Death Act did not violate the Equal Protection Clause by denying parents of adult children the right to recover damages for mental pain and suffering.

In *Stewart v. Price*, 718 So. 2d 205, 209-10 (Fla. 1st DCA 1998), *approved* 762 So. 2d 475 (Fla. 2000), the Florida Supreme Court affirmed the First District Court of Appeal's decision to strike down a challenge to the constitutionality of Florida's Wrongful Death Act, section 768.21(8), on the basis of Equal Protection. The First District analyzed the issue as follows: "[U]nder 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."[8] Thus, there was no statutory or common law right to recover for the adult children of persons who wrongfully died as a result of medical malpractice. However, as discussed in *Stewart*, section 768.21(8) could be declared an unconstitutional denial of equal protection if it bears no rational relationship to a legitimate state objective. To that extent, the First District concluded that the "[L]egislature'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* section 766.201(1), Fla. Stat. (1995)."[9]

A Debunked Agenda

Then, in 2000, the Supreme Court of Florida addressed the constitutionality of the Wrongful Death Act in *Mizrahi v. N. Miami Med. Ctr., Ltd.*, 761 So. 2d 1040 (Fla. 2000). In *Mizrahi*, the Court reasoned that 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."[10] The Court concluded that legislators "expressly linked the exclusion of adult children of medical malpractice decedents contained in section 768.21(8) to the health care crisis rationale."[11] In so holding, the Court noted the following: "[T]he 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."[12] The Court further acknowledged that "escalating insurance costs adversely impact not only physicians but also, ultimately, their patients through the resultant increased cost of medical care."[13] Thus, the Court in *Mizrahi* concluded that, "[c]learly, 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."[14] Accordingly, the Supreme Court of Florida held that the Florida Wrongful Death Act did not violate the equal protection guarantees of either the United States or Florida Constitutions because, although it created a right of action for many while excluding a specific class from such action, the distinction was rationally related to controlling healthcare costs and accessibility.

Unconstitutionality of Wrongful Death Act section 768.21(8)

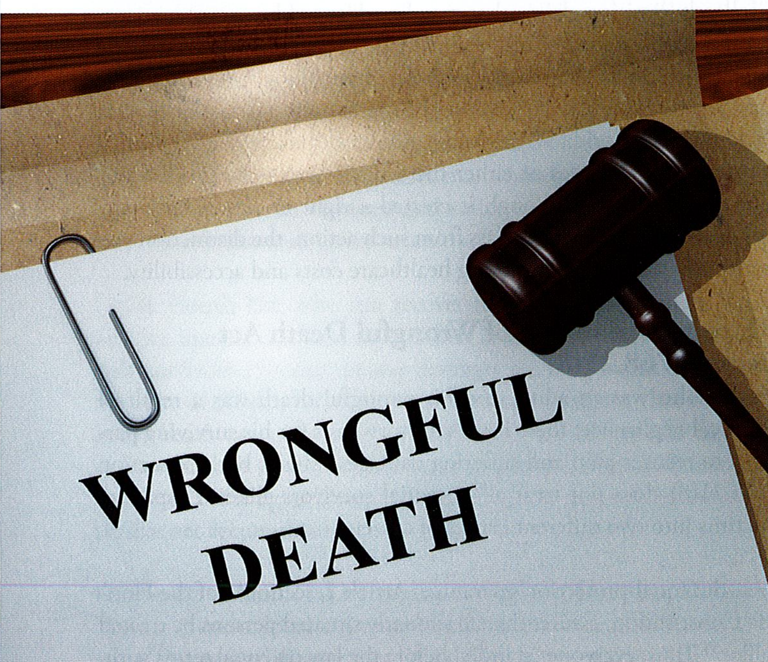
Since John was an adult, and his wrongful death was a result of medical negligence, there is no statutory basis for his surviving parents to recover pain and suffering damages. This is because section 768.21(8) does not treat all potential survivors alike; it separates victims into two different classes of citizens.

Yet, the equal-protection guarantee, Article I, section 2 of the Florida Constitution, assures that all similarly situated persons be treated alike.[15] Thus, everyone "stand[s] before the law on equal terms with,

to enjoy the same rights as belong to, and to bear the same burden as are imposed upon others in a like situation."[16]

Nevertheless, unless a suspect class or fundamental right protected by the Florida Constitution is implicated, the rational basis test will apply to evaluate an equal protection challenge.[17] To satisfy the rational basis test, a statute must bear a rational and reasonable relationship to a legitimate state objective, and it cannot be arbitrarily or capriciously imposed.[18]

Although the previous case law upheld the constitutionality of Fla. Stat. section 768.21(8), the Supreme Court of Florida's decision in *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014) now invalidates the previously "legitimate" state objective. The restriction on parents, in medical negligence claims, from recovering damages for pain and suffering after the death of an adult child violates a plaintiff's right to equal protection under the Florida Constitution. Section768.21(8) clearly violates this guarantee by imposing different and additional burdens on some injured parties when an act of medical negligence gives rise to a claim. In such an instance, medical malpractice claimants do not receive the same rights to full compensation and do not bear the same burden because of an arbitrary restriction on their legally cognizable claims. The restriction of pain and suffering damages to parents of an adult decedent with respect to claims for medical negligence fails the rational basis test because it imposes unfair and illogical burdens on injured parties. Further, the restriction does not bear a rational relationship to the stated purpose the limitation is purported to address because the stated purpose is no longer a legitimate objective if there is no medical malpractice insurance crisis in Florida. The previously "legitimate" state objective is no longer legitimate as the Court's decision in *McCall* found that the existence of a medical malpractice crisis is not fully supported.



Here, in John's case, the test for consideration of equal protection is whether individuals are classified separately based on a difference which has a reasonable relationship to the applicable statute, and the classification can never be made arbitrarily without a reasonable and rational basis. Thus, Fla. Stat. section 768.21(8) should be declared an unconstitutional denial of equal protection if it bears no rational relationship to a legitimate state objective. As such, because the Legislature's stated purpose of limiting increases in medical insurance costs is no longer a legitimate state objective, the restriction of damages on parents of adult children who wrongfully died as a result of medical malpractice is no longer valid.

a. *Arbitrary Distinction*

The type of classification imposed by section 768.21(8) is purely arbitrary and unrelated to a legitimate state interest. The classification distinguishes recovery solely on the basis of the type of action brought as a result of medical malpractice. The statute irrationally treats those differently and less favorably in circumstances involving medical malpractice than those in circumstances that do not involve medical malpractice. No one chooses to die as a result of someone else's negligence, whether by medical negligence, auto accident, or otherwise. The result is an irrational and unreasonable cost and impact when the victim of medical malpractice died as an adult leaving behind their parents as the sole survivors. The parents of an adult decedent are nonetheless adversely impacted and affected by the death of their child. What parents are unaffected by the death of their own child? Are they less upset if their child's death was a result of a doctor's negligence instead of a driver's negligence?

The tortfeasors in this type of matter are also treated differently, without justification. A tortfeasor who injures an adult decedent as a result of other negligent conduct is liable to the decedent's parents for pain and suffering damages if their child died without a spouse. In contrast, the current legislation confers a benefit on a similarly situated tortfeasor who injures the same type of individual but as a result of medical malpractice. This tortfeasor pays an incomplete amount of damages because of the limitation.

b. *No Legitimate State Objective*

In *McCall*[19], the Florida Supreme Court's plurality and concurring opinions address whether the statutory caps on wrongful death noneconomic damages under section 766.118 violate the right to Equal Protection guaranteed by the Florida Constitution. Five justices agreed that the caps violate the right to equal protection under Florida's Constitution. In doing so, the Court analyzed the alleged medical malpractice crisis, which the courts in *Stewart* and *Mizrahi* relied upon to affirm the constitutionality of Fla. Stat. section 768.21(8).

The Court in *McCall* asserted that "[t]he Florida Legislature attempted to justify the cap on noneconomic damages by claiming that 'Florida is in the midst of a medical malpractice insurance crisis of unprecedented magnitude.'"[20] Furthermore, "[t]he Legislature asserted that the increase in medical malpractice liability insurance premiums has resulted in physicians leaving Florida, retiring early from the practice of medicine, or refusing to perform high-risk

procedures, thereby limiting the availability of health care."[21] Lastly, in enacting the statutory cap on noneconomic damages, the Legislature relied heavily on a report which concluded that "actual and potential jury awards of noneconomic damages (such as pain and suffering) are a key factor (perhaps the most important factor) behind the unavailability and un-affordability of medical malpractice insurance in Florida."[22]

Nevertheless, the Supreme Court of Florida in *McCall* held that "the conclusions reached by the Florida Legislature as to the existence of a medical malpractice crisis are not fully supported by available data."[23] In fact, "the alleged interest of health care being unavailable is completely undermined by authoritative government reports."[24]

The Court analyzed the alleged medical malpractice crisis by "fact checking" the Legislature's justifications of such a crisis. The Court pointed out that during the alleged medical malpractice crisis, the numbers of physicians in Florida increased.[25] In fact, from 1991 to 2001, "Florida's physician supply" per 100,000 people grew 10.7 percent in metropolitan areas and 19 percent in nonmetropolitan areas.[26]

Additionally, the Court correctly pointed out that an analysis of claim activity "does not provide a rational basis for the clear discrimination presented by the legislation."[27] The Court further stated: "[a]lthough assertions of a malpractice insurance crisis are often accompanied by images of runaway juries entering verdicts in exorbitant amounts of noneconomic damages, *see, e.g.,* Task Force Report at xvii, one study revealed that in Florida cases which resulted in payments of $1 million or more over a [14]-year period, *only 7.5 percent involved a jury trial verdict.*"[28] "Moreover, 10.1 percent of settlements that involved payments of $1 million or more were resolved *without a legal action ever being filed.*[29] As such, jury trials constitute only a very small portion of medical malpractice payments.[30] Thus, the Court concluded that the "finding that noneconomic damage awards by juries are a primary cause of the purported medical malpractice crisis in Florida is most questionable."[31]

The Court in *McCall* also held that "although medical malpractice premiums in Florida were undoubtably high in 2003, we conclude that the Legislature's determination that 'the increase in medical malpractice liability insurance rates is forcing physicians to practice medicine without professional liability insurance, to leave Florida, to not perform high-risk procedures, or to retire early from the practice of medicine' is unsupported."[32] Furthermore, the Court held "that Florida was in the midst of a bona fide medical malpractice crisis, threatening the access of Floridians to health care, is dubious and questionable at the very best."[33]

In conclusion, the Supreme Court of Florida's decision in *McCall* held that section 766.118 violates Florida's Equal Protection Clause because "the available evidence fails to establish a rational relationship between a cap on noneconomic damages and alleviation of the purported crisis."[344] Lastly, the Court specified that even if a medical malpractice crisis existed at some point, a crisis is not a permanent condition.[35]

c. *The Restriction Cannot Meet the Rational-Basis Test*

In addition to arbitrary discrimination of medical malpractice claimants, the restriction also violates the Equal Protection Clause of the Florida Constitution because it bears no rational relationship to a legitimate state objective, thereby failing the rational basis test.

The rational-basis test requires a court to "determine (1) whether the statute serves a legitimate governmental purpose, and (2) whether it was reasonable for the Legislature to believe that the challenged classification would promote that purpose."[366] "Without exception, all statutory classifications that treat one person or group differently than others ... cannot be discriminatory, arbitrary, or oppressive."[37] Because there is no evidence that a medical malpractice crisis ever existed, and the Supreme Court of Florida in *McCall* declared that said crisis does not currently exist, the restriction imposed by section 768.21(8) bears no rational relationship to a legitimate state objective.

i. The Alleged Medical Malpractice Crisis

The courts in Stewart and Mizrahi, justified the restriction in section 768.21(8) by claiming that Florida is in the midst of a medical malpractice insurance crisis, and as a result, there is an adverse impact on the accessibility of health care. The courts relied on the Legislature's claims of a medical malpractice insurance crisis to justify the restriction in order to limit increases in medical insurance costs.

Thus, in light of the Court's discussion in *McCall* regarding the existence of a medical malpractice crisis, there is no longer a justification for the restriction in section 768.21(8). Conditions have changed. Even if there once was a medical malpractice crisis and thus a rational basis for section 768.21(8) when it was enacted, the current data reflects that there is no indication that the past medical malpractice crisis continues into the present. Thus, no rational basis currently exits, if it ever did, between the restriction in section 768.21(8) and any legitimate state purpose. It is a "'settled principle of constitutional law' that although a statute is constitutionally valid when enacted, that statute may become constitutionally invalid due to changes in the conditions to which the statute applies."[38] The absence of a current medical malpractice crisis is precisely a "change in the condition to which the statute applies."

iii. The Restriction Does Not Control Health Care Costs and Accessibility

Even if the conclusions by the Legislature are assumed to be true, and Florida is facing a medical malpractice crisis, section 768.21(8) still violates Florida's Equal Protection Clause because the available evidence fails to establish a rational relationship between a restriction on pain and suffering damages and alleviation of the purported crisis. The available data has failed to establish a correlation between restrictions on pain and suffering damages and a reduction of malpractice premiums. There is no evidence of a continuing medical

malpractice crisis that would justify the restriction of survivors' noneconomic damages in wrongful death cases simply because the action is a medical malpractice suit. This arbitrary distinction punishes the survivors of victims of medical malpractice without any commensurate benefit to the survivors and without a rational relationship to the goal of reducing medical malpractice premiums.

Conclusion

In 1998 and 2000, the Courts in *Stewart* and *Mizrahi* upheld the constitutionality of Fla. Stat. section 768.21(8) because the rational basis test was satisfied based on a legitimate state objective: the medical malpractice crisis. In 2014, the alleged medical malpractice crisis was again analyzed in *McCall*. The Supreme Court of Florida held that the conclusions reached by the Florida Legislature as to the existence of a medical malpractice crisis are not fully supported by available data. Further, the Court held that the finding that Florida was in the midst of a bona fide medical malpractice crisis, threatening the access of Floridians to health care, is dubious and questionable at the very best. And even if there had been a medical malpractice crisis in Florida, the current data reflects that it has subsided. Lastly, if a crisis ever existed, it is not a permanent condition. From these findings, the logical conclusion follows that the purpose of Fla. Stat. section 768.21(8) is no longer legitimate and even if it is, no rational basis exists.

In conclusion, to take away an entire class's right to recovery of damages for pain and suffering based on an erroneous and/or outdated objective by the Legislature is unconstitutional and violates the Equal Protection Clause of the Florida Constitution. John's family, like Tim's, deserves equal protection under the law, and Florida should correct this injustice at long last. All that is needed is the right case. ■

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[1] *See* Fla. Stat. §768.21.
[2] *See* Fla. Stat. §768.21 (8) (stating that parents of adult children shall not recover pain and suffering damages with respect to claims of medical negligence).
[3] *See* Fla. Stat. §768.21 (8).
[4] *See Weimer v. Wolf*, 641 So.2d 480 (Fla. 2d DCA 1994).
[5] *Stewart v. Price*, 718 So. 2d 205, 209 (Fla. 1st DCA 1998), approved 762 So. 2d 475 (Fla. 2000).
[6] *Id.*
[7] *White*, 323 So. 2d at 575.
[8] *Stewart*, 718 So. 2d at 209.
[9] *Id.* at 210.
[10] *Mizrahi*, 761 So. 2d at 1042.
[11] *Id.* (citing *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 (April 16, 1990)).
[12] *Id.* at 1041.
[13] *Id.*
[14] *Id.* at 1043.
[15] *De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204 (Fla. 1989).
[16] *Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1105 (Fla. 2005).
[17] *See Amerisure Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 897 So.2d 1287, 1291 (Fla.2005).
[18] *Dep't of Corr. v. Fla. Nurses Ass'n*, 508 So.2d 317, 319 (Fla.1987).
[19] *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014).
[20] *Estate of McCall*, 134 So. 3d at 906.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Estate of McCall*, 134 So. 3d at 907.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 909.
[33] *Id.*
[34] *Id.*
[35] *Estate of McCall*, 134 So. 3d at 913.
[36] *Hechtman v. Nations Title Ins.*, 840 So. 2d 993, 996 (Fla. 2003).
[37] *Vildibill v. Johnson*, 492 So. 2d 1047, 1050 (Fla. 1986) ("a statutory classification cannot be wholly arbitrary").
[38] *Estate of McCall*, 134 So. 3d at 920.