IN THE SUPREME COURT FOR THE STATE OF FLORIDA

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

Petitioners,

vs.

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

Respondent.

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

PETITIONERS' REPLY BRIEF ON THE MERITS

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CERTIFICATION

The undersigned certifies, pursuant to this Court's Administrative Order of July 28, 1998, that this brief uses 14 point Times Roman Font.

All emphasis has been supplied, unless otherwise indicated.

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PRELIMINARY STATEMENT

In this Reply Brief Petitioners, Respondent and Mrs. Pittman, the decedent, will be referred as they were in the Initial Brief, as will the record on appeal (R), trial transcripts and the Supreme Court record (S.Ct.R.). The appendix accomp-anying this brief will be referred to as "Reply Brief A." followed by Tab number 1 - 4, and page number. The Appendices to Petitioners' Initial Brief will be referred to as "Initial Brief A." followed by a Tab number 1-15, and page number.

Subsequent to the filing of Petitioner's Initial Brief this Court has received numerous *amicus curiae* briefs. Argument or comment on the contents of any brief will reference the specific brief and page(s). Appendices which accompany the *amicus curiae* briefs will also be referenced directly by Tab number.

I. § 768.21(8), FLA. STAT. (1991), IS UNCONSTITUTIONAL.

Plaintiffs would again suggest to this Court that both the trial court and the First

District Court of Appeal committed reversible error in finding §768.21(8), Fla. Stat. (1991), constitutional both on its face and as applied. For the reasons set forth in their Initial Brief, and below, this Court should: find that the First District committed reversible error in holding §768.21(8), constitutional; hold the subject section ***unconstitutional and severable***; and quash that portion of the First District opinion which holds to the contrary.

Petitioners also adopt herein all arguments advanced by *amicus curiae*, ASSOCIATION FOR RESPONSIBLE MEDICINE, FLORIDA WOMEN'S CONSORTIUM, INC., THE FLORIDA SILVER HAIRED LEGISLATURE, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC. which have filed a brief in support of Petitioners.

A. Review Under Discretionary Jurisdiction is Proper

First, Dr. Price again argues that the portion of the First District's decision that expressly declares §768.21(8) constitutional is nothing more than *dicta*; and does not constitute a basis for this Court to exercise its discretionary jurisdiction.[1] Petitioners contend that this Court's exercise of its discretionary jurisdiction in this case is proper and will rely on all arguments set forth in their Brief on Jurisdiction.

B. §768.21(8) Denies Florida's Fundamental Right of Access to Courts

Dr. Price next argues that under *Kugler v. White*, 281 So.2d 1 (Fla. 1993), Mrs. Pittman's adult children, were not denied access to Florida's courts by §768.21(8). He

[1] See Article V, Section 3(b)(3), of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A) (i).

claims that Mrs. Pittman's daughters never had a common law or statutory right to recover damages for their non-economic losses arising from the wrongful death of their mother ***prior to*** the Declaration of Rights in the 1968 Florida Constitution; and thus, fail to satisfy the first prong of the *Kugler* test. As additional support for this proposition, Dr. Price cites *White v. Clayton*, 323 So. 2d 573 (Fla. 1975), and *Bassett v. Merlin, Inc.,*335 So. 2d 273 (1976).

However, Dr. Price improperly applies *Kugler* to the fact of this case and misunderstand Petitioners' arguments. Mrs. Pittman filed this action for medical malpractice in 1991 (R.35) for **her personal injuries** allegedly caused by Dr. Price's medical negligence. Upon her death, her daughters were substituted in as Plaintiffs, **co-personal representatives** of her Estate, by Order of the trial court.(R.104). They are not individual parties to this action, and never have been.

It is not Mrs. Pittman's adult children, whom Petitioners assert are being denied access to Florida's courts. Under the Florida Survival Statute, §46.021, Fla. Stat.(1967), its predecessors, and The Florida Wrongful Death Act, §768.16 - §768.27, it is the ***decedent's personal representative who has the cause of action*** to recover various elements of damages for the benefit of the decedent's survivors. §768.21, Fla. Stat.(1991), §46.021, Fla. Stat. (1967).[2]

[2] Florida has had a Wrongful Death Act since 1883, *Clayton* at 576; and a Survival Act since before that. However, under the pre 1972 Wrongful Death Acts the only element of damages a personal representative could recover was the value of the loss of the decedent's prospective estate. *East Coast Ry. Co. v. Hayes*, 67 Fla. 101, 64 So. 504, 505 (Fla. 1914). Under the pre 1972 Wrongful Death Acts he could not recover for a decedent's pain and suffering from the date of injury to the operdate of death. A cause of action for those damages only existed under the Survival Act. *Hooper*

Under §46.021, as it existed ***prior to*** the 1968 Declaration of Rights, Mrs. Pittman's **co-personal representatives**, clearly had the right to access Florida's courts and bring an action for her injuries. They were entitled to recover monetary damages, for their mother's Estate, **for her pain and suffering, from the date of her injury to the date of her death**, caused by Dr. Price's medical negligence. *Smith v. Laskey*, 222 So. 2d 773 (Fla. 4th DCA 1969). Any monetary damages recovered would then have been shared by them as Mrs. Pittman's heirs and next of kin. *See Laskey Supra; H. E. Wolf Construction Co. v. Parks*, 129 Fla. 50, 175 So. 786 (1937). The 1972 Wrongful Death Act, and §768.21(8), have both eliminated the cause of action for Mrs. Pittman's co-personal representatives and left nothing in its place in violation of the rule set forth in *Kugler* and Art. I, §21, Fla. Const.

Further, in *Martin v. United Security Services, Inc.*, 314 So.2d 765 (Fla. 1975), the constitutionality of 1972 Wrongful Death Act was upheld, but only "***to the extent that [it] consolidate[d] survival and wrongful death actions and substitute[d] for a decedent's pain and suffering the survivors' pain and suffering*** as an element of damages." *Clayton* at 574, citing *Martin*. In other words, it was constitutional for the legislature to ***eliminate the personal repre-sentative's cause of action*** for the pain and suffering of the decedent under the Survival Act, §46.021, in cases when the wrongdoer also caused the decedent's death; but only ***because it substituted that cause of action for a new cause of action for the***

Const. Co. v. Drake, 73 So. 2d 279 (Fla. 1954); *Ellis v. Brown*, 77 So. 2d 845 (Fla.1955). But loss of the value of the decedent's prospective estate was also not recoverable in a survival action. *Hooper* at 281.

survivors pain and suffering.

Dr. Price also relies on *Clayton* and *Bassett* to argue that Petitioners had no cause of action prior to the 1968 Declaration of Rights. But that reliance is misplaced, as those cases are clearly distinguishable from *Martin* and the case at bar. The issue in those cases was whether the legislature could constitutionally **change** existing **elements of damages** from one version of the Wrongful Death Act to the next. **NOT** whether it could deleate, or eliminate, from an existing statute ***an entire cause of action***. In *Clayton* this Court recognized that distinction when it stated that the issue before it was ***"different"*** than the one presented in *Martin. Clayton* at 574. Further, although the First District found that §768.21(8) did not eliminate an existing remedy, it noted that if it had, it would have been required to engage in a different analysis under *Kugler*. *Stewart* at 209.

When the legislature enacted The Florida Wrongful Death Act, §768.16 - §768.27(1972), it **eliminated the personal representative's cause of action** from the Survival Statute, §46.021, and as to adult children of a decedent, failed to replace it with another cause of action. Specifically, where a decedent's death has been caused by a wrongdoer, the personal representative's **cause of action** for the decedent's pain and suffering, was unconstitutionally eliminated, when the only survivors were the decedent's adult children. This violates the original legislative intent of the Wrongful Death Act[3] and Art. I, §21, Fla. Const.

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[3]"It is the public policy of this state to shift the losses resulting when wrongful death occurs from the survivors . . . to the wrongdoer."§768.17, Fla. Stat. (1972).

Prior to the 1972 Wrongful Death Act, Mrs. Pittman's daughters had the right to access Florida's courts to recover monetary damages for their mother's pain and suffering, caused by Dr. Price. §768.21(8) denies that right. Thus, if Dr. Price's medical negligence caused Mrs. Pittman's death, **in addition to causing her pain and suffering from the date of her injury to the date of her death**, Mrs. Pittman's ***co-personal representatives*** can no longer access Florida's courts to seek monetary damages for her pain and suffering.[4] The 1972 Wrongful Death Act eliminated the cause of action for Mrs. Pittman's pain and suffering -- and substituted nothing in its place.[5]

This constitutional infirmity, however, was finally cured when the legislature revised the definition of "survivor" to include ***all*** children of the decedent, in §768.18;

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[4] It should also be noted that on retrial, if Dr. Price is found to have been negligent in his care of Mrs. Pittman, and that his negligence caused personal injury to her, but ***not*** her death (E.g. that she died from her ruptured esophageal varices, not the melanoma), then under § 46. 021, Mrs. Pittman's daughters, as co-personal representative of her Estate, could still recover monetary damages for her pain and suffering from the date of her injury to the date of her death.

[5]Dr. Price, at page 14 of his Answer Brief, seems to suggest to this Court that he is surprised by Petitioners' argument that the 1972 Florida Wrongful Death Statute, §768.16 - §768.27, is, and was, also unconstitutional as a violation of access to courts; and that it is somehow a *new* argument. However, that argument was first presented to the trial court in 1993. (R. 137). Specifically, the Petitioners argued, "In *Martin v. Security Services, Inc.*, 314 So.2d 765 (Fla. 1975), the Florida Supreme Court upheld the legislative elimination of a decedent's right of action for pain and suffering specifically because the statute included a cause of action for the ***survivor's*** pain and suffering. **While probably unintentional, one weakness in the Act left standing by the *Martin* decision was the absence of any cause of action for pain and suffering if the only survivors were adult children.** See Nancy Ann Daniels, Comment, *Florida's Wrongful Death Act Is Constitutional and Permits Punitive Damages* -Martin v. Security Services, Inc., 314 So.2d 765 (Fla. 1975), 4 Fla. St. U. L. Rev. 394, 100-401 (1976)."

and added their right to recover as a class for their loss of parental companionship, instruction, guidance and mental pain and suffering. §768.21(3). Had the legislature not simultaneously added §768.21(8), the flaw in the 1972 Wrongful Death Act would have been cured as to **all adult children** of a decedent under *Kugler* and *Martin*. Without the medical malpractice exemption of §768.21(8), the Wrongful Death Act would have *substituted* one cause of action for another. Thus, under both this Court's decisions in *Kugler* and *Martin* the addition of §768.21(8), abolished Petitioners' right of access to Florida's courts without providing a reasonable alternative in violation of Art. I, § 21, Fla. Const.

The final matter under any constitutional challenge concerns the question of whether §768.21(8) may properly be severed from the remaining portions of §768.21. In resolving this issue of severability, this Court has consistently applied the four part test set forth in *Cramp vs. Board of Public Instruction of Orange County,* 137 So.2d 828 (Fla. 1962). Recently this Court extended its application to constitutional provisions in *Ray v. Mortham*, 1999 WL 685710 (Fla. September 2, 1999). In *Ray* this Court held that the unconstitutional portions of Art. VI., §4(b), Fla. Const., relating to term limits for federal legislatures, could be severed, dispite the fact that the provision satisfied the single subject requirement, because the ***over riding purpose*** of the amendment could still be accomplished, even though it could not be accomplished as to every class of legislator. *Ray* at 6. Applying this rationale to the case ar bar, §768.21(8) is clearly severable, from the remainder of the Wrongful Death Act. The over riding purpose of the 1990 amendments to the act in §768.21(3) and

§768.21(8) was to extend Wrongful Death damages to the adult children of decedents. And like in *Ray*, the unconstitutional exemption for medical malpractice in §768.21(8), although probably satisfying the single subject requirement, does not mean that that **over riding purpose** cannot be accomplished. This Court should thus: hold that §768.21(8) is unconstitutional on it's face and as applied; hold that §768.21(8) is severable from the other amendments to the Wrongful Death Act; hold that the First District committed reversible error in holding that statute constitutional; and quash that portion of the First District's opinion which holds to the contrary.

C. §768.21(8) Violates Equal Protection

Petitioners also maintain that Section 768.21(8), is unconstitutional as a violation of their right to equal protection under Art. I, § 9, Fla. Const., and the Fourteenth Amendment to the United States Constitution, both on its face, and as applied. As previously noted, Mrs. Pittman's daughters assert that §768.21(8), violates their fundamental right of access to Florida's courts. Therefore, under an equal protection analysis the appropriate level of judicial review is "strict scrutiny". *Doe v. Bollton*, 410 U.S. 93 S.Ct.739, 67 L.Ed.2d 201 (1973); *In re Estate of Greenberg*, 390 So.2d 40 (Fla. 1980) *appeal dismissed sub. nom., Pincus v. Estate of Greenberg*, 450 U.S. 961, 101 S.Ct. 1475, 67 L.Ed.2d 610 (1981). Dr. Price, glosses over this argument and dismisses Petitioners' strict scrutiny analysis simply on the basis of his perception that the statute does not involve a fundamental right; and his *Amici* do not address the application of strict scrutiny to §768.21(8).

Dr. Price's limited "strict scrutiny" equal protection arguments are clearly

flawed. But, assuming arguendo, that a "strict scrutiny" analysis does not apply, and that the appropriate standard for equal protection review is mere "rational basis", §768.21(8), still fails to pass constitutional muster. Dr. Price, and his *Amici*, have gone to great lengths to thoroughly review the Third District opinions of *Mizrahi v. North Miami Medical Center*, 721 So. 2d 826 (Fla. 3rd DCA 1998), and *Garber v. Snetman*, 712 So. 2d 481 (Fla. 3rd DCA 1998), and to focus on the legislative history of the several statutes to support their position that a rational basis does exist for §768.21(8). But a close reading of the documents referenced leads to the opposite conclusion as pointed out in Petitioners' Initial Brief.

In addition, Dr. Price's *Amici*, at page 16 of their Brief, asserts that the "data compiled by the Reports of the Academic Task Force was used in finding that a medical malpractice crisis existed in Florida" and that "[t]he Legislature's factual findings [by the Task Force] in turn were relied upon for the enactment of §768.21(8)."[6] The GAO surveyed six states that had limited recoveries in malpractice

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[6] Dr. Price's *Amici* also attaches to their appendix a copy of a 1996 article from JOURNAL OF HEALTHCARE RISK MANAGEMENT, *Malpractice Closed Claims Against Hospital Defendants in Florida*: 1986-1993. Further, they refer to United States Senate Report Number 104.84. This article and report are not part of the record on appeal and both should be struck.

However, if this Court is inclined to consider these items, Petitioners wish to point out that the HEALTHCARE RISK MANAGEMENT article merely eludes to the fact that some of Academic Task Force reforms are working. *Id*. at 14. Petitioners have not questioned that some of the reforms are working. What they do question is the total exclusion of a whole class of persons from access to Florida's courts to protect a single industry -- medical malpractice insurance carriers.

Should this Court choose to consider the United States Senate Report Number 104.83, it should consider it in its entirety and it is therefore attached here as Reply

cases and found that insurance companies in those states were enjoying profits that averaged 122% above the national average.[7] Yet, Dr. Price's *Amici* failed to point out that the Task Force recommended, "that the Legislature not adopt a plan that would eliminate recovery for all non-economic damages and the right to jury trial while requiring the claimant to prove fault." Med. Mal. Rec., Nov. 6, 1987, at 1, Initial Brief A., Tab 14, p.751. Nowhere in the Task Force documents does it recommend to the legislature that it exclude an entire class of persons from access to Florida's courts. Yet, §768.21(8), treats, or classifies, the adult children of persons killed by medical malpractice differently than the adult children of persons killed by all other torts. One group has access to Florida's courts, and one does not, solely on the basis of the status of the wrongdoer. If Dr. Price had run over Mrs. Pittman with his car, her daughters would have access to Florida's courts; but because he may have killed her through medical negligence, they do not.

Finally, Dr. Price's *Amici* argues that The Board of Medicine, the Peer Review Processes, the Internal Risk Management Programs, and AGENCY FOR HEALTHCARE ADMINISTRATION (AHCA) provide sufficient deterrence for medical malpractice, and Petitioners should be satisfied without any judicial access to redress their loved one's pain and suffering or wrongful death. But legitimate reporting requirements do not exist. *Bayfront Med. Center v. AHCA*, No. 98-02756,

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Brief A, Tab 3. Petitioners urge this Court to consider the "Minority View" to assure a balance in evaluating the existence or non-existence of a continuing malpractice "crisis."(*Id.*,1995 WL 311930 at 51-55, A.,Tab 3, at p.57-62).

1999 Fla. App. LEXIS 13133 (Fla. 2d DCA Oct. 1, 1999), *reh'g denied* (refusing, per AHCA's subpoena and AHCA's statutory responsibilities of risk management review, to order Bayfront to produce peer review records for AHCA's inspection) *See* Reply Brief A.,Tab 4.

II. THE FIRST DISTRICT CORRECTLY HELD THAT IT WAS REVERSIBLE ERROR TO EXCLUDE THE STANDARD OF CARE TESTIMONY OF DR. BADER, AN INTERNAL MEDICINE SPECIALIST.

Next, Dr. Price contends that the First District committed error in reversing the trial court's decision to exclude the standard of care testimony of Dr. Bader, Plaintiffs' expert in internal medicine. Incredibly, Dr Price continues to argue that although he, ". . .practiced internal medicine, . . .[t]he undisputed facts are that [he] treated Mrs. Pittman, not as an internal medicine specialist, but as a general family practice doctor. [Tr.559]"; that "there was no evidence presented to the contrary"; and that "whether Dr. Price considered himself a specialist in internal medicine has no relevance to any issue in this matter. . .[as he was] trained and experienced in family practice (although not certified)." (Respondent's Brief at p. 36). This is a complete misrepresentation of the record evidence in this case and the First District in *Stewart*, succinctly pointed that out to Dr. Price.[8]

The First District properly held that the trial court committed reversible error when it excluded certain testimony of Plaintiffs' expert in internal medicine. Mrs. Pittman's personal representatives accept and adopt the logic, reasoning and holding of

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[8]*See also* (R.3182), A. Tab 1, photo of Dr. Price's office and Exhibit 43 in evidence, A. Tab 2, Dr. Price's 7/27/83 letterhead. *See* R. Regulating Fla. Bar 4-3.2.

the First District on this issue, and request this Court affirm their decision.

III. DR. PRICE'S FAILURE TO PASS HIS BOARDS WAS RELEVANT.

Dr. Price argues that whether or not he passed his internal medicine board examinations is irrelevant in this case, under §90.401, because he wasn't practicing internal medicine on Mrs. Pittman; and even if it was relevant, its probative value is outweighed by its prejudicial effect. He claims he was only seeing Mrs. Pittman as a general practitioner, but does admit that if his "***skill*** as an internal medicine physician were at issue in the case, then such an argument might have merit." (Respondent's Brief at 40-41).

The record in this case is clear to the contrary. Dr. Price ***WAS*** practicing internal medicine at the time he saw Mrs. Pittman. *Stewart*, at 207-209. His ***skill*** as an internal medicine specialist and practitioner was the central issue in the case. The jury was asked to decide whether or not Dr. Price failed to use reasonable care in providing medical treatment to Mrs. Pittman. Reasonable care was defined for the jury by the trial court as follows:

> Reasonable care on the part of a physician is that level of care, ***skill*** and treatment [*sic*] which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably careful similar health care providers. (1/20/95 Tr.1356).

The fact that Dr. Price failed his internal medicine board examinations is, therefore, highly relevant and highly probative of his ***skill*** as an internal medicine specialist. The jury should have had that information to consider in reaching their verdict. The First District thus, committed reversible error when it found plaintiffs' argument, on this issue to be without merit, and this court should so hold.

IV. THE TRIAL COURT IMPROPERLY GRANTED A DIRECTED VERDICT ON THE ISSUE OF CAUSE OF DEATH .

The First District committed reversible error, and this court should so hold, when it found plaintiffs' argument on the impropriety of the trial court granting Defendant's motion for a directed verdict on the issue of the cause of Mrs. Pittman's death, to be without merit. The record evidence is clear. At the close of Plaintiffs' case, the jury had before it conflicting evidence on the cause of Mrs. Pittman's death. Dr. Carroll, the pathologist who performed Mrs. Pittman's autopsy, testified that her ruptured esophageal varices (G.I. bleeding) *probably* caused Mrs. Pittman's death. (1/19/95 Tr. 886-87). Similarly, she thought the melanoma was only a *possible, not probable,* cause of death. (*Id*. at 887, 898). Dr. Evans, on the other hand, thought Mrs. Pittman died of the melanoma, (1/18/95, Tr. 417), though he admitted that because of his lack of experience in pathology, he would defer to Dr. Carroll's findings. (*See id*. at Tr. 416, *see also id.* at Tr. 526-27 (objections)).

These conflicting accounts of Mrs. Pittman's death raised the following question: did the melanoma kill her, or was it the G.I. bleeding? This dispute as to causation is a quintessential jury issue and cannot be resolved by a court. *E.g.*, *Ramsby v. DeAnsz Group, Inc.*, 596 So.2d 151 (Fla. 2d DCA 1992) (causation a jury issue). Indeed, even the Court agreed that "[t]he most there could possibly be, even in the light of most favorable, would be *some inference."* (1/20/95, Tr. 1081). Since the directed verdict was improper. *Jones v. Heil Co.*, 566 So.2d 565 (Fla. 1st DCA 1990) (appellate court must reverse if there is some evidence or reasonable inference to support the position of the party against whom a directed verdict has been granted).

Respectfully Submitted this 4th day of October, 1999.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to:

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on this the 4th day of October, 1999.

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reply.sct