IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO.: 93,804

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

Petitioners,

vs.

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

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

BRIEF ON THE MERITS OF RESPONDENT, I.B. PRICE, M.D.

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INTRODUCTION

The Respondent, I.B. PRICE, M.D. ("DR. PRICE"), was the Appellee at the First District and the Defendant at the trial court. The Petitioners, Jean Stewart and Kathryn Reynolds, Co-Personal Representatives of the Estate of Mable Pittman, Deceased, were

the Appellants at the First District and the Plaintiffs at the trial court. The parties will be referred to by proper name or by their position before this Court.

The letter "R." followed by a page citation, will refer to the trial court record on appeal. The two volume appendix accompanying the Petitioners' Appendix to their 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. The letters "R.A." followed by a page citation refer to the particular page of the Appendix attached to Respondent's Brief on the Merits.

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 thus the letters "Tr." followed by the page number will be used to refer to those trial proceedings.

All emphasis in the Respondent's Brief on the Merits is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND OF THE FACTS

DR. PRICE supplements and clarifies the Statement of the Case and of the Facts in the Petitioners' Initial Brief on the Merits as follows:

The First District's discussion concerning the constitutionality of Section 768.21(8), Florida Statutes (1991), does not constitute an express declaration of the statute's constitutionality.[1] Instead, the First District's commentary on that issue constitutes nothing more than an advisory statement and is purely *dicta*. The majority recognized the advisory nature of its Opinion when it stated that it was addressing the constitutional challenge, despite the absence of a liability finding, "because of the reasonable possibility that on remand the question of damages will be addressed." Stewart, 718 So. 2d at 209, n. 3. Moreover, as Judge Benton stated in his concurring opinion:

> Inasmuch as no liability had been found, it was unnecessary for the trial court to reach the question of the constitutionality of section 768.21(8), Florida Statutes (1991). Nor would I reach that question at this juncture. I concur in reversing for a new trial on liability, because the trial court erred, for the reasons the majority has set out, in excluding Dr. Bader's testimony. (emphasis added)

718 So. 2d at 210.

With regard to the evidence presented at trial, DR. PRICE never claimed that his practice focused on "internal medicine." To the contrary, the majority of DR. PRICE's

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[1] Consequently, there is no basis for invoking this Court's discretionary jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i).

practice was devoted to general family medicine. [Tr. 559]. DR. PRICE treated Mrs. Pittman, not as an internal medicine specialist, but rather as her general family practice doctor. [Tr. 559].

During the time that DR. PRICE treated Mrs. Pittman, she never once complained of any problem with her toe. [Tr. 1139]. He treated her for a number of problems, including stasis dermatitis, for which he prescribed hydrocortisone cream. [Tr. 193-194]. However, DR. PRICE never told Mrs. Pittman to use the hydrocortisone cream on her toe. [Tr. 212].

After Mrs. Pittman's death, Dr. Carroll, a pathologist, conducted an autopsy, listing the cause of death as massive GI bleeding from the upper gastrointestinal tract. [Tr. 887]. Dr. Carroll believed that there were two potential sources that caused the bleeding, a stomach ulceration caused by the metastatic melanoma, and esophageael varices with submucosa hemorrhage related to cirrhosis of the liver. [Tr. 887-888, 906-907]. Dr. Carroll could not, however, ascribe a percentage of the bleeding between the stomach and the esophagus. [Tr. 907-908]. Rather, she could only state that the two sources of bleeding were concurrent causes of Mrs. Pittman's death. [Tr. 900].

Finally, defense counsel did not, at trial, attempt to portray DR. PRICE as a specialist in internal medicine. In fact, counsel asked DR. PRICE whether he was board certified in internal medicine and DR. PRICE replied: "No, I am not." [Tr. 560].

QUESTIONS PRESENTED

The Respondent, I.B. PRICE, M.D., prefers to restate the questions presented for decision more precisely and accurately as follows:

I. WHETHER SECTION 768.21(8), FLORIDA STATUTES (1991), IS CONSTITUTIONAL?

II. WHETHER THE FIRST DISTRICT'S DECISION TO PERMIT THE STANDARD OF CARE TESTIMONY OF DR. BADER, AN INTERNAL MEDICINE SPECIALIST, IS ERRONEOUS AND SHOULD BE REVERSED?

III. WHETHER THE EXCLUSION OF EVIDENCE CONCERNING DR. PRICE'S FAILURE TO PASS THE BOARD EXAMINATION IN INTERNAL MEDICINE WAS NOT ERRONEOUS AND DOES NOT CONSTITUTE GROUNDS FOR A NEW TRIAL?

IV. WHETHER THE TRIAL COURT PROPERLY ENTERED A DIRECTED VERDICT ON THE CAUSE OF MRS. PITTMAN'S DEATH?

SUMMARY OF THE ARGUMENT

Both the trial court and the First District Court of Appeal properly determined that Section 768.21(8), Florida Statutes (1991), is constitutional.

The decision of the Legislature to extend the right to recover noneconomic damages to the adult surviving children of a decedent who dies of causes unrelated to medical malpractice does not violate the Right of Access to the Courts. Section 768.21(8) does not, notably, preclude the adult surviving children of a decedent from entering the courthouse. In other words, Section 768.21(8) has not abolished "the right of access to the courts for redress for a particular injury . . . provided by statutory law" or the common law. The adult surviving children of a decedent have never had a common law or statutory right to recover damages for their own noneconomic losses. Section 768.21(8) simply does not extend a right to certain adult surviving children which they have never had.

Section 768.21(8), Florida Statutes (1991), also passes constitutional muster under the Petitioners' Equal Protection challenge. The legislative history underlying the enactment of Section 768.21(8) demonstrates that the purpose of the exclusion set forth in that provision was to prevent increases in insurance premiums in order to keep medical care both affordable and accessible. The Legislature's enactment of Section 768.21(8) bears a rational relationship to the legitimate state interest of preserving the accessibility of health care for Florida residents by curtailing medical malpractice costs. Petitioners have failed to establish beyond a reasonable doubt that the statute has no conceivable factual predicate to support the classification. When the Legislature chose to expand

wrongful death recovery to certain classes of survivors, it was not required to expand it to all classes of survivors. Therefore, the presumption of validity that is afforded to legislative enactments has not been overcome.

Petitioners' Substantive Due Process challenge must also fail. Since there is no constitutional right to wrongful death damages, Petitioners' challenge is subject to a "rational basis" analysis virtually identical to the one applied to Equal Protection challenges. Petitioners' Substantive Due Process challenge must therefore fail for the same reasons that their Equal Protection claim failed.

Should this Court declare Section 768.21(8) unconstitutional, Chapter 90-14 must necessarily be condemned in its entirety. In other words, Sections 768.21(3) and (4) cannot survive a declaration that Section 768.21(8) is unconstitutional. These sections are "so inseparable in substance that it can[not] be said that the Legislature would have passed the one without the other."

The First District did err in reversing the trial court's decision to exclude the opinion testimony of Dr. Bader concerning the appropriate standard of care of a family practice physician. Dr. Bader was neither a "similar health care provider" nor did he possess sufficient training, knowledge or experience in family practice so as to qualify as an expert witness pursuant to Section 766.102, Florida Statutes (1991). Furthermore, since the Petitioners and DR. PRICE both presented one expert witness on the standard of care, limiting Dr. Bader's testimony, if error by the trial court, was harmless and does not require a new trial.

The First District properly concluded that the trial court did not err in excluding the irrelevant and unfairly prejudicial evidence concerning DR. PRICE's failure to pass the oral portion of his board examination in internal medicine. DR. PRICE's qualifications in internal medicine were irrelevant to this action since he provided treatment to Mrs. Pittman simply as her family practice physician.

Finally, the First District properly rejected the Petitioners' contention that the trial court erred in directing a verdict on the cause of Mrs. Pittman's death. The evidence and expert testimony clearly establish that, within a reasonable degree of medical probability, Mrs. Pittman died of metastatic melanoma. Even after drawing every reasonable inference in favor of the Petitioners, there was no reasonable basis to conclude that Mrs. Pittman died of anything else.

ARGUMENT

I. SECTION 768.21(8), FLORIDA STATUTES (1991), IS CONSTITUTIONAL.

Florida's Wrongful Death Act, Section 768.16 through Section 768.27, Florida Statutes, creates statutory causes of action on behalf of various "survivors" of persons who died because of the wrongful act of another. The provision of the Wrongful Death Act at issue in this case, Section 768.21, Florida Statutes (1991), defines the elements of damages that may be awarded to the estate for the various losses incurred by the decedents and their survivors. Since its enactment in 1972, the Legislature has expanded the scope of damages allowable under the Wrongful Death Act three (3) times. *See* Chapters 81-183, 85-260 and 90-14, Laws of Florida. A claim for wrongful death was not authorized at common law and, therefore, claimants are strictly limited to the damages allowed under the statutory scheme of recovery. *See* White v. Clayton, 323 So. 2d 573, 575 (Fla. 1975).

The Petitioners' challenge in this case is to Chapter 90-14, Laws of Florida. This Act permits adult children of persons who die from the wrongful act of another to assert a cause of action for wrongful death if there is no surviving spouse of the decedent. The Act also permits the parents of an adult child to recover damages for mental pain and suffering if there are no other survivors. These provisions expand the allowable damages under the Wrongful Death Act which were not previously authorized by the Legislature. As part of the same Act, however, the Legislature declined to extend these new forms of damages to claims for medical malpractice as defined by section 766.106(1).

Petitioners have no disagreement with the Legislature's expansion of the causes of action and damages allowable under the Wrongful Death Act. Petitioners claim, however, that the Legislature acted unconstitutionally by not extending the expansion of the Wrongful Death Act to include medical malpractice claims.

Section 768.21, Florida Statutes (1991), of the Wrongful Death Act, states in pertinent part:

> (3) Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for any mental pain and suffering from the date of the injury.
>
> . . . .
>
> (8) The damages specified in subsection (3) shall not be recoverable by adult children, and the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical malpractice as defined in s. 766.106(1).

§ 768.21(3), (8), Fla. Stat. (1991).

Petitioners challenge the statute on the grounds that it violates the Right of Access to the Courts guaranteed under Article I, Section 21 of the Florida Constitution and under the Sixth and Fourteenth Amendments of the United States Constitution; that it violates the Equal Protection Clause, Article I, Section 2 of the Florida Constitution and the Fourteenth Amendment of the United States Constitution; and, that is violates their Substantive Due Process Rights under the Florida and United States Constitutions. With regard to the Equal Protection and Substantive Due Process challenges, Petitioners assert that there is no rational distinction between death by medical malpractice and death by

any other tort. Petitioners further contend that the statute creates a classification which is discriminatory, arbitrary and irrational and bears no reasonable relation to any legitimate state objective.

A. Section 768.21(8) does not Violate the Petitioners' Right of Access to the Courts.

The First District in Stewart correctly disposed of Petitioners' access to the courts challenge with the following statement:

> Chapter 90-14 closed no courthouse doors. Rather, it opened, albeit only for some, those doors by creating a limited right of recovery where no recovery had previously existed at all. We find section 768.21(8) constitutes therefore neither a denial of due process nor a denial of access to courts. In short, Appellants have failed to overcome the presumption of constitutionality of this statute. *See Florida Dep't of Education v. Glasser*, 622 So. 2d 944 (Fla. 1993).

Stewart, 718 So. 2d at 210.

The test applied in access to courts challenges is set forth in the seminal case of Kluger v. White, 281 So. 2d 1 (Fla. 1973). While Petitioners acknowledge the Kluger standard, they clearly misapply it. The first inquiry in an access to the courts analysis is, as Petitioners correctly point out, whether "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 by "the common law." Kluger, 281 So. 2d at 4 (emphasis added). If the answer to this inquiry is no, the statute does not violate the Right of Access to the Courts. If the answer is yes, the inquiry must go further.

DR. PRICE submits that this Court does not have to go any further than the first inquiry. Petitioners concede "that the common law did not recognize actions for wrongful

death."[2] [Petitioners' Brief on the Merits, p. 12]. Petitioners then, however, spuriously argue that redress for the "particular injury" existed via the statutory survival action provided by section 46.021, Florida Statutes (1967), and its predecessors.[3] Petitioners' argument conveniently ignores the very nature of the damages they are so vehemently seeking to recover.

Statutory survival actions permitted the recovery of damages for, among other things, the **injured person's** pain and suffering, regardless of whether the injury resulted in death. *See* Martin v. United Security Services, Inc., 314 So. 2d 765, 767 (Fla. 1975). The damages Petitioners seek here, however, are for **their own** "lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury." *See* § 768.21(3), Fla. Stat. (1991). Statutory survival actions have never, without dispute, permitted an adult surviving child to personally recover such noneconomic damages. *See* Martin, 314 So. 2d at 767-768. Accordingly, Section 768.21(8) has not abolished "the right of access to the courts for redress for a particular injury . . . provided by statutory law" and it thus passes constitutional muster.

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[2] The *Amici* on the Petitioners' behalf, nevertheless, seek to change over 200 years worth of common law, without justification and legal support.

[3] The *Amici* for Petitioners similarly contend that Florida's 1972 Wrongful Death Act abolished the right, under the Survival Statute, to recover the decedent's pain and suffering which thereafter benefitted the decedent's heirs. [Amici's Brief, pp. 15-18]. *Amici* fail to realize, however, that the Survival Statute has never conferred the adult surviving children of a decedent with any rights or causes of action. Adult surviving children have never had a right to sue for the decedent's pain and suffering. That right has **only** belonged to the decedent or the decedent's estate. Similarly, the Survival Statutes have never conferred adult surviving children with the right to recover the noneconomic damages they sustained as a result of the decedent's death.

Section 768.21(8) does not, very importantly, preclude the adult surviving children of a decedent from entering the courthouse. It simply does not extend to some of them the right to recover noneconomic damages. Petitioners are therefore in no worse position than they were prior to the enactment of Section 768.21(8).

Finally and incredibly, Petitioners also appear to be challenging the 1972 Wrongful Death Act, in its entirety, on access to the courts grounds. In particular, Petitioners question the propriety of substituting the injured person's right to recover pain and suffering damages (which are inherited by surviving beneficiaries if the injured person died) for the close relative survivors' right to recover noneconomic damages. This Court specifically and expressly addressed Petitioners' concerns over 24 years ago in Martin v. United Security Services, Inc., 314 So. 2d 765 (Fla. 1975), and 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. . . .
>
> . . . .
>
> . . . The claim for pain and suffering of the decedent from the date of injury to the date of death was eliminated. Substituted therefor was a claim for pain and suffering of close relatives, the clear purpose being that any recovery should be for the living and not the for the dead. . . .
>
> . . . .
>
> [W]e believe that the new right of surviving close relatives to recover for their own pain and suffering brought about by the wrongful death of a decedent is a reasonable alternative to dividing among the survivors the amount formerly recoverable under Section 46.021, Florida Statutes, for the

> decedent's pain and suffering, if any. The new item of damages is much more susceptible of proof, since the party claiming damage for the pain and suffering is available to testify, while the claim formerly permitted under Section 46.021 for the decedent's pain and suffering had to be based upon testimony of others. (emphasis added)

314 So. 2d at 767-771.

B. Section 768.21(8) does not Violate the Right to Equal Protection.

Petitioners also argue that Section 768.21(8) violates the Equal Protection Clause because it creates an irrational distinction between adult child survivors in medical negligence cases and adult child survivors in non-medical negligence cases. However, as the First District noted in Stewart:

> [U]nder the common law an adult, who has not been dependant on a parent, was not entitled to recover damages for the wrongful death of a parent. (citations omitted). Prior to the enactment of Chapter 90-14, Laws of Florida, under section 768.21(3) only *minor* children could recover damages for their pain and suffering upon the wrongful death of a parent. (citation omitted). . . .
>
> 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, however, section 768.21(8) may be declared an unconstitutional denial of equal protection only if it bears no rational relationship to a legitimate state objective. . . . We find no constitutional barrier to the legislature's subsequent *limited* grant of the right to recover damages for pain and suffering to adult, nondependant children. 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). (italics in the original)

718 So. 2d at 209-210.

The Third District in Mizrahi v. North Miami Medical Center, Ltd., 712 So. 2d 826 (Fla. 3d DCA 1998), likewise recognized the public purpose served by Section 768.21(8) and the rational relationship of this statutory section to such purpose:

> 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. [sic] (1995). Obviously, these escalating insurance costs adversely impact not only physicians but also, ultimately, their patients through the resultant increased cost of medical care.
>
> . . . .
>
> 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. It is beyond question that the accessibility of health care for Florida residents, preserved by curtailing medical malpractice costs, is a legitimate interest of the state. (italics in the original)

712 So. 2d at 828-829.

Petitioners, as the party challenging Section 768.21(8), must overcome the presumption of validity which is afforded to legislative enactments. Belk-James, Inc. v.

Nuzum, 358 So. 2d 174 (Fla. 1978); State v. McDonald, 357 So. 2d 405 (Fla. 1978). This presumption will survive unless the Petitioners prove, beyond a reasonable doubt, that the statute is unconstitutional. Belk-James, 358 So. 2d at 177. Petitioners attempt to satisfy their heavy burden by conveniently contending that the appropriate level of judicial scrutiny involves application of the "strict scrutiny" analysis. DR. PRICE submits that Section 768.21(8) should be analyzed under a "rational basis" standard and not given "strict scrutiny."

The "strict scrutiny" analysis "applies only when the statute operates to the disadvantage of some suspect class such as race, nationality, or alienage or impinges upon a fundamental right explicitly or implicitly protected by the constitution." In re Estate of Greenberg, 390 So. 2d 40, 43 (Fla. 1980). Petitioners implicitly concede that Section 768.21(8) does not adversely impact upon a suspect class. Petitioners argue instead that the statute violates their fundamental right of access to the courts. In the process, Petitioners utterly ignore the fact that the statutory right at issue, and which they are so vehemently fighting for, is the right to recover noneconomic damages under the Wrongful Death Act, not the right to sue under the Act. The right to wrongful death damages is not, however, a fundamental right because it does not flow from either the United States or Florida Constitution. Mizrahi, 712 So. 2d at 828, n. 4; *see* De Ayala v. Florida Farm Bureau Casualty Insurance Company, 543 So. 2d 204, 206 (Fla. 1989). In other words, the right to wrongful death damages is created by statute and is not fundamental in nature. *See* In re Estate of Greenberg, 390 So. 2d at 43 (testator's statutory rights to appoint a

personal representative not fundamental). A "strict scrutiny" standard of review is thus clearly inappropriate under the instant circumstances.

As recognized by the First District in Stewart and the Third District in Mizrahi, since no suspect class or fundamental right is implicated by Section 768.21(8), the test of constitutionality is whether this statutory provision has a rational relationship to a legitimate state interest. Stewart, 718 So. 2d at 209; Mizrahi, 712 So. 2d at 828; *see also* Vildibill v. Johnson, 492 So. 2d 1047 (Fla. 1986) (court used rational basis test in determining constitutionality of provision of Wrongful Death Act which allowed parents to recover for adult's child net accumulations only if there were no surviving lineal defendants); Pinillos v. Cedars of Lebanon Hospital Corp., 403 So. 2d 365 (Fla. 1981) (court applied rational basis test to determine constitutionality of section 768.58, Florida Statutes, which required judgments rendered in medical malpractice actions to be reduced by amounts received by plaintiffs from collateral sources). Under this "rational basis" test,

> the equal protection clause is not violated merely because a classification made by the laws is not perfect. Equal protection does not require a state to choose between attacking every aspect of the problem or not attacking it at all, and a statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it. (citation omitted). To be constitutional, a statutory classification need not be all inclusive.

In re Estate of Greenberg, 390 So. 2d at 46. Moreover,

> [u]nder a 'rational basis' standard of review a court should inquire only whether it is conceivable that the regulatory classification bears some rational relationship to a legitimate state purpose. (citation omitted). The burden is upon the

> party challenging the statute or regulation to show that there is *no* conceivable factual predicate which would rationally support the classification under attack. (italics in the original)

The Florida High School Activities Association, Inc. v. Thomas, 434 So. 2d 306, 308 (Fla. 1983).

Accordingly, Petitioners have the burden of proving beyond a reasonable doubt that Section 768.21(8) has no conceivable factual predicate to support excluding recovery by adult children if the parent's death is a result of medical malpractice. As noted by the Third District in Mizrahi, "[i]t is not the function of the courts to agree or disagree with whether the factual predicate actually exists, nor to quibble with the means selected by the legislature to accomplish its stated purpose for the challenged classification, so long as the classification is not wholly arbitrary." 712 So. 2d at 830.

In Woods v. Holy Cross Hospital, 591 F. 2d 1164, 1174 (5th Cir. 1979), the court, quoting Dandridge v. Williams, 397 U.S. 471, 485, 90 S. Ct. 1153, 1161 (1990), stated:

> In the area of economics and social welfare, a statute does not violate the equal protection clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice, it results in some inequality.'

Id. The courts have long recognized that "equal protection is not violated where a permissible classification includes one, but not others, who might have been included in the broader classification, as long as those within the legally formed class are accorded

equal treatment under the law creating the classification." State v. White, 194 So. 2d 601, 603 (Fla. 1967). When the Legislature chose to bring the classes of people benefitted by Chapter 90-14 within the scope of the Wrongful Death Act, the Constitution did not compel the Legislature to include all classes within the expanded scope of the Act. *See* State v. Peters, 534 So. 2d 760, 765 (Fla. 3d DCA 1988) (statute does not violate due process where legislative body could deny rights altogether).

The First District Court of Appeal in B & B Steel Erectors v. Burnsed, 591 So. 2d 644 (Fla. 1st DCA 1991), explained the "some rational basis" standard when employing the rational basis test:

> Under this standard, the courts uphold classifications so long as there appears to be any plausible reason for the Legislature's action, asking only whether it is *conceivable* that the classification bears a rational relationship to an end of government which is not prohibited by the government. It is 'constitutionally irrelevant' whether the plausible reason in fact supports the legislative decision, because the courts have 'never insisted that a legislative body articulate its reason for enacting a statute.' (citation omitted). This standard is 'highly deferential' toward the State's actions, and the burden is on the party challenging the law to establish that the State's action is without ***any*** rational basis. (italics in the original) (emphasis added)

591 So. 2d at 647; *see also* The Florida High School Activities Association, Inc. v. Thomas, 434 So. 2d 306 (Fla. 1983); Mizrahi, 712 So. 2d at 828.

In cases such as this one which involve an economic classification, the rational basis test is extremely lenient, a searching inquiry into the validity of legislative judgments is not required. Cash Inn of Dade, Inc. v. Metropolitan Dade County, 938 F. 2d 1239 (11th Cir. 1991) ("even if the court is convinced the [Legislature] made an

improvident, ill advised, or unnecessary decision,...it must uphold the act if it bears a reasonable relation to a legitimate governmental purpose"). As this Court stated in Smith v. Department of Insurance, 507 So. 2d 1080, 1095 (Fla. 1987), "[w]hether this is the best solution, or whether it will work, is not for this Court to determine." Additionally, where there is a plausible reason for a legislative enactment, it is constitutionally irrelevant whether that reason in fact underlay the legislative decision. McElrath v. Burley, 707 So. 2d 836, 839 (Fla. 1st DCA 1998); 10 Fla. Jur. 2d Constitutional Law, §414 (1999). Simply put, the rational basis test does not require an inquiry into whether the statutory classification effects a permissible goal in the best possible manner as some degree of imprecision or inequality is permitted. McElrath, 707 So. 2d at 839. This is a heavy burden and "any doubts [must] be resolved in favor of an enactment's constitutionality." *Id.*

Upon application of the "some rational basis" standard to the instant case, the First District properly held that Section 768.21(8) does not violate the constitutional guarantees of equal protection. The Florida Supreme Court has consistently recognized the public purpose served by various enactments addressing medical malpractice and the rational relationship of those enactments to such purpose. For example, in Pinillos v. Cedars of Lebanon Hospital Corp., 403 So. 2d 365 (Fla. 1981), this Court held that excluding recovery of "collateral sources" in medical malpractice actions did not violate the equal protection clause. In so holding, this Court recognized the reasonable relationship to a legitimate state interest of protecting public health by insuring the availability of adequate medical care for the citizens of this State. *Id.*, at 368.

Furthermore, Florida courts have repeatedly upheld Florida's Wrongful Death Act against due process and equal protection challenges where a certain class of persons were not permitted to recover damages under the Act. *See* Bassett v. Merlin, Inc., 335 So. 2d 273 (Fla. 1976); White v. Clayton, 323 So. 2d 573 (Fla. 1975); Capiello v. Goodnight, 357 So. 2d 225 (Fla. 2d DCA 1978).

The legislative history of Chapter 90-14, Laws of Florida, indicates that the Florida Legislature deliberately excluded medical malpractice claims from the Act expanding allowable wrongful death damages for other tort claims. [A. Vol. I, T. 7, pp. 74, 77-78; A. Vol. I, T. 8, pp. 82-86]. Otherwise, the Legislature would have undermined the many reforms it had enacted two (2) years before in Chapter 88-1, Laws of Florida, to address the medical malpractice insurance crisis in Florida. In this regard, it is important to keep in mind that, as this Court stated in University of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993),

> [t]he Legislature has the final word on declarations on public policy, and the courts are bound to give great weight to legislative determinations of facts. (citation omitted). Further, legislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous. (citations omitted).

618 So. 2d at 196.

Legislative committee considerations of the 1990 proposals further reinforce the Legislature's awareness of the potential problems associated with expanding wrongful death damages in medical malpractice claims. During a House Judiciary Subcommittee

Meeting, Mr. Paul Jess, representing the Academy of Florida Trial Lawyers, supported the proposal and stated:

> There was a study done last year by the department that said that there would be estimated approximately 2.5% rise in insurance rates as a result of this bill, but a larger percent increase as a result of medical malpractice. And that, I believe, is the basis why last year an amendment was made to the bill to exclude medical malpractice. So it does have a rational basis, although we believe philosophically, it probably should be covered. But there's certainly a rational basis for the bill that you have in front of you today. . . .

[R.A. 9].

The foregoing indicates that the rational basis for the Legislature's exclusion of medical malpractice claims in the enactment of Section 768.21(8) was to curtail rising medical costs while keeping medical services accessible to the public. In finding that there is a "rational" basis for the classification set forth in Section 768.21(8), the Third District in Mizrahi recognized that "accessibility of health care for Florida residents, preserved by curtailing medical malpractice costs, is a legitimate interest of the state." 712 So. 2d at 829.

Petitioners state that the First District in Stewart ignored the legislative history of Section 768.21(8). A cursory review of the Stewart decision shows that Petitioners' contention is meritless. In fact, the irony of the Petitioners' contention is the fact that the materials which comprise tab numbers 3 through 15 of the Appendix to Petitioners' Initial Brief on the Merits are exhibits which were part of the Record on Appeal transmitted to the First District. [R. 258, Exhibits 6, 14, 15a-15g, 18-21].

In addition to attacking the First District for purportedly ignoring the legislative history, Petitioners second-guess the Legislature and attack the legislative history itself. Petitioners have, in the span of eight pages in their Brief on the Merits, dissected under a microscope approximately 1100 pages worth of materials generated by the Academic Task Force created by the Legislature in 1986 to review the tort and insurance systems.[3] [Petitioners' Brief on the Merits, pp. 30-37]. In the process, Petitioners have done nothing more than disagree with and challenge the underlying data, without any corroboration. Petitioners' efforts have not, notably, negated the legislative history which demonstrates that the medical malpractice insurance crises which existed in 1988, when

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[3] The basis of the Task Force's Fact-Finding Report is broader and more extensive than indicated by Petitioners and includes the following:

> 1) seven public meetings and hearings in Tampa and Miami to receive presentations, recommendations and comments from experts and interested citizens; 2) a comprehensive literature search and review; and 3) eight research projects conducted in Florida which surveyed medical malpractice claims, closed claims, loss payments, profitability and other aspects of the insurance companies; studied data from the Insurance Services Office, a non-profit organization which collects data and files rate applications for liability carriers nationwide; a survey of 1,500 randomly selected physicians; a survey of 1,500 attorneys who regularly handle tort cases; conducted a computer analysis of the financial situation of commercial liability insurance carriers; and an analysis of Florida's civil litigation rates. The Academic Task Force then conducted a six-hour hearing in Gainesville to preview the preliminary findings from the eight research projects. Fact-Finding Report at 23-24.

University of Miami v. Echarte, 618 So. 2d at 196, n. 17. [A. Vol. II, T. 13, pp. 498-499].

Section 766.201(1) was enacted, was still in existence in October of 1990 when Section 768.21(8) took effect.[4] For example, Judge Spicola in Jones v. Abernathy, Third Judicial Circuit, Case No. 92-8661, cites to Senator Bob Johnson's testimony wherein he stated that he was a member of the Legislature in 1988 and information was presented on the on-going medical malpractice crisis in Florida and the need to curtail these costs to keep medical care both affordable and accessible. [*See* R.A. 9]

Moreover, if anyone has ignored the legislative history of Chapter 90-14, it is the Petitioners. That legislative history, as relied on by the Third District in Mizrahi, establishes a "rational basis" for the challenged classification.

> 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. . . . 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 has been caused by medical malpractice, contained in subsection (8), was expressly linked to the same 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.*

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[4] Contrary to the suggestion of Petitioners and the Amici for Petitioners, the medical malpractice crisis continues to exist affecting the availability and affordability of health care for millions of Floridians. *See* S.Rep. 104-83, 1995 WL 311930 (1995).

> *709 Before Fla. House Judiciary-Civil Comm*., Fla. House, 1990 Session (Apr. 16, 1990).

Mizrahi, 712 So. 2d at 828-829.[5]

Petitioners' suggestion that a greater numerical threshold must be met before a "legitimate state interest" finding can be made is without merit. An increase of 4.5% in medical malpractice insurance rates, absent the exclusion for medical malpractice claims

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[5] Section 766.201(1), Fla. Stat. (1991), cited in both Stewart and Mizrahi, provides in pertinent part:

> (1) The Legislature makes the following findings:
>
> > (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.
> >
> > (b) The primary cause of increased medical malpractice liability insurance premiums has been the substantial increase in loss payments to claimants caused by tremendous increases in the amounts of paid claims.
> >
> > (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.
> >
> > (d) The high cost of medical malpractice claims in the State can be substantially alleviated . . . by imposing reasonable limitations on . . . damages. . . .

§ 766.201(1)(a-d), Fla. Stat. (1991).

set forth in Section 768.21(8), is substantial in light of the legislative findings set forth in Section 766.201(1), Fla. Stat. (1991). Those findings are not, by the way, limited by the Legislature's announced intent to provide a plan for prompt resolution of medical malpractice claims. Rather, the findings set forth in Section 766.201(1) are a proper predicate for the trial court's and the First District's conclusion that the Legislature had a "legitimate state interest" in enacting Section 768.21(8).

Courts do not, moreover, require mathematical certainty, as long as there is some reasonable relation to a permissible legislative objective. *See* Woods v. Holy Cross Hospital, 591 F. 2d 1164 (5th Cir. 1979). The prevention of any increase to the already staggering and unaffordable medical malpractice liability insurance premiums is a "legitimate state interest." In light of the astronomical medical malpractice liability insurance premiums in Florida, the fact that Section 768.21(8) was enacted in order to prevent a future increase of 4.5%, constitutes a reasonable relation to a permissible legislative objective.

Notably, the Third District in Mizrahi recognized that "[t]he statute as written allows minor children who suffer lost parental companionship, instruction, and guidance, pain and suffering, to recover for those losses regardless of the type of negligence precipitating the claim." 712 So. 2d at 829. Accordingly, the Third District stated that the statute "affords the broadest recovery to those arguably most in need of compensation for the type of damages at issue." The Third District also recognized that "[a]t the same time, in an effort to control skyrocketing medical costs, the statute restricts these limited

basis for recovery, when made by adult children, arguably those better able to survive the specific types of harm at issue." *Id*.

In conclusion, as stated by the Third District in Mizrahi:

> The fact that the legislature, through chapter 90-14, chose to expand avenues of wrongful death recovery to certain classes of survivors does not mean that it was required to open the door to all classes of survivors. The appellants have failed to overcome the presumption of section 768.21(8)'s constitutionality. (citations omitted). It is well established that this presumption of validity will survive unless the challenging party proves beyond a reasonable doubt that the statute is unconstitutional - that there is no conceivable factual predicate to support the classification the statute contains. (citations omitted). The appellants have not met this difficult burden.

712 So. 2d at 829. The Petitioners in the instant case have similarly failed to meet the difficult burden of overcoming the presumption of validity.

C. Section 768.21(8) Does Not Violate the Substantive Due Process Guarantees.

The constitutional guarantees of Substantive Due Process protect **fundamental** rights or, in other words, those rights flowing from either the United States or Florida Constitution. Mizrahi, 712 So. 2d at 828, n. 3. The Third District in Mizrahi addressed Section 768.21(8)'s constitutionality with regards to substantive due process, in *dicta,* and stated that "there is no such constitutional right to wrongful death damages; wrongful death actions did not exist at common law and were created by the legislature." Mizrahi, *supra*; *see also* White v. Clayton, 323 So. 2d 573, 575 (Fla. 1975). Here, as in Mizrahi, no fundamental right is consequently implicated.

Furthermore, given the absence of a fundamental right, Petitioners' Substantive Due Process challenge is subject to an analysis which "is virtually identical to the rational basis test for evaluating equal protection challenges." Mizrahi,712 So. 2d at 828, n. 3. The "rational basis" analysis applied by DR. PRICE in the foregoing section with regard to Petitioners' Equal Protection challenge therefore equally applies to Petitioners' Substantive Due Process claim. That analysis, thoroughly discussed above, establishes that Substantive Due Process is not implicated or violated at all. *Id*.

D. Section 768.21(8), if Unconstitutional, Cannot Be Severed from Sections 768.21(3) and (4).

Declaring Section 768.21(8) unconstitutional requires a declaration that the remainder of the legislation enacted by Chapter 90-14, namely Sections 768.21(3) and (4), is invalid. The various sections of Chapter 90-14 simply cannot be severed, contrary to Petitioners' suggestion.

An unconstitutional portion of a statute may be severed from the remainder of the statute and the remainder will survive **only** if all four prongs of the severability test set forth by this Court in Cramp v. Board of Public Instruction of Orange County, 137 So. 2d 828, 830 (Fla. 1962), are met.[6] *See* Smith v. Department of Insurance, 507 So. 2d 1080,

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[6] The Cramp test allows the unconstitutional portions of an act to stand **only** if:

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

1089-1090 (Fla. 1987). The failure to satisfy **any** prong precludes severance. Smith, *supra*; Cramp, *supra*. DR. PRICE submits that the third prong of the Cramp test cannot be satisfied and that Section 768.21(8) thus cannot be severed.[7]

The third prong of the Cramp test permits severance only if "the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other." 137 So. 2d at 830. In this regard, the Legislature's decision not to include a severability clause in Chapter 90-14 supports the conclusion that Sections 768.21(3) and (4) are inseparable from Section 768.21(8) and would not have passed without the inclusion of Section 768.21(8). *Cf.* Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987) ($450,000 cap on noneconomic damages was severable from remainder of Tort Reform and Insurance Act where Legislature specifically provided that any provision of Act found to be invalid should be severed).

The inseparable nature of the sections of Chapter 90-14 is further evidenced by the legislative history. The Legislature simply would not have passed Sections 768.21(3) and (4) without Section 768.21(8). In fact, Sections 768.21(3) and (4) did not pass one year earlier when Section 768.21(8) was not part of the proposed legislation. [A. Vol. I, T. 6,

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invalid provisions are stricken.

137 So. 2d at 830.

[7] Petitioners, in applying Cramp, incorrectly analyze Section 786.21(8) in conjunction with the 1972 Wrongful Death Act instead of with Chapter 90-14, Laws of Florida.

pp. 45-71; A. Vol. I, T. 7, pp. 72-81; A. Vol. I, T. 8, pp. 82-93; A. Vol. I, T. 9, pp. 94-99; A. Vol. I, T. 10, pp. 100-110; R.A. 1-9]. Moreover, when Chapter 90-14 was being considered, the Legislature was clearly concerned about the current medical malpractice crisis. *Id.* The last thing the Legislature wanted to do was exacerbate the crisis by enacting legislation which would have further increased medical malpractice liability insurance premiums at the expense of the affordability and accessibility of health care. *Id.* Declaring Section 768.21(8) unconstitutional will therefore necessarily condemn Chapter 90-14 in its entirety, including Sections 768.21(3) and (4).

II. THE FIRST DISTRICT'S DECISION TO PERMIT THE STANDARD OF CARE TESTIMONY OF DR. BADER, AN INTERNAL MEDICINE SPECIALIST, IS ERRONEOUS AND SHOULD BE REVERSED.

DR. PRICE, the Respondent, practiced internal medicine, but the majority of his time was devoted to his general family medical practice. [Tr. 152, 559-560]. He is not certified in either specialty. [Tr. 147, 550]. The undisputed facts are that DR. PRICE treated Mrs. Pittman, not as an internal medicine specialist, but as a general family practice doctor. [Tr. 559]. Since there was no evidence presented to the contrary, whether DR. PRICE considered himself a specialist in internal medicine has no relevance to any issue in this matter.

DR. PRICE is trained and experienced in family practice (although not certified). Accordingly, a similar health care provider is one who "[is] trained and experienced in the same specialty," and "[is] certified by the appropriate American board in the same specialty." § 766.102(2)(b), Fla. Stat. (1993). Dr. Paul Bader clearly does not qualify under this statute as a similar health care provider. Dr. Bader is neither trained and experienced nor board certified in family practice medicine. [R. 3907-3987]. Dr. Bader is board certified in internal medical [R. 3977], hence, the Petitioners' misguided concentration on this aspect of DR. PRICE's practice. Dr. Bader's area of practice and expertise is, however, in medical oncology, with 60% of his practice spent in that area and the other 40% in hematology. [R. 3923-3935]. He does not see patients for general examinations, and simply does not engage in general family practice. [R. 3983].

Since Dr. Bader is not a similar health care provider as defined in Section 766.102, he could only testify as an expert in this matter if the trial court was satisfied that Dr. Bader possesses "sufficient training, experience and knowledge" in the area of general practice so as to be qualified to render an opinion on the appropriate standard of care. §766.102(2)(c)2, Fla. Stat. (1993). The trial court was not, however, satisfied that Dr. Bader possessed the requisite training, experience or knowledge and appropriately precluded Dr. Bader from providing opinion testimony concerning the standard of care required of a general family practice physician in conducting physical exams. Such a decision is ordinarily conclusive, and is entitled to great weight on appeal. *See* Ramirez v. State, 542 So. 2d 352 (Fla. 1989) ("the determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error"); Mathieu v. Schnitzer, 559 So. 2d 1244 (Fla. 4th DCA 1990). It should be noted that Dr. Bader was allowed to render expert testimony about Mrs. Pittman's cancer, an area in which he was qualified to testify.

Even if Dr. Bader's testimony on the standard of care was improperly excluded, the Petitioners have not demonstrated that they were unfairly prejudiced. The same testimony the Petitioners sought to elicit from Dr. Bader was provided by Dr. Evans, Mrs. Pittman's treating physician, who was also retained by the Petitioners as an expert witness. [Tr. 307-310]. Thus, both Petitioners and the Respondent put on one expert witness each concerning the standard of care. The excluded testimony from Dr. Bader

was, therefore, cumulative and could have been properly excluded regardless of Dr. Bader's qualifications. § 90.403, Fla. Stat. (1993).

The number of witnesses (expert or not) that each side may call at trial is within the discretion of the trial court. Fogel v. Mirmelli, 413 So. 2d 1204 (Fla. 3d DCA 1982). Limiting the number of expert witnesses that each side may call has been recognized as an appropriate power of the trial court. Stager v. Florida East Coast Railway Co., 163 So. 2d 15 (Fla. 3d DCA 1964), *cert. discharged,* 174 So. 2d 540 (Fla. 1965); Ritter v. Jimenez, 343 So. 2d 659 (Fla. 3d DCA 1977). In fact, a trial court may limit experts to one expert per side. Carpenter v. Alonso, 587 So. 2d 572 (Fla. 3d DCA 1991); *see also* Gold, Vann & White v. DeBerry, 639 So. 2d 47 (Fla. 4th DCA 1994). Any error in limiting the testimony of Dr. Bader was therefore harmless and does not constitute grounds for a new trial.

III. THE EXCLUSION OF EVIDENCE CONCERNING DR. PRICE'S FAILURE TO PASS THE BOARD EXAMINATION IN INTERNAL MEDICINE WAS NOT ERRONEOUS AND DOES NOT CONSTITUTE GROUNDS FOR A NEW TRIAL.

Admittedly, DR. PRICE did not pass the oral portion of his certification examination in internal medicine. [10/10/94, V. I, Tr. 137]. It is not true, however, that DR. PRICE "freely boasted" at trial of being a specialist in internal medicine. [Petitioners' Brief on the Merits, pp. 5, 46]. His testimony that he "[b]asically . . . considered [himself] an internal medicine specialist," [Tr. 152], was in response to a specific question posed by Petitioners' counsel. At no time during his testimony did DR. PRICE attempt to emphasize the internal medicine aspect of his practice. Defense counsel never attempted to portray DR. PRICE as a specialist in internal medicine. In fact, DR. PRICE's attorney specifically asked, "Doctor, you're not board certified in internal medicine, are you?" To which DR. PRICE replied, "No, I am not." [Tr. 560]. DR. PRICE also made it clear that he was not treating Mrs. Pittman as an internal medicine specialist, but rather simply as her general practice doctor. [Tr. 559].

Petitioners argue that DR. PRICE's failure to pass his oral boards is relevant evidence as to his lack of skill. [Petitioners' Brief on the Merits, p. 47]. If DR. PRICE's skill as an internal medicine physician were an issue in the case, then such an argument might have merit. Relevant evidence, however, "is evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. (1993) (emphasis added). Whether DR. PRICE passed or failed his oral boards in internal medicine simply is not material to the issue in

this case - whether he deviated from the standard of care required of a family practice physician in his care and treatment of Mrs. Pittman. Since this evidence was not relevant, it was properly excluded. § 90.402, Fla. Stat. (1993). At most, it was evidence concerning a collateral matter, the admission of which is within the broad discretion of the trial judge. Toyota Motor Co., Ltd. v. Moll, 438 So. 2d 192 (Fla. 4th DCA 1993). The Petitioners have failed to demonstrate that the trial court (or the First District Court of Appeal) abused its discretion in excluding this evidence and, thus, are nor entitled to a new trial.

Regardless of the relevancy, the trial court properly determined that the prejudicial impact of this evidence substantially outweighed whatever probative value it had. [10/11/94, Tr. 13-14]. "Where a trial court has weighed probative value against prejudicial impact before reaching its decision to admit or exclude evidence, an appellate court will not overturn that decision absent a clear abuse of discretion." Sims v. Brown, 574 So. 2d 131 (Fla. 1991). The trial court properly concluded that the jury would unfairly find DR. PRICE negligent based in part on his failure to pass the oral portion of a board examination in a specialty different from the one he was practicing while rendering services to Mrs. Pittman. The Petitioners have failed to demonstrate that this ruling constituted a clear abuse of discretion and, thus, is not grounds for a new trial.

Even if this evidence was improperly excluded, such error does not mandate a new trial. Not every error committed during trial warrants setting the verdict aside. Gills v. Angelis, 312 So. 2d 536 (Fla. 2d DCA 1975), *cert. denied*, 330 So. 2d 17 (Fla. 1976). Only "if the error complained of has resulted in a miscarriage of justice," should a new

trial be granted. Ford v. Robinson, 403 So. 2d 1379 (Fla. 4th DCA 1981). This evidence at best concerned only a collateral matter, and had no bearing on whether there was a deviation from the standard of care. It likewise had no bearing on the issue of damages and, thus, its exclusion in no way resulted in a "miscarriage of justice." For this reason and the reasons above, the exclusion of the evidence in question does not require reversing the First District's decision and a new trial.

IV. THE TRIAL COURT PROPERLY ENTERED A DIRECTED VERDICT ON THE CAUSE OF MRS. PITTMAN'S DEATH.

The First District properly found that the Petitioners' argument on the propriety of the trial court granting DR. PRICE's Motion for a Directed Verdict on causation was meritless. Although not distinctly plead, the Petitioners were allowed to proceed at trial under two separate, inconsistent theories. [10/10/94, V. I, Tr. 109, 118-119]. The Petitioners' first theory was that DR. PRICE failed to either diagnose or properly treat the cancer on Mrs. Pittman's toe, and that she died as a result of this negligence. Their second theory was that DR. PRICE was negligent in the same manner, but that his negligence did not result in Mrs. Pittman's death. Since the evidence presented at trial clearly establish that Mrs. Pittman's cancer was the cause of her death, the trial court properly directed a verdict in favor of DR. PRICE only on the survival action.

Within a reasonable degree of medical probability, all of the evidence in this case shows that Mrs. Pittman died of metastatic melanoma. Both of the Petitioners' experts, Dr. Evans and Dr. Bader, testified that metastatic melanoma - not the complications from her cirrhotic liver - was the cause of Mrs. Pittman's death. [Tr. 417, 850]. DR. PRICE's experts, Dr. Hendrickson and Dr. Reintgen, did not testify concerning this issue. Dr. Evans, who signed Mrs. Pittman's death certificate, listed carcinomatosis (due to the melanoma) as the cause of death. [Tr. 306]. Dr. Evans' opinion at trial was that, within a reasonable degree of medical probability, Mrs. Pittman died because she had cancer. [Tr. 417]. Contrary to Petitioners' assertions, Dr. Evans did not state that he would defer

to the findings of Dr. Carroll. He merely stated that, due to her training, she had a "valid opinion." [Tr. 441].

Even if Dr. Evans had deferred to Dr. Carroll's opinion, that would not mandate a change in the result. Dr. Carroll's testimony did not establish that Mrs. Pittman's death, with a reasonable degree of medical probability, was not attributable to the cancer. Dr. Carroll testified that Mrs. Pittman died from a massive upper gastrointestinal hemorrhage or "bleed." [Tr. 898]. Dr. Carroll identified two locations for the bleeding that were the direct cause of Mrs. Pittman's death. One was Mrs. Pittman's stomach, where the metastatic melanoma had ulcerated and penetrated the stomach wall. [Tr. 887-888]. The second location was the esophagus, the bleeding there being caused by Mrs. Pittman's cirrhosis of the liver. [Tr. 901]. Dr. Carroll, however, could not, within a reasonable degree of medical probability, state which "bleed" was the primary cause of the hemorrhage that directly resulted in Mrs. Pittman's death. The following testimony makes it clear that Dr. Carroll could not rebut Dr. Bader's and Dr. Evan's testimony so as to create a fact issue concerning Mrs. Pittman's cause of death:

> Q. In terms of the massive upper GI bleed you cannot subscribe or ascribe a percentage of the bleeding between the stomach and the esophagus, is that correct?
>
> A. That's correct.

[Tr. 907-908].

In addition, Dr. Bader testified that absent the melanoma, Mrs. Pittman could have lived indefinitely, even though she had cirrhosis of the liver. [Tr. 853-854]. Given Dr. Carroll's testimony that the cancer and the liver disease were concurrent causes of Mrs.

Pittman's death [Tr. 900], there is no testimony that establishes that she would have lived, but for DR. PRICE's alleged negligence.

Even after drawing all inferences from the evidence in the light most favorable to the Petitioners, there is no reasonable basis to conclude that Mrs. Pittman died of anything other than the melanoma. Since Petitioners could not show that some other condition was, within a reasonable degree of medical probability, the cause of Mrs. Pittman's death, DR. PRICE was entitled to a directed verdict. This action was properly submitted to the jury as a wrongful death action only, and the jury's verdict for the Defendant should be affirmed.

CONCLUSION

For the above-stated reasons, Respondent, I.B. PRICE, M.D., respectfully requests this Honorable Court to approve the decision of the District Court of Appeal, First District, in all respects except for the First District's decision that the case be remanded for a new trial. In this regard, the Respondent respectfully requests this Honorable Court to affirm the Final Judgment entered in accordance with the jury's verdict for the Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above Respondent's Brief on the Merits and the Appendix attached hereto were mailed on this 25th day of August, 1999, to: **Tari Rossitto-Van Winkle, Esquire,** attorney for Petitioners, 1425 North Monroe Street, Tallahassee, Florida 32303; **Douglas M. McIntosh, Esquire** and **Jack Heda, Esquire**, McIntosh, Sawran, Peltz & Cartaya, P.A., Attorneys for Amicus Curiae, P.O. Box 029008, Fort Lauderdale, FL 33302-9008; **Harriet Rae Freeman, Esquire**, 105 S. Narcissus Ave., Ste. 412, West Palm Beach, FL 33401; **Barbara Scheffer, Esquire**, 11380 Prosperity Farms Rd., Suite 204, Palm Beach Gardens, FL 33401

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IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO.: 93,804

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

Petitioners,

vs.

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

Respondent.

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

APPENDIX TO BRIEF ON THE MERITS OF RESPONDENT, I.B. PRICE, M.D.

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