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IN THE SUPREME COURT FOR THE
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.

JURISDICTIONAL BRIEF OF RESPONDENT, DR. I.B. PRICE, M.D.

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CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this Brief is 12 point proportionately spaced New Century Schoolbook.

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TABLE OF CONTENTS

PAGE(S)

PAGE(S)

TABLE OF CITATIONS

CASES **PAGE(S)**

CONSTITUTION(S)

STATUTE(S)

RULE(S)

INTRODUCTION

The Respondent, DR. I.B. PRICE, M.D. (hereinafter "DR. PRICE"), was the Defendant in the trial court and the Appellee at the First District Court of Appeal. The Petitioners, JEAN STEWART and KATHRYN REYNOLDS, Co-Personal Representatives of the Estate of MABLE PITTMAN, Deceased, were the Plaintiffs in the trial court and the Appellants at the First District Court of Appeal. The parties will be referred to as they stand in this Court and/or by proper name.

The letters "App." followed by a number refer to the particular item or document so designated in the Appendix to Petitioners' Brief on Jurisdiction.

All emphasis is supplied by undersigned counsel unless otherwise indicated.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent, DR. PRICE, accepts Petitioners' representation of the facts concerning the alleged medical malpractice claim but disagrees with Petitioners' characterization of the First District's decision below. The First District did not expressly declare section 768.21(8), Florida Statutes (1991), constitutional. The First District's discussion concerning section 768.21(8) is simply and merely *dicta*. [App. 1]. 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)

[App. 1].

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QUESTIONS PRESENTED

Respondent, DR. PRICE, prefers to restate the Questions Presented more accurately and concisely as follows:

I. WHETHER THE DECISION SOUGHT TO BE REVIEWED EXPRESSLY AND DIRECTLY CONFLICTS WITH AN OPINION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THE SUPREME COURT ON THE SAME QUESTION OF LAW?

II. WHETHER A "PIPELINE CASE" IS AUTOMATICALLY ELIGIBLE FOR DISCRETIONARY REVIEW?

III. WHETHER THE DECISION SOUGHT TO BE REVIEWED EXPRESSLY DECLARES SECTION 768.21(8), FLORIDA STATUTES (1991), VALID?

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SUMMARY OF THE ARGUMENT

Discretionary conflict jurisdiction is not available to review the First District's decision below. The First's District's statements, in *dicta*, concerning the constitutionality of section 768.21(8), Florida Statutes (1991), are in harmony with the Third District's express declarations upholding the statute's validity. The requisite express and direct conflict on the same question of law does not, without dispute, exist.

The purported "pipeline" nature of the instant case does not, moreover, magically confer this Court with jurisdiction. This case must, but **cannot**, satisfy the well-established and constitutionally enumerated criteria for discretionary review.

Lastly, the First District's *dicta* concerning the validity of section 768.21(8), Florida Statutes (1991), is not sufficient for this Court's exercise of its discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i). *Dicta* does not constitute a "decision" which "expressly declare[s] valid a state statute."

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ARGUMENT

I. THE DECISION SOUGHT TO BE REVIEWED DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH AN OPINION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THE SUPREME COURT ON THE SAME QUESTION OF LAW.

The First District's decision below does not expressly and directly conflict with the decisions of the Third District in Mizrahi v. North Miami Medical Center, Ltd., 712 So. 2d 826 (Fla. 3d DCA 1998), and Garber v. Snetman, 712 So. 2d 481 (Fla. 3d DCA 1998). To the contrary, the First District has, purely in *dicta,* found section 768.21(8), Florida Statutes (1991), to be constitutional while the Third District in Mizrahi and Garber expressly declared the statute valid. Similar, if not identical, legal principles and grounds were, in fact, discussed and applied in all three cases. Simply put, both Districts are in agreement on the same question of law. The requisite express and direct conflict on the same question of law is thus fatally absent and this Court may not entertain discretionary review jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

The fact that the First District declined to certify the Petitioners' constitutional question as one of great public importance, whereas the Third District did certify the question in both Mizrahi and Garber, does not create the requisite express and direct conflict. This Court in Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980), interpreted the term "expressly" as necessitating a "'represent[ation] in words'." *Sub*

judice, there is nothing within the four corners of the First District's July 29, 1998 Corrected Opinion which indicates a decision not to certify a proposed question or which otherwise establishes the requisite express and direct conflict. [App. 1]. Moreover, the simple denial of a motion to certify a question does not form the basis for discretionary conflict jurisdiction nor have Petitioners cited any authority in support of their ingenious contention.

The intent of the 1980 constitutional amendment requiring that a decision "expressly and directly" conflict with a decision of another district court of appeal or of the Supreme Court was to restore the district courts to their original intended stature as courts of final appellate jurisdiction. *See* Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980). The 1980 amendment was also intended to discourage the automatic filing of petitions for review by litigants who lose in the district courts. *Id.* This Court's exercise of jurisdiction over the instant case would effectively abrogate the 1980 amendment and condone the view that regards the district courts as mere intermediate appellate courts. Firm adherence to the letter of the 1980 amendment by dismissing the instant Petition is thus necessary to guarantee that the people's wishes are a reality.

II. A "PIPELINE CASE" IS NOT AUTOMATICALLY ELIGIBLE FOR DISCRETIONARY REVIEW.

The Petitioners' contention that this case is a "pipeline case" does not justify the exercise of this Court's discretionary review jurisdiction. Article V, Section 3(b)(3)

of the Florida Constitution does not specifically establish discretionary jurisdiction over purported "pipeline cases." A "pipeline case" must, instead, meet the specifically enumerated criteria in order to be eligible for discretionary review. This case does not, as discussed herein, satisfy that criteria. Moreover, there is no need for the exercise of discretionary jurisdiction over this case. This case has been remanded for a new trial and, as a "pipeline case," the opinions rendered in Mizrahi and Garber will, as Petitioners concede, be binding and apply to this case. *See* State v. Brown, 655 So. 2d 82, 84 (Fla. 1995); Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992); Linder v. Combustion Engineering, Inc., 342 So. 2d 474, 476 (Fla. 1977).

III. THE DECISION SOUGHT TO BE REVIEWED DOES NOT EXPRESSLY DECLARE SECTION 768.21(8), FLORIDA STATUTES (1991), VALID.

Finally, the First District's decision is **not** an express declaration that section 768.21(8), Florida Statutes (1991), is valid. Instead, the district court's discussion concerning the constitutionality of section 768.21(8), Florida Statutes (1991), is simply an advisory statement and purely *dicta*. 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)

[App. 1]. Respondent submits that *dicta* does not constitute a "decision" which "expressly declare[s] valid a state statute," nor have Petitioners referred to any precedent holding otherwise. Thus, 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).

CONCLUSION

Based on the foregoing reasons, Respondent respectfully submits that this Court should decline to exercise its discretionary review jurisdiction in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief of Respondent was mailed on this 2nd day of October, 1998 to: **Tari Rossitto-Van Winkle,** 1425 North Monroe Street, Tallahassee, Florida 32303.

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