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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-54
L.T. Case No. 3D12-779

KIMBERLY ANN MILES and JODY HANES, her husband,

Petitioners,

vs.

DANIEL WEINGRAD, M.D.,

Respondent.

BRIEF OF AMICUS CURIAE FLORIDA JUSTICE ASSOCIATION IN SUPPORT OF PETITIONERS MILES/HAYNES

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INTRODUCTION

The Florida Justice Association ("the FJA") is a large, voluntary, statewide association of more than 3,000 lawyers concentrating on litigation. The members of the FJA are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts. The lawyer members of the FJA care about the integrity of the legal system and, toward this end, established an amicus curiae committee. This case is important to the FJA because it involves constitutional issues regarding the right to full compensation in medical malpractice actions, and the binding effect of a recent decision of this Court protecting constitutional rights.

SUMMARY OF ARGUMENT

In its Supplemental Brief, Respondent claims this Court's decision in Estate of McCall v. United States of America, No. SC11-1148 (Fla. March 13, 2014) has no precedential value because it was composed of both a plurality and a concurring opinion. Respondent is wrong. Five Justices of this Court concurred in the answer to a question certified by the 11th Circuit Court of Appeal to this Court. Under this Court's constitutional authority to answer questions from the federal courts, this Court's answer, concurred in by five Justices, is binding precedent.

Respondent's Supplemental Brief also argues that this Court should announce in Miles that McCall may only be applied prospectively. Changing the

substance of the McCall decision through a pronouncement in Miles, months or years later would wreak havoc upon the justice system and there is no legal basis for such a ruling. The cases relied upon by Respondent are inopposite. McCall recognized that this unconstitutional law adversely impacts individuals far more than the insurance or medical community. Further, Respondent's claims of reliance by the medical and insurance industry are belied by the record.

Amici FJA disagrees with the remainder of Respondent's Supplemental Brief but limits its comments to these two sections of it.

ARGUMENT

A. THE DECISION IN MCCALL CONSTITUTES BINDING PRECEDENT.

Respondent's Supplemental Brief questions the precedential value of this Court's decision in McCall because it consists of both a plurality opinion and a concurring in result opinion. The claim that McCall has no precedential value beyond the facts of the case disregards the jurisdictional basis for this Court's decision and the legal principles governing this Court's authority to answer certified questions from federal courts. A proper legal analysis of McCall compels the conclusion that it is binding precedent on the certified question answered.

McCall came to this Court on a series of certified questions from the United States Court of Appeal from the Eleventh Circuit pertaining to damage caps contained in Fla. Stat. §766.118. Estate of McCall v. The United States, 642 F.3d

944 (11th Circuit 2011). This Court's jurisdiction to answer the questions was based on Article V, Section 3(b)(6) of the Florida Constitution which states that the court:

> May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

As that provision indicates, an answer to a certified question is not an advisory opinion, but is only authorized when the answer is "determinative of the cause."

In Greene v. Massey, 384 So.24 (Fla. 1980), this Court received multiple questions certified by the United States Court of Appeal for the Fifth Circuit. However, in Greene, this Court declined to answer certified question number 3 as not "determinative of the cause," and this Court "decline[d] to undertake an academic discussion" in response to that question Id. at 27-28. Other state supreme courts with similar certified question jurisdiction also declined to answer such questions if they were not case-dispositive. See Jefferson v. Moran, 479 A.2d 734 (R.I. 1984); Grant Creek Waterworks, Limited v. Commissioner of Internal Revenue, 775 P.2d 684 (Mont. 1988); Palmore v. First Unum, 841 So.2d 233 (Ala. 2002).

In fact, in McCall, the plurality opinion of Justice Lewis (joined by Justice Labarga) expressly declined to answer certified questions number 2, 3, and 4, on

the basis that to do so would constitute an unauthorized advisory opinion (slip op. p. 41-42). The concurring in result opinion of Justice Pariente (joined by Justice Quince and Justice Perry) agreed with the plurality's decision not to address those certified questions as well (slip op. p. 43).

However, the plurality opinion in McCall did address the first certified question, rephrasing it as follows (slip op. p.2):

> Does the statutory cap on wrongful death noneconomic damages, Fla. Stat. § 766.118, violate the right to equal protection under Article I, Section 2 of the Florida Constitution?

The plurality opinion answered that question in the affirmative. Justice Pariente's concurring in result opinion agreed with the plurality's rephrasing of first certified question and the decision to answer it in the affirmative (slip op. p. 43, 53). Thus, five Justices agreed that the rephrased question should be answered in the affirmative. As a result, McCall constitutes binding precedent that:

> …the statutory cap on wrongful death noneconomic damages, Fla. Stat. § 766.118, violate[s] the right to equal protection under Article I, Section 2 of the Florida Constitution[.]

Respondent questioned the precedential value of McCall, but never mentioned the certified question in his argument on that issue. He relies on cases addressing the precedential effect of plurality opinions, none of which decided (ie. answered) certified questions. The Florida Constitution requires only four justices to concur

in order to have a binding decision; Article V Section 3(a) Fla. Const.; Santos v. State, 629 So.2d 838, 840 (Fla. 1994).

In discussing plurality opinions in Santos, this Court stated:

> In the present context at least, a "decision" is the result reached by the Court in the case, as distinguished from the "opinion." Id. at 840 n.1

This Court defined "opinion" in Santos as follows:

> For present purposes, the "opinion" is the entire written statement issued by the Court in reaching its decision in a case, including the analysis and reasoning.
> Id. at 840, n.2

In the context of a certified question from a federal court, the "decision" of this Court consists of the answer to the question, as contrasted with the rationale contained in an opinion. This is to be distinguished from other appellate proceedings where the result is the determination of the rights, liabilities, duties, status, etc. of the parties to the proceeding. Dadeland Depot, Inc. v. St. Paul Fire and Marine Insurance, 483 F.3d 1265 (11th Cir. 2007); See Floridians for a Level Playing Field v. Floridians Against Expanded Gambling, 967 So. 2d 832 (Fla. 2007) ("conversely, certification is separate from the judgment of the court and its reasoning for the judgment as expressed in the opinion;" the judgment is the " 'court's final determination of the rights and obligations of the parties in a case,'" quoting Black's Law Dictionary at 858). When a federal court certifies a question to a state supreme court, it retains authority over the judgment between the parties.

While the state court's decision will be dispositive, it does not have authority to affirm, reverse, or vacate the underlying judgment. E.g. Cray v. Deloitte Haskins and Sells, 925 P.2d 60, 62 (Okla. 1996).

Here, the decision to rephrase the certified question and to answer it affirmatively was reached by five Justices. Justice Pariente's concurrence in the result was an agreement with the plurality to rephrase the certified question and to answer it affirmatively. Her agreement on that was expressly stated twice in her opinion. (slip op. p.43, 53.) Cf. Rando v. GEICO, 39 So. 2d 244, 251 (Fla. 2010) (Polston, J. dissenting) (dissenting because the majority declined to re-phrase question certified from the federal court, even though the dissent agreed with the majority's analysis) Since five Justices in McCall agreed on the answer to the certified question, the determination that the cap on wrongful death noneconomic damages in Fla. Stat. § 766.118 violates the right to equal protection under Article I, Section 2 of the Florida Constitution, was a binding decision as defined in the Florida Constitution.

This conclusion is also mandated by the purpose and language of this Court's authority to answer certified questions from federal courts. This Court's jurisdiction only exists when a "question of law … is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida," Article V, Section 3(b)(6) Fla. Const. The purpose of certified question jurisdiction

is to enable the federal court to obtain state supreme court precedent on unsettled issues of law to apply in diversity cases, as mandated by Erie R.R. v. Tompkins, 304 U.S. 64 (1938). In fact, one established treatise on federal practice states that, "Certification would be a pointless exercise unless the state court's answers are regarded as an authoritative and binding statement of state law." Wright and Miller, Federal Practice and Procedure, § 4248.

Other states with similar certified question jurisdiction hold that when the supreme court's authority is limited to answering case dispositive questions, the answers constitute binding legal precedent entitled to stare decisis. In Wolner v. Mahaska Industries, Inc., 325 N.W. 2d 39, 41 (Minn. 1982), the Supreme Court of Minnesota stated:

> Our decision is a pronouncement of law with the same effect as our pronouncements of law in cases arising in the courts of this state. We conclude, as did the supreme court of the State of Washington, that our decisions on certification proceedings to federal court will be "legal precedent applicable in all future controversies involving the same legal question until and unless this court overrules its opinion" In re Elliot, 446 P. 2d 347, 354 (1968).

See also In re Richards, 223 A.2d 827, 832 (Me. 1966) (judgment of Supreme Judicial Court of Maine in certified question proceedings shall be treated "as having the force of decided case law within the courts of this state"); Penn Mutual Life Insurance Company v. Abramson, 530 A.2d 1202, 1207 (D.C. App. 1987) (determination of certified question "is stare decisis of this Court, as well as res

judicata as to the same parties in local courts"); Los Angeles Alliance Survival v. City of Los Angeles, 993 P.2d 344, 354 (Cal. 2000) ("Our decision will be a legal precedent applicable on all future controversies involving the same legal question until and unless this Court overrules this opinion").

Federal courts also recognize that decisions of state supreme courts which properly answer certified questions are binding precedent on the issue addressed. See Grover v. Eli Lilly Company, 33 F.3d 716, 719 (6th Circuit 1994); Reinkemeyer v. Safeco Insurance Co. of America, 166 F.3d 982, 984 (9th Circuit 1999); see also Sifers v. General Marine Catering Co., 892 F.2d 386, 391-92 (5th Circuit 1990); see also Federal Procedure, Lawyers Edition, § 3:788 ("A federal court is bound to follow a determination of state law which is certified to it by the highest court of the state.") As Judge Brown colorfully wrote in addressing answers to certified questions from this Court in Allen v. Estate of Carman, 486 F2d 490, 492 (5th Cir. 1973):

> It is not for us to tell our distinguished Brothers of the high court of Florida how to write (or paint). However characterized, what they have said is the law of the Medes and Persians which binds Floridians and Erie-bound Federal Judges, and it is declared in plain language that even those who run may read.

B. THE DOCTRINE OF "PROSPECTIVE APPLICATION" DOES NOT APPLY.

In McCall, this Court did not limit the answer to the Eleventh Circuit's question to "prospective application". Mandate issued on April 7, 2014 and the opinion is final. Thus, the argument that McCall should be limited to prospective application only is foreclosed. Supp. Br. pp.17-23. To attempt to change this ruling for other litigants, case by case, after having instructed the Eleventh Circuit that the caps are unconstitutional in McCall would wreak havoc upon the court system.

Of equal importance, all of the cases cited by Respondent are inopposite. The cases implementing prospective only application involve minimal impact on those who's constitutional rights were violated, but significant adverse consequences to the opposing party. For example, Interlachen Lakes Estates, Inc. v. Snyder, 304 So. 2d 433 (Fla. 1973) involved a relatively small unconstitutional tax burden balanced against a significant governmental budget impact for funds already expended for the benefit of the same tax payers. In this case, McCall already observed that the equities are reversed. (slip op. p. 13) (the cap "…has the effect of saving a modest amount for many by imposing devastating costs on a few – those who are most grievously injured, those who sustain the greatest damage and loss …".) Further, in a much more expansive but similar case this court did not limit the reach of its opinion to "prospective application". See Smith v. Dept. of Insurance, 507 So.2d 1080 (Fla.1987).

Respondent claims that insurance carriers and healthcare providers relied upon the caps statute. Supp. Br. p. 17. Respondent's claims of detrimental reliance by the insurance and healthcare communities are directly contradicted by the record. There was sworn testimony before the legislature that healthcare providers and insurance carriers would not rely upon any statutory change until after the culmination of any constitutional challenge. (slip op. p.30.)

Respondent also claimed that "a majority of this Court in McCall did not find that there was a rational basis for enacting the caps statute in 2003" (Supp. Br. P. 22). This misstates McCall. The concurring in result opinion expressly states in multiple places that it joined the plurality opinion in finding a lack of a rational basis on at least two grounds, including the multiple claimant/ single claimant issue (slip op. p.44, 47, 49, 50) and the lack of any connection between the legislative caps and insurance premiums. (Id. p. 50, 52)[1]

CONCLUSION

Therefore, contrary to Respondent's arguments, this Court's answer to a certified question in McCall is binding precedent. The decision is not limited in effect to the parties in the case, nor is it limited to aggregate caps or multiple claimant cases. Nor is the decision limited to prospective application.

[1] Justice Pariente's Opinion also concurs that "there is no evidence of a continuing medical malpractice crisis". (slip op. p. 51-53)

Respondent's arguments, minimizing the precedential effect of McCall, must be rejected.

Respectfully submitted,

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