The Florida Justice Reform Institute Opposes HB 651 and SB 1112

House Bill 651 and Senate Bill 1112 seek to undo the Florida Legislature's wise policy decision more than 30 years ago to narrowly expand the Wrongful Death Act to allow recovery of damages by certain adult children, but not in the medical negligence context. Specifically, both bills propose to delete section 768.21(8)'s prohibition on parents recovering emotional damages resulting from the wrongful death of their adult child when the wrongful death is based on a claim of medical malpractice.

Before 1990 in Florida, parents had ***no*** common law or statutory right to recover damages for pain and suffering, grief, or emotional loss for the wrongful death of their adult child. *See in re Guardianship of Schiavo*, 792 So. 2d 551, 562 n.11 (Fla. 2d DCA 2001). This was consistent with the majority of jurisdictions, which reasoned that sound public policy dictates that some limit be placed on the survivors that may recover for tort damages. *See, e.g.*, *Estate of Wells v. Mt. Sinai Med. Ctr.*, 515 N.W.2d 705, 710 (Wis. 1994) ("[S]ound public policy dictates that some limit be placed on the liability faced by negligent tortfeasors. As the law currently stands, a negligent tortfeasor may be liable not only to the victim herself for injuries sustained, but also to the victim's spouse and minor children for loss of society and companionship. The tortfeasor may in some instances also be liable to third parties for the negligent infliction of emotional distress. To hold that same tortfeasor potentially liable to the parents . . . for the loss of an adult victim's society and companionship, is, we believe, excessive and contrary to public policy." (internal footnotes omitted)); *Boucher ex rel. Boucher v. Dixie Med. Ctr.*, 850 P.2d 1179, 1184-85 (Utah 1992) (rejecting cause of action for loss of consortium by parent of adult child and reasoning that such claims "have the potential for greatly expanding the liability that can flow from one negligent act, and courts that have adopted consortium claims have been unable to develop rational limits on this liability"). Florida law did, however, authorize parents' recovery of damages for pain and suffering associated with the wrongful death of a minor child. *See, e.g.*, § 768.21(3), Fla. Stat. (1987) ("Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury.").

In 1990, the Florida Legislature expanded the Wrongful Death Act and, among other things, gave parents of adult children the ability to recover damages for mental pain and suffering. *See* Ch. 90-14, § 2, at 38, Laws of Fla. Thus, Chapter 90-14 authorized all parents to recover for mental pain and suffering associated with the wrongful death of an adult child if there were no other survivors. At the same time, however, the Legislature precluded the application of this expanded "survivors" definition to parents of adult children where the cause of the wrongful death was medical malpractice.

This distinction was important because 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 affect medical malpractice insurance premiums in Florida and, ultimately, adversely affect the accessibility of health care for all Floridians. Wrongful deaths attributable to other forms of negligence simply do not have such a broader impact. This distinction is precisely the one the Legislature drew in subsection (8) in 1990. The Florida Supreme Court has also specifically upheld the distinction drawn in subsection (8) as constitutional, finding that the Legislature had a legitimate interest in making this distinction in order to control health care costs and accessibility. *See Mizrahi v. N. Miami Med. Ctr., Ltd.*, 761 So. 2d 1040, 1043 (Fla. 2000).

That same substantial and legitimate interest now supports leaving subsection (8) as is. To the extent medical malpractice insurance premiums are better than they were two decades ago, it is partly because the Legislature soundly chose in 1990 to not extend the recovery of wrongful death damages to parents of adult children—particularly where parents of adult children have ***never*** been able to recover such damages, under statute or common law.

For all these reasons, we urge you to vote no on HB 651 and SB 1112.

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