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IN THE SUPREME COURT OF FLORIDA

SAMANTHA ELAINE TSUJI et al.,

Petitioners,

v.

H. BART FLEET, etc. et al.,

Respondents.

Case No.: SC21-1255
L.T. No.: 1D20-0901;
2018-CA-000218

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

AMICUS BRIEF OF PROBATE ATTORNEYS IN SUPPORT OF NEITHER PARTY

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS

Amici Sean F. Bogle, John P. Cole, Robert D. Hines, Matthew H. Hinson, Christopher D. Russo, and Kathryn E. Stanfill ("Probate Attorneys") are Florida lawyers with substantial experience in the area of probate law. Though they do not take a position on the result of this case, Probate Attorneys offer their insight as to how the First District's decision veered from the settled understanding of Florida's Probate Code. If affirmed, the decision will have a significant impact on the timing and filing of probate cases. Given the broad issues at stake, the frequency with which they arise, and the need for uniformity in probate and tort litigation, Probate Attorneys seek to highlight the effects of this Court's decision on the probate system and, in particular, on the Florida citizens subject to that system.

SUMMARY OF ARGUMENT

In answering the certified question, this Court should be cognizant of the ramifications this decision will have beyond the specific circumstances of the underlying case. Affirming the First District's decision and repudiating *Pezzi v. Brown*, 697 So. 2d 883 (Fla. 4th DCA 1997), will alter settled expectations of lawyers and clients from all corners of probate law. Those clients include personal injury plaintiffs and creditors, who may be prejudiced by their reliance on *Pezzi* and their lack of notification as to the death of a tortfeasor. Those clients may also include estates and tortfeasors, who will endure increased litigation wrought by plaintiffs seeking to avoid a time bar on claims that could have settled with more time. The practical ramifications on Florida citizens wrought by the First District's interpretation deserve this Court's consideration.

ARGUMENT

The First District's decision diverged from longstanding Florida law regarding time bars under the probate code, creating practical implications for entities throughout the probate system.

Probate Attorneys seek to inform this Court of the practical implications an affirmance of *Tsuji v. Fleet*, 326 So. 3d 143, 147 (Fla. 1st DCA 2021), and the necessary repudiation of *Pezzi v. Brown*, 697 So. 2d 883 (Fla. 4th DCA 1997), would have on Florida probate law and the administration of estates. Such a decision would have wide-ranging effects on estates, creditors, plaintiffs, and the court system.

A. Clients who have been advised based on *Pezzi* will be prejudiced if this Court affirms the decision of the First District.

Repudiation of *Pezzi*, without a recognition of the interplay between sections 733.702 (the "short statute") and 733.710 (the "long statute"), Florida Statutes, would upset settled expectations in probate law. Prior to the First District's ruling, probate lawyers relied on *Pezzi* for the notion that if insurance covered a tort claim, the two-year timeliness bar in the long statute did not apply, insofar as the plaintiff sought only policy limits. *Pezzi*, 697 So. 2d at 885. Now, thousands of plaintiffs and probate petitioners may no longer

be able to recover as a result of their attorney following the law. A retroactive change in that law which provides no recourse for those clients unfairly prejudices them for listening to the sound advice of their attorneys.

Those plaintiffs and petitioners encompass far more than persons with personal injury claims. Banks, credit card companies, beneficiaries of estates, and insurance companies with subrogation liens are examples of parties who will have to change their course of business if *Pezzi* is no longer the rule.

Further complicating matters is the reality of probate administration. If a probate estate has not been opened, no notice to a creditor has been published because there is no obligation on a party to notify a creditor of a death. And it is unlikely that an injured party would receive notice of an insured defendant's death within two years. Insured claims are generally handled by the insurance company and its adjustor, not a personal representative. For insured claims, the short statute deadlines do not apply. Thus, a personal representative often will not give notice due to the presence of insurance.

The First District's decision may even promote gamesmanship, as it would shelter from payment of the policy limits an insurance company that waited until two years after the death of a decedent to give the notice required by Florida Rule of Civil Procedure 1.260(a). Under the First District's decision, a heavy burden would be placed on trial lawyers to preemptively and actively verify that an insured defendant is still living by continuously reaching out to adjustors. This burden is impractical and may result in prolonged litigation.

B. The number of claims filed in probate court will increase if this Court affirms the decision of the First District.

Additionally, the practical strategies trial lawyers employ when deciding whether and when to file suit will change if the First District's decision stands, razing the benefits those strategies confer on the probate system and its participants. Many trial lawyers do not file insurance claims—in probate or in civil actions—unless and until all negotiations with the insurance company fail. Negotiations with insurance companies on these matters often take more than two years. Waiting to file suit is beneficial to the client and the judicial system because settlement can resolve a case more quickly and with less expense. Thus, many trial lawyers—again, relying on

Pezzi—have likely advised clients against filing suit within two years of a defendant's death.

As for those who have not discovered too late they relied on *Pezzi*, their recourse will now be to immediately file a claim with the estate, rather than allow the negotiation process to run its course. More probate estates may be opened that otherwise might have been settled by the insurance company without the need for administration. That will increase expenses, especially for probate courts and for decedents with few assets, who will be forced to open an estate when they otherwise would have not.

These changes will also unnecessarily put at risk the estate's assets because once the insured claim is filed in probate court, the plaintiff may collect from the estate, not just the insurance policy. This result defeats the long statute's purpose of protecting the estate's assets.

Upholding the First District's decision would also result in estates being left open for a longer, not shorter, period of time, contrary to the First District's presumption. *Tsuji*, 326 So. 3d at 147. Because the insurance exception in the short statute still applies to the three-month or thirty-day deadlines in subsection (1),

the estate will be subject to insured claims being filed in a probate proceeding within two years of death. § 733.710(1), Fla. Stat. That result too defeats "the Probate Code's central purpose," which, as the First District recognized, is to foster "the expeditious settlement of the estate of decedents." *Tsuji*, 326 So. 3d at 147.

CONCLUSION

For the foregoing reasons, Probate Attorneys urge this Court to consider the practical effects of retroactivity and increased filings that this decision will have on Florida citizens involved in probate matters.

Respectfully submitted,

/s/ Rima Nathan

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I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and the word limit requirements of Rule 9.210(a)(2).

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