

**ORIGINAL**

**FILED**

SID J. WHITE

SEP 8 1998

**IN THE SUPREME COURT FOR THE  
STATE OF FLORIDA**

CLERK, SUPREME COURT  
By B. J. V.  
Chief Deputy Clerk

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

**Plaintiffs/Appellants,**

**vs.**

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

**Defendant/Appellee.**

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

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**APPELLANTS' BRIEF ON JURISDICTION**

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## STATEMENT OF CASE AND PROCEDURAL HISTORY

This court is being asked to review, as a matter of first impression, only that portion of the First District Court of Appeal's decision that expressly declares constitutional § 768.21(8), Florida Statutes (1991).<sup>1</sup> Section 768.21(8), Florida Statutes, is that portion of the Wrongful Death Act which creates an exemption from damages in medical malpractice cases, where there is no surviving spouse, for the lost companionship, instruction, guidance, and mental pain and suffering, endured by adult children, and parents, of an adult decedent. In all other torts, where there is no surviving spouse, adult children of a decedent, and parents of an adult child, are entitled to redress for their lost companionship, instruction, guidance, and mental pain and suffering.

In the proceedings below Mrs. Pittman originally filed a three-count medical malpractice Complaint and Jury Demand on March 15, 1991, alleging negligent diagnosis (melanoma mistaken for a fungus) and treatment, intentional misrepresentation and concealment of the condition, and negligent care and treatment of her cirrhosis of the liver. (R. 35.) After Mrs. Pittman's death on May 15, 1991, Plaintiffs amended the Complaint, (R. 153, 217, 219), to assert four malpractice claims along with four constitutional challenges to § 768.21(8), Florida Statutes (1991).

The Amended Complaint drew a Motion for Partial Summary Judgment, (R. 268), on the grounds that § 768.21(8), Florida Statutes, does not permit recovery when the survivors are the

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<sup>1</sup>"The [wrongful death] damages specified in subsection (3) [lost parental companionship, instruction, guidance, and mental pain and suffering] shall not be recoverable by adult children and the damages in subsection (4) [parent's mental pain and suffering] shall not be recoverable by parents of an adult child with respect to claims for medical malpractice as defined by s. 766.106(1)."

adult children of a medical malpractice victim. Plaintiffs moved to declare the statute unconstitutional. (R. 137, 241, 1619.) They argued that § 768.21(8), Florida Statutes (1991), offends three constitutional protections: (1) the right of access to courts under Art. I, § 21, Fla. Const.; (2) the state and federal constitutional rights of equal protection; and (3) the state and federal constitutional rights to due process, as the statute bears no rational relationship to its stated goals. The trial court found the statute constitutional, (R. 1766), and granted Summary Judgment on Counts Five through Eight of the Amended Complaint. The First District Court of Appeal declined interlocutory review of the constitutional issues prior to trial. (R. 1783 [Order dismissing appeal, District Court Case No. 93-3744]). However, on appeal from an adverse jury verdict and final judgment, the First District Court of Appeal granted Plaintiffs a new trial on the basis of reversible error; and, accepted Plaintiffs invitation to address the constitutionality of § 768.21(8), Florida Statutes, despite the absence of a liability determination, because of the reasonable likelihood that the issue would again surface on retrial. The First District Court of Appeal then specifically held § 768.21(8) of the Wrongful Death Act valid and denied Plaintiffs Motions for Rehearing and Certification of the question of the constitutionality of § 768.21(8), Florida Statutes (1991), as one of great public importance. (See App.2.)

### **SUMMARY OF ARGUMENT**

The decision of the First District Court of Appeal below expressly and directly conflicts with the decisions of the Third District Court of Appeal in *Mizrahi v. North Miami Medical Center, LTD.*, 712 So.2d 826 (Fla. 3rd DCA 1998) and *Garber v. Snetman*, 712 So.2d 481 (Fla. 3rd DCA 1998). In both *Mizrahi* and in *Garber* the Third District Court of Appeal certified to this court, as a matter of great public importance, the question of whether the medical

malpractice exemption in the Florida Wrongful Death Act, § 768.21(8), Florida Statutes (1995), violates the federal and state constitutional guarantees of equal protection. The First District Court of Appeal was asked to certify that same issue in the case at bar, and Plaintiffs' motion was denied. (See App. 2) This is expressly and directly in conflict with the Third District Court of Appeal decisions in *Mizrahi* and *Garber*. Conflict exists between the First and Third District Courts of Appeal on the question of whether or not the constitutionality of §786.21(8), Florida Statutes, is a matter of great public importance; and Jurisdiction should be exercised under Art. V, § 3(b)(3), Fla. Const.

In addition, Plaintiffs ask this court to take judicial notice of the cases of *Mizrahi* and *Garber* as both are currently pending before the Florida Supreme Court as: *Mizrahi v. North Miami Medical Center, LTD.*, 712 So.2d 826 (Fla. 3rd DCA 1998), Florida Supreme Court Case No. 93,649; and *Garber v. Snetman*, 712 So.2d 481 (Fla. 3rd DCA 1998), Florida Supreme Court Case No. 93,650. The case at bar involves the same issues, and similarly situated Plaintiffs, as those in *Mizrahi* and *Garber*. Plaintiffs properly and appropriately raised the issue of the constitutionality of § 768.21(8), Florida Statutes, in the trial court and on appellate review. This case is not yet final, as the direct review of *Mizrahi* and *Garber* proceeds. This case is thus a "pipeline case"<sup>2</sup> under *Mizrahi* and *Garber*. Jurisdiction should thus be exercised in this as well.

Finally, the decision of the First District Court of Appeal in this case also expressly declares valid a state statute and Jurisdiction under Art. V, § 3(b)(3), Fla. Const, should be

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<sup>2</sup> "Pipeline cases" are, those cases of similarly situated parties whose cases were pending on direct review, or not yet final during the time another controlling case was under consideration, but prior to the issuance of the opinion. *Mathis v. State*, 688 So.2d 334 (Fla. 1997).

exercised. The First District Court of Appeal specifically held that § 768.21(8), Florida Statutes, constitutional on the grounds that it did not violate the federal or state constitutional guarantees of either the equal protection or due process clauses; and did not infringe upon the Florida constitutional guarantee of access to courts under Art. I, § 21, Fla. Const.

**ARGUMENT**

**I. THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THAT OF ANOTHER DISTRICT COURT OF APPEAL AND JURISDICTION SHOULD BE EXERCISED.**

The decision of the First District Court of Appeal below expressly and directly conflicts with the decisions of the Third District Court of Appeal in *Mizrahi v. North Miami Medical Center, LTD.*, 712 So.2d 826 (Fla. 3rd DCA July 8, 1998) and *Garber v. Snetman*, 712 So.2d 481 (Fla. 3rd DCA July 8, 1998).

As in the case at bar, *Mizrahi* and *Garber* both involve wrongful death medical malpractice actions brought by surviving adult children, where the decedent had no surviving spouse. In *Mizrahi* and *Garber* the trial court granted Summary Judgment in favor of the Defendants based on § 768.21(8), Florida Statutes (1995), and the Plaintiffs appealed. In the case at bar the trial court also granted Summary Judgment in favor of the Defendant on the constitutionality of § 768.21(8), Florida Statutes (1991).<sup>3/4</sup> In both *Mizrahi* and *Garber* the Third District Court of

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<sup>3</sup> Section 768.21(8), Florida Statutes (1995), reviewed in *Mizrahi* and *Garber*, is identical to Section 768.21(8), Florida Statutes (1991), reviewed in the case at bar.

<sup>4</sup> In the case at bar the trial court granted the Defendant Partial Summary Judgment on Counts Five through Eight of the Plaintiffs' Amended Complaint challenging the constitutionality of § 768.21(8), Florida Statutes (1991). Later the court dismissed Counts Two and Three on motion, leaving only the survival action and the wrongful death action for trial. During the course



Appeal affirmed both Summary Judgments and specifically held § 768.21(8), Florida Statutes (1995), constitutionally valid, but certified the following question in both cases to the Florida Supreme Court as a matter of great public importance:

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

In the case at bar, the Plaintiffs also moved to have the First District Court of Appeal certify to the Florida Supreme Court the following similar question, as one of great public importance, but their motion was summarily denied (See App. 2):

DOES SECTION 768.21(8), FLORIDA STATUTES, UNCONSTITUTIONALLY DENY THE ADULT CHILDREN OF WRONGFUL DEATH VICTIMS OF MEDICAL MALPRACTICE EQUAL PROTECTION OF THE LAW, ACCESS TO COURTS, AND DUE PROCESS OF LAW BY PRECLUDING THEIR RECOVERY OF DAMAGES FOR LOSS OF COMPANIONSHIP, INSTRUCTION, GUIDANCE AND MENTAL PAIN AND SUFFERING IN WRONGFUL DEATH SUITS?

This question seeks to have the First District Court of Appeal certify to the Florida Supreme Court, as matter of great public importance, virtually the identical question actually certified by the Third District Court of Appeal in both *Mizrahi* and *Garber*. All three cases seek review of the constitutionality of § 768.21(8), Florida Statutes, by the Florida Supreme Court on the grounds that it violated the equal protection clause of both the federal and Florida

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of the trial the court directed verdict as to Mrs. Pittman's cause of death and only the wrongful death claim went to the jury. Thus, the only evidence presented at trial on damages was that of the decedent's funeral bill.

constitutions. The Plaintiffs in the case at bar simply seek review of § 768.21(8), Florida Statutes, by the Florida Supreme Court on the additional grounds that it also violates the federal and state due process clauses and the Florida constitutional guarantee of access to courts under Art. I, § 21, Fla. Const.

**II. THIS CASE IS A "PIPELINE CASE" AND JURISDICTION SHOULD BE EXERCISED.**

Plaintiffs request that this court take judicial notice of the cases of *Mizrahi v. North Miami Medical Center, LTD.*, 712 So.2d 826 (Fla. 3rd DCA 1998), and *Garber v. Snetman*, 712 So.2d 481 (Fla. 3rd DCA 1998), which are both currently pending on review before the Florida Supreme Court as Case No. 93, 649 and Case No. 93,650 respectively. In both these cases the Third District Court of Appeal has certified to the Florida Supreme Court as a matter of great public importance the question of whether § 768.21(8), Florida Statutes (1995), violates the federal and state constitutional equal protection clauses. Petitioners' briefs on the merits in both of these cases are due September 14, 1998. The case at bar involves the exact same issues, and the Plaintiffs are similarly situated to those in *Mizrahi* and *Garber*. Plaintiffs in the case at bar have properly and appropriately raised, both the trial and appellate levels, the question of the constitutionality of § 768.21(8), Florida Statutes (1991). This case is thus a "pipeline case". It is not yet final at the time of the direct review of *Mizrahi* and *Garber*, and the opinions in *Mizrahi* and *Garber* are not yet final and will apply to this case retrospectively. *Mathis v. State*, 688 So.2d 334 (Fla. 1997); *Rafael v. State*, 688 So.2d 335 (Fla. 1997); *Lee v. State*, 685 So.2d 1275 (Fla. 1996); *State v. Horn*, 684 So.2d 186 (Fla. 1996); *State v. Brown*, 655 So.2d 82 (Fla. 1995); *Smith v. State*, 598 So.2d 1063 (Fla. 1992); *Francis v. Barton*, 581 So.2d 583 (Fla. 1991); *Jones*

v. *State*, 569 So.2d 1234 (Fla.1990); *State v. Jones*, 485 So.2d 1283 (Fla.1986); *Bundy v. State*, 471 So.2d 9 (Fla.1985), *cert. denied*, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986); *Gonzalez v. State*, 367 So.2d 1008 (Fla.1979); *Linder v. Combustion Engineering, Inc.*, 342 So.2d 474 (Fla. 1977); *Rafael v. State*, 679 So.2d 314, 315 (Fla. 1st DCA 1996); *Garcia v. State*, 679 So.2d 17 (Fla. 3rd DCA 1996); *Florida Elks Children's Hospital v Stanley*, 610 So.2d 538 (Fla. 5th DCA 1992). Jurisdiction is thus proper under Art. V, § 3(b)(4), Fla. Const., and this court should accept jurisdiction of it as well.

**III. THIS CASE EXPRESSLY DECLARES VALID SECTION 768.21(8) AND JURISDICTION SHOULD BE EXERCISED.**

The decision of the First District Court of Appeal in this case, like *Mizrahi* and *Garber* from the Third District Court of Appeal, expressly declares valid § 768.21(8), Florida Statutes. *Mizrahi* and *Garber*, however, only address the validity of § 768.21(8), Florida Statutes, in terms of federal and state constitutional equal protection guarantees. The First District Court of Appeal in this case specifically held that § 768.21(8), Florida Statutes, was constitutional on the grounds that it did not violate the federal or state constitutional guarantees of either the equal protection or due process; and did not infringe upon the Florida constitutional guarantee of access to courts under Art. I, § 21, Fla. Const. In so holding they expressly stated, "We do not find persuasive, however, appellants' arguments that section 768.21(8) denies the federal and state constitutional guarantee of equal protection of the laws and due process or infringes upon the state constitutional guarantee of access to courts." *Stewart v. Price*, No. 95-996 (Fla. 1st DCA July 29, 1998) at p. 8.

Jurisdiction of this court is thus proper under Art. V, § 3(b)(3), Fla. Const. *See, e.g. Libertarian Party v. Smith*, 665 So.2d 1119 (Fla. 1st DCA), 687 So.2d 1292 (Fla. 1996). This court

should thus exercise jurisdiction to provide a thorough and complete review of all of the raised bases for constitutional challenge to § 768.21(8), Florida Statutes, including due process and access to courts, which *Mizrahi* and *Garber* do not address.

### CONCLUSION

This case presents this court with three bases on which it may exercise discretionary jurisdiction under Art. V, § 3(b)(3) and (4), Fla. Const. First, it expressly and directly conflicts with the decisions of the Third District Court of Appeal in *Mizrahi v. North Miami Medical Center, LTD.*, 712 So.2d 826 (Fla. 3rd DCA 1998) and *Garber v. Snetman*, 712 So.2d 481 (Fla. 3rd DCA 1998).

The Third District Court of Appeal certified the question of the constitutionality of § 768.21(8), Florida Statutes, as a matter of great public importance. The First District Court of Appeal refused to do the same. That creates conflict over what, and what is not, a question of great public importance.

Second, this is a "pipeline" case for *Mizrahi* and *Garber*. It involves the same issues, similarly situated Plaintiffs, and properly and appropriately raised the issue of the constitutionality of §768.21(8), Florida Statutes, in the trial court and on appellate review.

Finally, the decision of the First District Court of Appeal in this case also expressly declares valid § 768.21(8), Florida Statutes. That court held § 768.21(8), Florida Statutes, constitutional, not only on the grounds that it did not violate the federal and state constitutional guarantees of equal protection, as in *Mizrahi* and *Garber*; but went further, and also held that § 768.21(8), Florida Statutes, also passed constitutional muster under federal and state due process and the Florida constitutional guarantee of access to courts under Art. I, § 21, Fla. Const. This court should thus exercise jurisdiction to provide a thorough and complete review of all of the raised bases for

constitutional challenge to § 768.21(8), Florida Statutes.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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

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

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George, Hartz, Lundeen Flagg & Fulmer  
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on this 8th day of September, 1998.



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**APPENDIX**