Filing # 8956470 Electronically Filed 01/08/2014 06:34:31 PM

RECEIVED, 1/8/2014 18:38:33, John A. Tomasino, Clerk, Supreme Court

**IN THE SUPREME COURT OF FLORIDA**

---

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

---

KIMBERLY ANN MILES and JODY HAYNES, her husband,

Petitioners,

vs.

DANIEL WEINGRAD, M.D.,

Respondent.

---

ON DISCRETIONARY REVIEW OF A DECISION
OF THE THIRD DISTRICT COURT OF APPEAL

---

# RESPONDENT'S ANSWER BRIEF ON THE MERITS

---

HENDERSON, FRANKLIN,
STARNES & HOLT, P.A.
P.O. Box 280
Ft. Myers, FL 33902
Tel: (239) 344-1100
Fax: (239) 344-1200

HICKS, PORTER, EBENFELD &
& STEIN, P.A.
799 Brickell Plaza, 9th Floor
Miami, FL 33131
Tel: (305) 374-8171
Fax: (305) 372-8038

## TABLE OF CONTENTS

**PAGE**

## TABLE OF AUTHORITIES

**PAGE**

**Cases**

**Constitutional Provisions**



**Rules**

**Statutes**



**Other**

## INTRODUCTION

This brief is filed on behalf of Respondent, Daniel Weingrad, M.D. ("Dr. Weingrad"). This is the second time Petitioners have asked this Court to find a conflict between *Miles I*[1] and *American Optical Corp. v. Spiewak*, 73 So. 3d 120 (Fla. 2011). In 2011, this Court expressly declined to exercise its jurisdiction based on a purported conflict between *Miles I* and *American Optical*, after the Third District in *Miles I* held that a retroactive application of section 766.118's cap on noneconomic damages in medical malpractice cases was constitutionally permissible under these facts.

Undaunted, after the circuit court on remand followed the Third District's mandate in *Miles I*, Petitioners again appealed to the Third District, again citing conflict with *American Optical*. The Third District again rejected Petitioners' arguments in *Miles II*.[2] And once again, Petitioners have sought relief in this Court based on a purported conflict with *American Optical*. Although *Miles II* did not set forth any facts that would give rise to a conflict, this Court accepted jurisdiction.

Dr. Weingrad submits that this Court should discharge jurisdiction and dismiss its review of *Miles II* for lack of jurisdiction. *Miles II* does not expressly and directly conflict with any appellate decision and this Court does not have

[1] *Weingrad v. Miles*, 29 So. 3d 406 (Fla. 3d DCA 2010).

[2] *Miles v. Weingrad*, 103 So. 3d 259 (Fla. 3d DCA 2012).

jurisdiction to belatedly review any purported conflict between *Miles I* and *American Optical*. Alternatively, should the Court determine that jurisdiction is proper, the Court should approve the decisions below and hold that a retroactive application of section 766.118 is constitutional in this case because the damages cap statute does not impair a vested cause of action or any other vested right.

Although not the basis for this Court's acceptance of discretionary jurisdiction, Petitioners have also raised additional constitutional challenges to section 766.118. This Court should decline to address these issues, as most are waived and all lack merit.

## STATEMENT OF THE CASE AND FACTS

### A. Petitioners' Retroactivity Challenge.

In 2006, Kimberly Ann Miles and Jody Haynes ("Petitioners") brought a medical malpractice action against Dr. Weingrad claiming he performed unnecessary surgery to remove skin cancer on Ms. Miles' leg in January 2003 which resulted in pain, swelling, and limited mobility. (R1:2-12; T.428, 824-26). The jury found in favor of Petitioners and awarded $16,104 in economic damages. (R2:281). The jury also awarded $1,450,000 to Ms. Miles for her pain and suffering, and $50,000 to her husband for his consortium claims, amounting to total noneconomic damages of $1,500,000. (R2:281).

Thereafter, Dr. Weingrad filed a Motion to Limit Judgment for noneconomic

damages to $500,000 pursuant to section 766.118, Florida Statutes. (R2:301). Section 766.118, or the "caps" statute, limits the recovery of noneconomic damages in actions arising from medical negligence, and was signed into law on August 14, 2003, with an effective date of September 15, 2003. (R2:397). The statute's enabling clause, included as a footnote to section 766.118, states:

> It is the intent of the Legislature to apply the provisions of this act to prior medical incidents, to the extent such application is not prohibited by the State Constitution or Federal Constitution, except that the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is mailed on or after the effective date of this act [September 15, 2003].

(R2:397); 2003 Fla. Laws 416, § 86.

Dr. Weingrad performed Ms. Miles' procedure in January 2003, and the resulting infection had resolved by April of 2003. (T.400). Petitioners first served their Notice of Intent to Initiate Medical Malpractice Litigation on September 9, 2005, and suit was subsequently filed on January 4, 2006. (R3:396).

The trial court denied Dr. Weingrad's motion to limit the judgment, holding that because the causes of action accrued prior to the statute's enactment, applying it to Petitioners' action would amount to an unconstitutionally retroactive application. (R3:405). Dr. Weingrad appealed.

In 2010, the Third District issued an opinion reversing the trial court's order denying the motion to apply the statutory cap, holding that section 766.118's retroactive application was constitutionally permissible "as applied to the facts of

this case." *Miles I,* 29 So. 3d at 409-16. The district court relied on this Court's analysis in *Clausell v. Hobart Corp.*, 515 So. 2d 1275 (Fla. 1987), and discussed the Fourth District's decision in *Raphael v. Shecter*, 18 So. 3d 1152 (Fla. 4th DCA 2009), which had ruled that section 766.118 could not be retroactively applied in that particular case.

Petitioners sought review of *Miles I* in this Court based on conflict with *Raphael*, and this Court stayed its decision on jurisdiction pending its disposition of *Williams v. American Optical Corp.*, 985 So. 2d 23 (Fla. 4th DCA 2008), which had also been discussed by the Third District in its opinion in *Miles I.* (R3:450). Thereafter, this Court issued its decision in *American Optical* holding that the Asbestos and Silica Compensation Fairness Act could not be retroactively applied so as to completely abolish accrued causes of action pending on the effective date of the Act. *Am. Optical Corp. v. Spiewak*, 73 So. 3d 120, 125-34 (Fla. 2011).

This Court then directed Dr. Weingrad to show cause "why this Court should not accept jurisdiction in this case, summarily quash the decision being reviewed, and remand for reconsideration in light of our decision in *Williams v. American Optical*[.]" (R3:451). In response, Dr. Weingrad asserted that "the Court should not summarily quash the decision under review and remand for reconsideration in light of . . . *American Optical*." (R3:452). Dr. Weingrad detailed how *American Optical* was in no way binding on *Miles* because it involved a

diametrically different statutory scheme, and explained how the *Miles* decision was correctly based on longstanding Florida law. (R3:452-58).

On November 7, 2011, this Court issued an order stating:

> Upon review of the response(s) to this Court's order to show cause dated September 1, 2011, the Court has determined that it should decline to accept jurisdiction in this case. *See American Optical Corp. v. Spiewak*, 36 Fla. L. Weekly S435 (Fla. 2011). The petition for discretionary review is, therefore, denied.
>
> No motion for rehearing will be entertained by the Court. *See* Fla.R.App.P. 9.330(d)(2).

*Miles v. Weingrad*, 75 So. 3d 1245 (Fla. 2011). (R3:465).

Petitioners filed a motion for clarification reasserting their request to quash *Miles I* and remand for reconsideration of *American Optical*, and arguing that this Court left a standing conflict between *Miles* and *Raphael*.[3] (R3:466-70). This Court struck the motion as unauthorized. (R3:471).

Thereafter, Dr. Weingrad moved the trial court to vacate the prior judgment and enter a new judgment applying the caps statute in compliance with the Third District's decision in *Miles I*. (R3:416-37). Petitioners conceded the trial court was obligated to grant Dr. Weingrad's motion (R3:445) and, based on the mandate from *Miles I*, the trial court entered judgment based on the damage cap. (R3:490-92).

Petitioners then appealed that ruling in *Miles II*, and asked the Third District

[3] This Court separately declined jurisdiction in *Raphael* the same day it declined jurisdiction in this case. 75 So. 3d 1246 (Fla. 2011).

to find conflict between *Miles I* and *American Optical* despite this Court's express refusal to exercise its jurisdiction based on such purported conflict in *Miles I*. (R5:Tab A). The Third District unanimously rejected Petitioners' argument in a one-sentence opinion stating:

> Finding no conflict between our prior opinion in *Weingrad v. Miles*, 29 So. 3d 406 (Fla. 3d DCA 2010), and the Supreme Court's opinion in *American Optical Corp. v. Spiewak*, 73 So. 3d 120 (Fla. 2011), we affirm.

*Miles II*, 103 So. 3d at 259 (R4:627-29).

Petitioners then asked this Court, again, to find conflict between *Miles I* and *American Optical*, and this time this Court granted jurisdiction.

**B. Petitioners' Other Constitutional Challenges.**

In their 2008 response to Dr. Weingrad's motion to limit the judgment, Petitioners contended that the caps statute is unconstitutional because it violates Article I, section 26(a) of the Florida Constitution ("Amendment 3"), and the rights to trial by jury, access to courts, and equal protection. (R2:311-36). However, the trial court did not reach these arguments. (R3:396 n.1).

Because a reversal of the order denying Dr. Weingrad's motion to limit the judgment would require a finding by the Third District that the caps statute was facially constitutional, in the 2010 appeal Dr. Weingrad expressly asked the Third District to hold that the caps statute is facially constitutional as well, and fully briefed the constitutional challenges raised by Petitioners in the trial court.

(R4:528-57). In response, Petitioners offered only cursory arguments that the caps statute violates Amendment 3 and access to courts. (R4:600-02). Petitioners did not argue in *Miles I* that the caps statute violates the right to jury trial or equal protection.

On remand from *Miles I*, Petitioners argued that the statutory cap was facially unconstitutional as a violation of equal protection, access to courts, the right to trial by jury and, for the first time, asserted that the caps statute also violates separation of powers. However, Petitioners agreed that their constitutional challenges "must be rejected in light of the Third District's 2010 opinion and mandate." (R3:445).

In *Miles II*, Petitioners generally claimed that the damages cap violates equal protection, the right to trial by jury, separation of powers, the right of access to courts, and Amendment 3. (R5:Tab A, pp.11-12). However, Petitioners did not explain how the statute violates any of these constitutional provisions or cite any authority for their general claims that the statute is constitutionally infirm. Additionally, Petitioners acknowledged that they did not raise their equal protection, jury trial, or separation of powers arguments in *Miles I*. (*Id.*; R5:Tab C, p.4).

In this appeal, Petitioners again generally assert, without argument or citations of authority, that the caps statute violates equal protection, access to courts, the right to jury trial, separation of powers, and Amendment 3.

## SUMMARY OF ARGUMENT

This Court should discharge jurisdiction and dismiss its review of *Miles II* for lack of jurisdiction. *Miles II* does not expressly and directly conflict with any other appellate decision and this Court does not have jurisdiction or authority to review any purported conflict between *Miles I* and *American Optical* more than two years after it denied review in *Miles I*.

Alternatively, should the Court determine that jurisdiction is proper, the Court should approve the decisions below and hold that a retroactive application of section 766.118 is constitutional in this case. Significantly, unlike the statute at issue in *American Optical*, the damages cap statute does not impair a vested cause of action or any other vested right.

The Court should decline to address the additional constitutional challenges Petitioners have raised to section 766.118. Most are waived, and all lack merit.

## ARGUMENT

### I. THIS COURT SHOULD DISCHARGE JURISDICTION AND DISMISS ITS REVIEW OF *MILES II* FOR LACK OF JURISDICTION.

Dr. Weingrad respectfully submits that this Court should discharge jurisdiction and dismiss its review of *Miles II* for lack of jurisdiction. *See, e.g.*, *Brantley v. State*, 115 So. 3d 360, 361 (Fla. 2013) (discharging jurisdiction initially granted based upon express and direct conflict and dismissing review proceeding after concluding, upon further consideration, "that jurisdiction was improvidently granted."); *Martin County Conservation Alliance v. Martin County*, 122 So. 3d 243, 243 (Fla. 2013) (same).

"The jurisdiction of this Court extends only to the narrow class of cases enumerated in Article V, Section 3(b) of the Florida Constitution." *Gandy v. State*, 846 So. 2d 1141, 1143 (Fla. 2003) (quoting *Mystan Marine, Inc. v. Harrington*, 339 So. 2d 200, 201 (Fla. 1976)). The Florida Constitution provides the Court with discretionary jurisdiction to review a decision of a district court which "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const.

*Miles II* is a one-sentence decision finding no conflict between *Miles I* and *American Optical*. *Miles II*, 103 So. 3d at 259-60. Nothing within the four corners

of *Miles II* conflicts with a decision from this Court or another district court of appeal. *See Reaves v. State*, 485 So. 2d 829, 830 (Fla.1986) (in order for this Court to exercise conflict jurisdiction, conflict must be express and direct and contained within the four corners of the opinion sought to be reviewed). Petitioners have simply argued, for the second time, that *Miles I* conflicts with *American Optical* and other appellate decisions. (IB, pp. 11-15).

This Court stayed its decision on jurisdiction in *Miles I* pending the outcome of *American Optical*. After issuing its opinion in *American Optical*, the Court had the opportunity to quash or review *Miles I*, but expressly declined to do so. Respectfully, the Court's November 7, 2011 order denying the petition for discretionary review definitively ended *Miles I*, and there is no authority that allows the Court to re-visit that denial now. *See The Florida Star v. B.J.F.*, 530 So. 2d 286 (Fla. 1988) (holding that Florida Supreme Court jurisdiction exists, at least potentially, until such time as the Court issues its order denying review).

The Third District's citation to *Miles I* in the *Miles II* decision does not permit this Court to reexamine whether *Miles I* conflicts with other appellate decisions. As this Court has explained, "[t]he issue to be decided from a petition for conflict review is whether there is express and direct conflict in the decision of the district court before us for review, not whether there is conflict in a prior

written opinion which is now cited for authority."[4] *Dodi Publ'g Co. v. Editorial Am., S.A.*, 385 So. 2d 1369, 1369 (Fla. 1980).[5]

Moreover, because the Court lacks jurisdiction over *Miles II* in the first instance, it does not have authority to review *Miles I* under the exception that permits the Court to consider other issues appropriately raised and argued in the appellate process. That exception only applies if the Court properly has jurisdiction in the case. In *Savoie v. State*, 422 So. 2d 308 (Fla. 1982), this Court explained:

> We have jurisdiction, and, once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal. This authority to consider issues other than those upon which jurisdiction is based is discretionary with this Court and should be exercised only when these other issues have been properly briefed and argued and are dispositive of the case.

*Id.* at 312.

Dr. Weingrad therefore respectfully submits that jurisdiction is improper, and that the Court should dismiss this review proceeding.

---

[4] All emphasis by underline is supplied unless otherwise noted.

[5] The limited exception to this rule recognized by this Court in *Jollie v. State*, 405 So. 2d 418 (Fla. 1981), does not apply. *Jollie* only applies when a district court decision "cites as controlling authority a decision that is either pending review in or has been reversed by this Court." *Id.* at 420.

## II. ALTERNATIVELY, THE COURT SHOULD HOLD THAT A RETROACTIVE APPLICATION OF SECTION 766.118 IS CONSTITUTIONALLY PERMISSIBLE IN THIS CASE.

Alternatively, if the Court finds that jurisdiction is proper, this Court should hold that a retroactive application of section 766.118 is constitutionally permissible in this case.

*Miles I* held that section 766.118 could be applied retroactively in this case because the damages cap did not curtail Petitioners' causes of action; the statute simply limited the amount of noneconomic damages that Petitioners were permitted to recover. *Miles I*, 29 So. 3d at 416. Based upon this Court's seminal decision in *Clausell v. Hobart Corporation*, 515 So. 2d 1275 (Fla. 1987), and because Petitioners had not served their notice of intent or complaint prior to the effective date of the statute, the Third District held that:

> [Petitioners] had at most a "mere expectation" or prospect that they might recover damages of an indeterminate amount at an unspecified date in the future. The [Petitioners] had no vested right to a particular damage award and thus suffer no due process violation with the application of the caps statute to their cause of action.

*Miles I*, 29 So. 3d at 416.

In *Miles II*, the Third District found no conflict between *Miles I* and *American Optical* after this Court expressly declined to exercise jurisdiction or to quash *Miles I* in light of its earlier decision in *American Optical*.

For the reasons that follow, the Court should approve the decisions below and conclude that a retroactive application of section 766.118 is constitutionally permissible in this case.

### A. Retroactive Application of the Caps Statute Does Not Impact a Substantive Vested Right.

Whether a statute can be applied retroactively is a question that has two parts. First, the Court must determine whether the statute itself expresses an intent that it be applied retroactively. If the statute does express such an intent, the Court must decide whether a retroactive application would be constitutional. *See Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, 986 So. 2d 1279, 1284 (Fla. 2008).

Undisputedly, section 766.118 expressly provides that its provisions were intended to be applied to any medical incident for which a notice of intent to initiate litigation is mailed on or after the effective date of the act. The statute has an effective date of September 15, 2003, and Petitioners' notice of intent was not mailed until September 9, 2005, nearly two years later.

Thus, only the second prong of the retroactivity analysis is at issue here, which requires the Court to examine whether the application of section 766.118 to an inchoate cause of action that has not yet been filed impacts a substantive vested right. *See Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 490 (Fla. 2008).

In *Clausell*, this Court explained the nature of a "substantive vested right":

> "A statute is not unconstitutionally retrospective in its operation unless it impairs a substantive, vested right. A substantive vested right is an immediate right of present enjoyment, or a present fixed right of future enjoyment." *In re Will of Martell*, 457 So. 2d 1064, 1067 (Fla. 2d DCA 1984). "To be vested a right must be *more than a mere expectation based on an anticipation of the continuance of an existing law*; it must have become a title, legal or equitable, to the present or future enforcement of a demand." *Division of Workers' Compensation v. Brevda*, 420 So. 2d 887, 891 (Fla. 1st DCA 1982).

*Clausell*, 515 So. 2d at 1276 (emphasis by italics in original). *See also City of Sanford v. McClelland*, 163 So. 513, 514-15 (Fla. 1935) (same).

*Clausell* held that this Court's decision in *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657 (Fla. 1985), which upheld the validity of a statute of repose in products liability actions and which overruled a prior decision finding the statute unconstitutional, could be applied retrospectively to the plaintiff's cause of action because no cause of action was created or eliminated by the statute of repose, and plaintiffs "had no vested contract or property right prior to the *Pullum* decision; instead Plaintiff was merely pursuing a common law tort theory to recover damages." *Clausell*, 515 So. 2d at 1276. Quoting from a federal district court decision, the Court explained:

> *Pullum*, receding from *Battilla*, held the statute was not unconstitutional. No cause of action was created by the statute and *Battilla* vested in plaintiffs no cause of action. It removed the bar of the statute to plaintiffs' assertion of a cause of action. But plaintiffs had, at most, a mere expectation that they had a cause of action they could pursue, and a subsequent decision, holding the statute to be constitutional, could not and does not deprive them of any vested rights.

*Id.* at 1276 (quoting *Eddings v. Volkswagenwerk, A.G.*, 635 F. Supp. 45, 47 (N.D. Fla. 1986).

This Court's decision in *Clausell* clearly holds that no individual has a vested right in an inchoate, unfiled cause of action. 515 So. 2d at 1276. Similarly, in *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001), this Court approved a decision of the Fourth District holding that Congress was permitted to enact a statute that retroactively deprived the plaintiff of a common law right of action because "[n]o person has a vested right in a nonfinal tort judgment, much less an unfiled tort claim." *Doe v. Am. Online, Inc.*, 718 So. 2d 385, 388 (Fla. 4th DCA 1998). *See also Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 490 (Fla. 2008) (citing *Clausell* with approval and noting that in that case "this Court concluded that a plaintiff did not have a vested right in his ability to bring a cause of action for products liability.").

In 2003, Petitioners were only potential medical malpractice claimants who had not filed an action or mailed a notice of intent to initiate litigation. Petitioners therefore had, at most, a mere expectation that they might recover noneconomic damages above $500,000 at some unspecified date in the future. Such an expectation or prospect in an unfiled tort claim does not rise to the level of "an immediate right of present enjoyment, or a present fixed right of future enjoyment." *Clausell*, 515 So. 2d at 1276. The Third District thus correctly

concluded that Petitioners did not have a vested right in a particular award of noneconomic damages, let alone a vested interest in an award in excess of the statutory cap. *Miles I*, 29 So. 3d at 416.

Contrary to Petitioners' brief, there is nothing improper or unfair in applying the caps statute to an action that had not been filed at the time of the statute went into effect. As stated by the "leading authority" to whom Petitioners cite (IB, p.10), "[t]here is no vested right in a mere expectancy," and thus "no vested right in a particular remedy or procedure so long as an adequate remedy exists." 2 SUTHERLAND STATUTORY CONSTRUCTION § 41:6 (6th ed. Sept. 2009). Thus, "[t]here is no constitutional objection to a retroactive statute which makes a reasonable change in a remedy." *Id.* at § 41:9.

### B. *American Optical* and the Other Cases Relied Upon by Petitioners are Inapposite.

*American Optical* and the other cases relied upon by Petitioners are wholly inapposite. In *American Optical* and this Court's recent decision in *Maronda Homes, Inc. of Florida v. Lakeview Reserve Homeowners Association, Inc.*, 2013 WL 3466814 (Fla. July 11, 2013), litigation was commenced prior to the effective date of the statutes at issue and, unlike here, retroactive application of those statutes not only would have curtailed those plaintiffs' vested common law causes of action, but "abolished them" altogether. *See Am. Optical*, 73 So. 3d at 131; *Maronda Homes*, 2013 WL 3466814 at *15-16.

In *American Optical*, this Court affirmed a decision from the Fourth District holding that the retroactive application of the Asbestos and Silica Compensation Fairness Act (the "Asbestos Act") was unconstitutional as applied to the appellees, who had filed actions for asbestosis-related injuries before the Asbestos Act was enacted. The retroactive application of the Asbestos Act in *American Optical* would have required dismissal of those plaintiffs' pending actions, a result which plaintiffs contended violated their due process rights.

This Court approved the Fourth District's decision in *American Optical*, holding that the plaintiffs had vested rights to maintain their pending actions, and the Asbestos Act therefore could not be applied so as to abolish and require the wholesale dismissal of those actions.

Similarly, in *Maronda Homes*, this Court considered the constitutionality of a retroactive application of a statute (section 553.835) that was enacted during the pendency of the case specifically to abrogate the underlying decision from the Fifth District Court of Appeal and any prospective decision by this Court. 2013 WL 3466814 at *11. There, as in *American Optical*, retroactive application of section 553.835 would have completely abolished the homeowner's association's common law cause of action for breach of the implied warranty of fitness and merchantability. *Id.* at *14-16.

Although *American Optical* and *Maronda Homes* involve already-pending tort actions, those decisions appear to deem an accrued cause of action a vested right, thus suggesting that this Court may have implicitly receded from past precedent holding that a claimant has no vested property interest in merely pursuing a common law tort action which has not yet been filed. *See Clausell,* 515 So. 2d at 1276. However, even if *American Optical* and *Maronda Homes* expanded vested rights to include inchoate causes of action that have not yet been filed, there is no language in either decision suggesting, let alone holding, that they apply to the damages cap at issue in the instant case, which does not in any way deprive Petitioners of the right to bring a cause of action.

*American Optical* and *Maronda Homes* are therefore wholly distinguishable from the case at bar. As the Third District correctly recognized in *Miles I*, the noneconomic damages cap did not eliminate or curtail Petitioners' causes of action. Petitioners here were still permitted to file and maintain claims for medical malpractice and loss of consortium against Dr. Weingrad. They were entitled to pursue all of the causes of action that they could have asserted prior to the enactment of the caps statute, and in fact recovered a judgment against Dr. Weingrad.

*Kaisner v. Kolb,* 543 So. 2d 732 (Fla. 1989), also relied upon by Petitioners, is consistent with *American Optical* and *Maronda Homes*, and is therefore likewise

distinguishable. In that case, this Court addressed whether a statute (chapter 87-134) that limited a litigant's recovery by providing that the purchase of liability insurance no longer waived the sovereign immunity limit on damages, could be retroactively applied. *Id.* at 738. The legislature had stated that chapter 87-134 was intended to apply to any pending cause of action in which a verdict or judgment had not been obtained by the effective date of the statute. *Id.*

This Court held that chapter 87-134 could not be retroactively applied to the petitioners because they had a vested interest under the prior statute (section 286.28) that would be impaired. *Id.* at 738-39. However, in *Kaisner*, as in *American Optical* and *Maronda Homes*, the petitioners had filed suit prior to the effective date of the statute. *See also Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982) (amendment to sovereign immunity statute that relieved state employees from personal liability for negligent acts could not be applied retroactively to abolish causes of action that were pending prior to the effective date of the amendment); *Dep't of Transp. v. Knowles*, 402 So. 2d 1155 (Fla. 1981) (amendment to statute waiving sovereign immunity could not be applied to abrogate cause of action against state employee where plaintiff had already filed suit and obtained jury verdict against state entity and employee, and application of statute would abrogate $20,000 from jury award); *City of Winter Haven v. Allen*, 541 So. 2d 128, 131 (Fla. 2d DCA 1989) (after suit was filed, plaintiff had vested property right to seek to

collect by judgment up to limits of city's liability policy, precluding retroactive application of statute limiting liability of government entity to $100,000 regardless of whether entity carries liability insurance).

Moreover, the *Kaisner* Court held that litigants whose actions had accrued had a vested right to sue state employees "under section 286.28 as it was interpreted by [the] Court in *Avallone* [*v. Board of County Commissioners*, 493 So. 2d 1002 (Fla. 1986)]." *Kaisner*, 543 So. 2d at 738. Critically, the *Avallone* Court held that section 286.28 not only waived the damage limits provided by section 768.28, but also waived the absolute immunity for "planning level" functions, in essence creating additional rights of action against state entities that had obtained liability insurance. *Avallone*, 493 So. 2d at 1003.

In contrast, any and all causes of action that existed prior to the effective date of section 766.118 continue to exist, and no new ones were created.

*American Optical*, *Maronda Homes*, and *Kaisner* also do not apply to *Miles* because the statutes in those cases were adopted and immediately went into effect while the claimants' actions were pending, thus giving the plaintiffs no opportunity to avoid the effect of the statutes and further depriving them of their due process rights. *See Am. Optical*, 73 So. 3d at 125; *Maronda Homes*, 2013 WL 3466814 at *11, *16; *Kaisner*, 543 So. 2d at 738.

In contrast, the damages caps statute provided a safe harbor giving claimants whose causes of action had accrued the opportunity to file their actions after the caps statute was enacted but prior to its effective date. Petitioners simply failed to avail themselves of the safe harbor, as the alleged medical malpractice occurred prior to the effective date of the caps statute, yet the claimants did not file their notices of intent to initiate litigation until well after its effective date. In fact, it was not until September 2005 -- a full two years after the statute's effective date -- that Petitioners filed their notice of intent. *American Optical*, *Maronda Homes*, and *Kaisner* are wholly distinguishable from the instant case on this basis as well.

### C. Other Considerations Supporting a Retroactive Application of Section 766.118.

#### 1. The Caps Statute is Remedial in Nature.

Petitioners also incorrectly suggest that *Maronda Homes* mandates that the caps statute not be applied retroactively because it is not procedural or remedial in nature. (IB, p.14). As will be explained, this argument wholly misconstrues *Maronda Homes* and Florida's longstanding precedent. Moreover, the case law demonstrates that a statute that does not affect a right of action but merely limits recoverable damages is in fact a procedural or remedial statute.

Petitioners cite to language in *Maronda Homes* stating that "[f]or the retroactive application of a law to be constitutionally permissible, the Legislature must express a clear intent that the law apply retroactively, and the law must be

procedural or remedial in nature." 2013 WL 3466814 at *13, citing *Metro. Dade Cnty. v. Chase Fed. Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999). However, nothing in *Metropolitan Dade* or this Court's past precedent mandates that only procedural or remedial changes in the law can be retroactively applied regardless of legislative intent. To the contrary, *Metropolitan Dade* recognizes the general rule that substantive changes in the law are presumed to operate prospectively, but that this presumption can be rebutted by a clear showing of legislative intent for the statute to apply retroactively. 737 So. 2d at 499. *See also State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995) ("The general rule is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but that a procedural or remedial statute is to operate retrospectively.").

As explained in the sections above, the caps statute applies retroactively because it contains clear legislative intent for retroactive application, and it does not destroy vested rights because no person has a vested right to non-economic damages in excess of $500,000 prior to filing a tort action. *See Clausell*, 515 So. 2d at 1276.

Dr. Weingrad additionally submits that section 766.118 is in any event a remedial measure that should be retroactively applied. *See, e.g., City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986) ("If a statute is found to be remedial

in nature, it can and should be retroactively applied in order to serve its intended purposes.").

Statutes that simply affect a remedy, but not the underlying cause of action, have long been held to be remedial in nature and thus subject to retroactive application. *See, e.g., Tel Serv. Co. v. Gen. Capital Corp.*, 227 So. 2d 667 (Fla. 1969) (statute requiring forfeiture of usurious interest charged to a corporation could be applied retroactively to contract entered into before statute's effective date; statute affected only a remedy and not a vested substantive right);[6] *Village of El Portal v. City of Miami Shores*, 362 So. 2d 275, 278 (Fla. 1978) (Uniform Contribution Among Tortfeasors Act was required to be retroactively applied because it is a remedial measure which affects only the remedies available in a cause of action which already exists); *Tahiti Beach Homeowners Ass'n, Inc. v. Pfeffer*, 52 So. 3d 808, 808-09 (Fla. 3d DCA 2011) (statute placing limitation on fines by homeowners' associations is "unquestionably procedural and remedial in nature" and thus was required to be applied retroactively); *Lacey v. Healthcare & Retirement Corp. of Am.*, 918 So. 2d 333 (Fla. 4th DCA 2005) (remedial nursing home statute would be retroactively applied to void damages provisions in parties'

[6] In *Walker & LaBerge, Inc. v. Halligan*, 344 So. 2d 239, 243 (Fla. 1977) this Court specifically explained that the nature of the statute at issue in *Tel Service Co.* was inherently procedural because it "affected only the measure of damages for vindication of a substantive right." *Id.* at 243.

arbitration agreement); *Senfeld v. Bank of Nova Scotia Trust Co. (Cayman) Ltd.*, 450 So. 2d 1157 (Fla. 3d DCA 1984) (civil theft statute was remedial in nature and was properly applied retroactively to impose treble damages against defendant); *Fogg v. Southeast Bank, N.A.*, 473 So. 2d 1352 (Fla. 4th DCA 1985) (statutory amendment exempting mortgages securing extensions of credit in excess of $500,000 from forfeiture provision of balloon mortgage statute was required to be applied retroactively to mortgages executed prior to date of enactment of amendment).

The district courts in *Miles I* and *Raphael* mistakenly concluded that the caps statute was substantive based upon *Alamo Rent-A-Car v. Mancusi*, 632 So. 2d 1352 (Fla. 1994). *Miles I*, 29 So. 3d at 409-10; *Raphael*, 18 So. 3d at 1156-57.[7] However, that case is distinguishable. In *Mancusi*, this Court analyzed whether an amendment to the punitive damages statute could be applied retroactively where the amendment added "misconduct in commercial transactions" as a civil action in

[7] To the extent necessary, Dr. Weingrad respectfully submits that the Court should disapprove of the Fourth District's contrary decision in *Raphael v. Shecter*, 18 So. 3d 1152 (Fla. 4th DCA 2009), which erroneously relied upon *Alamo Rent-A-Car v. Mancusi*, 632 So. 2d 1352 (Fla. 1994) to hold that a mere expectation of an award of noneconomic damages is a vested right. Notably, the Fourth District did not address this Court's decision in *Clausell* in reaching its determination that the claimant's right to an award of noneconomic damages vested or accrued at the same time as the cause of action. *Raphael*, 18 So. 3d at 1157.

which punitive damages were limited to no more than three times the amount of compensatory damages. *Id.* at 1357-58.

Notably, unlike here, the punitive damages statute did not express a legislative intent to apply retroactively. But regardless, the Court determined that the amendment was substantive not because it limited the amount of damages awardable, but because it affected a plaintiff's right to obtain punitive damages. The Court explained:

> Punitive damages are assessed not as compensation to an injured party but as punishment against the wrongdoer. *Carraway v. Revell*, 116 So.2d 16 (Fla. 1959). Consequently, a plaintiff's right to a claim for punitive damages is subject to the plenary authority of the legislature. *Gordon v. State*, 608 So.2d 800, 801 (Fla. 1992), *cert. denied*, 507 U.S. 1005, 113 S.Ct. 1647, 123 L.Ed.2d 268 (1993). The establishment or elimination of such a claim is clearly a substantive, rather than procedural, decision of the legislature because such a decision does, in fact, grant or eliminate a right or entitlement.

*Mancusi*, 632 So. 2d at 1358. Section 766.118, on the other hand, does not affect a plaintiff's right to obtain noneconomic damages. The amendment at issue in *Mancusi* is thus in stark contrast to the caps statute.

**2. The Legislature Was Responding to an Unprecedented Medical Malpractice Insurance Crisis.**

Petitioners' brief contends that in the past, the Legislature has not expressed an intent to apply enactments limiting recoverable damages retroactively. (IB, p.10). However, in enacting the caps statute, the Legislature concluded that a

retroactive application was necessary to respond to an unprecedented medical malpractice insurance crisis.

Statutes should be applied retroactively where, like here, failing to do so would hinder the Legislature's ability to allay a public crisis. For example, federal courts have held that legislation applying sovereign immunity to federal employees may be applied retroactively where Congress expressed an intent for such application based on a finding that recent case law allowing litigants to sue government employees had created an "immediate crisis." *See, e.g., Arbour v. Jenkins*, 903 F.2d 416, 419 (6th Cir. 1990); *Sowell v. Am. Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989).

In *Department of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981), this Court explained that a weighing process should be utilized to balance whether to sustain the retroactive application of a statute, involving three considerations: (1) the strength of the public interest served by the statute; (2) the extent to which the right affected is abrogated; and (3) the nature of the right affected. *Id.* at 1158.[8]

Applying this weighing process also favors retroactive application of the caps statute. In enacting section 766.118, the Florida Legislature recognized "that

[8] In *Metropolitan Dade County*, this Court noted that "the *Knowles* analysis has not been used recently by this Court when discussing retroactivity." *Metropolitan Dade County*, 737 So. 2d at 500 n.9. However, it is unclear whether *Knowles* has been abandoned by the Court.

Florida is in the midst of a medical malpractice insurance crisis of unprecedented magnitude," and that "this crisis threatens the quality and availability of health care for all Florida citizens." Ch. 2003-416, § 1(1) & (2), Laws of Fla. The Legislature also recognized, among other things, that "the overwhelming public necessities of making quality health care available to the citizens of this state, of ensuring that physicians continue to practice in Florida, and of ensuring that those physicians have the opportunity to purchase affordable professional liability insurance cannot be met unless a cap on noneconomic damages is imposed." *Id.* at § 1(14).

Here, the strength of the public interest served by the statute outweighs Petitioners' mere expectation at the time their cause of action accrued that they might recover in excess of $500,000 in noneconomic damages should they ever file an action. Additionally, Petitioners' right to recover noneconomic damages was not abrogated, as the caps statute was merely a procedural adjustment of the remedy.

It is clear that the Legislature weighed the depth of the medical malpractice crisis against any potential unfairness or due process concerns that would be implicated by the application of the caps. In doing so, it only applied the caps to plaintiffs who had not yet served notices of intent or complaints and thus could not have conceivably had any tangible expectations of a particular award for noneconomic damages.

This Court should follow the Legislature's express intent and approve the Third District's conclusion that a retroactive application of section 766.118 is constitutionally permissible in this case.

## III. PETITIONERS' OTHER CONSTITUTIONAL ARGUMENTS ARE WAIVED AND MERITLESS.

Petitioners generally claim that the caps statute violates the right of access to courts (Article I, section 21 of the Florida Constitution), equal protection (Article I, section 2), trial by jury (Article I, section 2), separation of powers (Article I, section 3), and "Amendment 3" (Article I, section 26(a)). This Court should decline to address these arguments. Most are waived and all are without merit.

### A. Waiver.

Once this Court accepts conflict jurisdiction, it may, in its discretion, address other issues that "have been properly briefed and argued and are dispositive of the case." *Murray v. Regier*, 872 So. 2d 217, 223 n.6 (Fla. 2002). Petitioners' equal protection, jury trial, and separation of powers challenges were never properly briefed or argued in *Miles I* or *Miles II*.

In *Miles I*, Dr. Weingrad extensively briefed the constitutionality of the caps statute, analyzing the alleged violations of Amendment 3, access to courts, the right to trial by jury, and equal protection raised by Petitioners in the trial court. (R2:311-36; R4:528-57). Yet, in response, Petitioners offered only cursory arguments that the caps statute violates Amendment 3 and access to courts.

(R4:600-02). Thus, in *Miles I*, Petitioners abandoned any argument that the caps statute violates the right to trial by jury or equal protection. *See Merchants Bonding Co. (Mut.) v. City of Melbourne*, 832 So. 2d 184, 185-86 (Fla. 5th DCA 2002) (holding that appellee abandoned claim that surety was not entitled to benefit of attorney fees provision in contract between principal and appellee, where appellee did not dispute claim on appeal).

Petitioners never presented argument to the trial court, either in the first instance or on remand, that the caps statute violates the separation of powers, and thus never gave the trial court the opportunity to rule on this issue. In spite of the fact that the argument was never raised prior to or during the first appeal, on remand from *Miles I*, Petitioners raised the separation of powers issue with the concomitant assertion that "this argument must be rejected in light of the Third District's 2010 opinion and mandate." (R3:445). Because Petitioners never timely raised this issue below or gave the trial court an opportunity to rule on this issue, it is plainly waived. *See Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." (quoting *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985)).

In *Miles II*, Petitioners attempted to revive their abandoned and waived

challenges to the statute, but again failed to brief how the statute violates equal protection, the right to jury trial, or the separation of powers, or to cite any authorities to support their barebones constitutional challenges. (R5:Tab A, pp.11-12). Thus, none of these issues were properly raised or argued in the Third District and this Court should decline to consider them now. *See Murray*, 872 So. 2d at 223 n.6.

**B. Merits.**

To the extent any of Petitioners' constitutional challenges have been properly preserved, Dr. Weingrad submits that the Court should nevertheless decline to reach the merits of these arguments. Petitioners have never seriously challenged the constitutionality of the caps statute, and their argument now is no more than an afterthought, comprising a single paragraph in their brief with no explanation as to how the caps statute violates the asserted constitutional provisions and no supporting authorities.

"Statutes are presumed to be constitutional and courts must construe them in harmony with the constitution if it is reasonable to do so." *Florida Dep't of Educ. v. Glasser*, 622 So. 2d 944, 946 (Fla. 1993). On de novo review of the Third District's implicit holding that section 766.118 is constitutional, Petitioners "ha[ve] the burden of showing beyond a reasonable doubt that the law is unconstitutional." *See Enter. Leasing Co. S. Cen., Inc. v. Hughes*, 833 So. 2d 832, 834 (Fla. 1st DCA

2002). "The burden of proof below was on the plaintiff to demonstrate that the statute was not constitutional by negating every conceivable basis for upholding the law." *McElrath v. Burley*, 707 So. 2d 836, 838-39 (Fla. 1st DCA 1998). Petitioners have not even attempted to meet this burden.

Dr. Weingrad submits that Petitioners' barebones constitutional challenges are meritless under controlling Florida law. *See University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993) (statutory cap on medical malpractice noneconomic damages after plaintiff declines arbitration and tries claims to jury did not violate access to courts, right to jury trial, equal protection or separation of powers).

**1. The Caps Statute Does Not Violate The Right Of Access To Courts.**

In *Miles I*, Petitioners generally claimed that they have a common law right to obtain full compensation for their injuries, and that the cap violates their right to access to courts, relying upon *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), and *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987). (R4:601-02).

Nearly forty years of precedent in this State establishes that the caps statute does not impermissibly infringe on the right of access to courts. *See Kluger*, 281 So. 2d at 1; *Echarte*, 618 So. 2d at 189.[9]

[9] The courts in *Estate of McCall v. United States*, 642 F.3d 944, 952-53 (11th Cir. 2011) and *M.D. v. United States*, 745 F. Supp. 2d 1274, 1275-1281 (M.D. Fla. 2010) likewise correctly ruled that section 766.118's noneconomic damage caps do not violate the right to access to the courts under the Florida Constitution. *See*

In *Echarte*, this Court rejected an access to courts challenge to medical malpractice statutes (sections 766.207 and 766.209) which capped noneconomic damages where a plaintiff refused a demand to arbitrate and proceeded to trial. *See Echarte*, 618 So. 2d at 194-98. This Court explained that the damage caps satisfied *Kluger*'s second prong,[10] and therefore did not violate the Florida Constitution's access to court provision, because (1) the legislature had determined that there was a "medical malpractice insurance crisis" that constituted an "overpowering public necessity," *id.* at 196-97, and (2) a task force report upon which the legislature relied supported a finding that no alternative or less onerous method of addressing the crisis existed, *id.* at 197. This Court recognized that:

> The Legislature has the final word on declarations on public policy, and the courts are bound to give great weight to legislative determinations of fact. ... Further, legislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous. ... Because the Legislature's factual and policy findings are presumed correct and there has been no showing that the findings in the instant case are clearly erroneous, we hold that the Legislature has shown that an "overpowering public necessity" exists.

---

*M.D.*, 745 F. Supp. 2d at 1277-78; *McCall*, 663 F. Supp. 2d at 1298-1302. *McCall* is currently pending in this Court on certified questions.

[10] Under *Kluger*, where a right of access to the courts for a particular injury has been provided by statute or common law, the right to redress may be abolished by the legislature only upon demonstration of (1) a reasonable alternative to protect the right to redress for injuries, or (2) a legislative showing of both an overpowering public necessity for the abolishment of the right and that no alternative method of meeting the public necessity can be shown. *Kluger*, 281 So. 2d at 4.

*Id.* at 196-97.

*Echarte* also held that the Legislature had demonstrated that no alternative method would meet this necessity. *Id.* at 197. As this Court stated: "[I]t is clear that both [sections 766.207 and 766.209] ... and the strengthened regulation of the medical profession are necessary to meet the medical malpractice insurance crisis. ... [N]o alternative or less onerous method of meeting the crisis has been shown. Therefore, we hold that the second prong of *Kluger* is satisfied." *Id.* at 197-198.

Here, as in *Echarte*, the Florida Legislature enacted section 766.118's damage caps after specifically finding that "Florida is in the midst of a medical malpractice insurance crisis of unprecedented magnitude" that "threatens the quality and availability of health care for all Florida citizens." Ch. 416, §§1(1), (2), Laws of Fla. (2003). The Legislature also found that numerous "overwhelming public necessities" – including "making quality health care available to the citizens of this state," "ensuring that physicians continue to practice in Florida," and "ensuring that those physicians have the opportunity to purchase affordable professional liability insurance" – justified imposition of the caps. *Id.* §1(14). These findings are supported by substantial competent evidence compiled by the Governor's Select Task Force, which conducted extensive investigation into the issue, including surveys of other states' experience with similar crises, acceptance of affidavits and financial disclosures from insurance companies, and exhaustive

hearings from concerned members of the medical, legal and insurance professions. *See* GOVERNORS SELECT TASK FORCE ON HEALTHCARE PROFESSIONAL LIABILITY INSURANCE, REPORT AND RECOMMENDATIONS.

Petitioners' reliance on *Smith* in *Miles I* was wholly misplaced. In *Smith*, the Supreme Court declined to address *Kluger*'s second prong because the issue was neither raised nor ruled upon below. *Id.* at 1089 ("[T]he trial judge below did not rely on – nor have appellees urged before this Court – that the cap is based on a legislative showing of 'an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.'"). *Smith* held that the noneconomic damage limitation of the 1986 Tort Reform and Insurance Act denied claimants' access to courts solely on the basis that there was no commensurate benefit under *Kluger's* first prong. *Id.* at 1087-1089. "*Smith* does not control the decision in this case." *McCall*, 663 F. Supp. 2d at 1302. *See also M.D.*, 745 F. Supp. 2d at 1277 ("*Smith* significantly differs and is easily distinguishable from the case at hand").

Because the Florida Legislature plainly demonstrated that an overpowering public necessity existed and that no alternative method of meeting such public necessity could be shown, and because the noneconomic damage caps satisfy the

rational basis test,[11] section 766.118 does not violate access to courts. *See Echarte*, 618 So. 2d at 195-98; *M.D.*, 745 F. Supp. 2d at 1277-78; *McCall*, 663 F. Supp. 2d at 1298-1302.

**2. The Caps Statute Does Not Violate Amendment 3.**

Petitioners also contend that the damages cap conflicts with Amendment 3 to the Florida Constitution. (IB, p.16). This argument lacks merit and has been rejected by the federal district courts in *McCall* and *M.D.* *See McCall*, 663 F. Supp. 2d at 1297-98; *M.D.*, 745 F. Supp. 2d at 1282-83.

Amendment 3, codified as Article I, section 26(a) of the Florida Constitution, governs Florida patients' rights to damages in contingency fee medical malpractice actions. The amendment was passed to ensure that medical malpractice plaintiffs receive a fair share of the ultimate damages that they receive through the litigation process, and to prevent their attorneys from demanding disproportionately large percentages of these awards as a fee for their services.

The amendment states:

> In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first

[11] A highly deferential "rational basis" standard of review applies to an access to courts challenge to section 766.118's medical malpractice damage caps. *See Berman v. Dillard's*, 91 So. 3d 875, 877 (Fla. 1st DCA 2012) ("the proper standard for Claimant's access to court claim is rational basis review"), citing *Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1097 (Fla. 2005); *Echarte*, 618 So. 2d at 194-98.

> $250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of $250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. . . .

Art. I, § 26(a), Fla. Const.

This provision has nothing to do with section 766.118, as it seeks only to regulate the percentage of an award that a plaintiff's attorney may claim from the damages ultimately received. The amendment does not consider, contemplate or address what amount of damages might ultimately be awarded, nor does it in any way suggest that there may be no limitation on damages awards.

In *McCall* and *M.D.*, the federal district courts rejected arguments that Amendment 3 entitles a claimant to recover damages without regard to statutory limits. Both district courts explained that by its plain terms, Amendment 3 "acts as a restriction on the amount of attorney's fees that may be collected in a medical malpractice case, not as a definition of what amount of damages are in fact recoverable." *McCall*, 663 F. Supp. 2d at 1298; *M.D.*, 745 F. Supp. 2d at 1283 (quoting *McCall*).

Additionally, the *McCall* and *M.D.* district courts noted that the noneconomic damages caps were in existence prior to the passage of Amendment 3, and that the plain language of the statutory limitation on non-economic damages is not inconsistent with the protection afforded to medical malpractice litigants

under Amendment 3. *McCall*, 663 F. Supp. 2d at 1298; *M.D.*, 745 F. Supp. 2d at 1283. Indeed, in *In re Advisory Opinion to the Attorney General re Medical Liability Claimant's Compensation Amendment*, 880 So. 2d 675 (Fla. 2004), this Court examined whether Amendment 3's ballot summary was "clear and unambiguous" as required by Florida law, and explained that the purpose of the amendment was to "limit the contingency fee agreement between injured claimants and their attorneys in medical liability cases." *Id.* at 676. Nowhere did this Court suggest that the purpose or effect of the proposal was to invalidate statutory limits on damages.

In fact, Justice Lewis, who dissented on the ground that the summary should have declared that the purpose of the amendment was "to restrict a citizen's right to retain counsel," noted, without contradiction by the Court, that the statutory caps would remain in effect. *See id.* at 684 (Lewis, J., dissenting) ("It is also vital to note the damage caps which now exist within the medical negligence statutory provisions, which are rarely mentioned but will continue to remain in effect should the proposed amendment be adopted ....").

Accordingly, this argument should be rejected because section 766.118 is not inconsistent with the protection afforded by Amendment 3.

### 3. The Caps Statute Does Not Violate Equal Protection, The Right to Trial By Jury, or Separation of Powers.

Although Dr. Weingrad submits that the Court should not consider issues that were not properly presented to the trial court and not properly briefed and argued below, the merits of the waived and/or abandoned equal protection, right to jury trial, and separation of powers issues will nevertheless be addressed.

Petitioners' brief does not explain how applying section 766.118 violates equal protection, the right to jury trial, or the separation of powers in this case, and it does not. This Court has already rejected arguments that a similar cap on damages violates equal protection, the right to trial by jury, and separation of powers. *Echarte*, 618 So. 2d at 191 (holding that cap on noneconomic damages under medical malpractice arbitration statute did "not violate the right to trial by jury, equal protection guarantees, . . . or the non-delegation doctrine."

Under *Echarte*, the Legislature's decision in 2003 to curb the high costs of medical malpractice insurance to promote the availability of quality medical care to Florida citizens and reduce skyrocketing insurance premiums undoubtedly provides a rational basis for capping the total amount of noneconomic damages that can be awarded to plaintiffs. *See also McCall v. U.S.*, 642 F.3d at 951 (concluding that Florida's cap on noneconomic damages is rationally related to the legitimate state goal of controlling health care costs, and does not deny equal protection under the United States Constitution).

*Echarte* and other decisions from this Court likewise squarely hold that statutory caps on damage recovery do not violate jury trial rights or the separation of powers under the Florida Constitution. *See Echarte*, 618 So. 2d at 191; *Cauley v. City of Jacksonville*, 403 So. 2d 379, 387 (Fla. 1981) ("The statute [capping damage recovery] does not violate the right to . . . jury trial . . . or the separation of powers rule."). *See also McCall*, 663 F. Supp. 2d at 1306-07 (finding that section 766.118's cap on noneconomic damages did not violate Florida's doctrine of separation of powers); *M.D.*, 745 F. Supp. 2d at 1281 (same).

Thus, while Petitioners waived any argument that the caps statute violates equal protection, the right to jury trial, and separation of powers in the first instance, to the extent the Court considers any of these arguments they should be denied on the merits.

## CONCLUSION

Based upon the foregoing arguments and authorities, Dr. Weingrad respectfully submits that this Court should discharge its jurisdiction over *Miles II*. Alternatively, Dr. Weingrad submits that this Court should approve the decisions below and hold that a retroactive application of section 766.118 is constitutionally permissible in this case.

Respectfully submitted,

HENDERSON, FRANKLIN,
STARNES & HOLT, P.A.
P.O. Box 280
Ft. Myers, FL 33902
Tel: (239) 344-1100
Fax: (239) 344-1200
bruce.stanley@henlaw.com
*Counsel for Respondent,*
*Daniel Weingrad, M.D.*

HICKS, PORTER, EBENFELD &
& STEIN, P.A.
799 Brickell Plaza, 9TH Floor
Miami, FL 33131
Tel: (305) 374-8171
Fax: (305) 372-8038
mhicks@mhickslaw.com
dstein@mhickslaw.com
skain@mhickslaw.com
elerk@mhickslaw.com
*Appellate Counsel for Respondent*
*Daniel Weingrad, M.D.*

BY: /s/ *Dinah S. Stein*
MARK HICKS
Fla. Bar No. 142436
DINAH STEIN
Fla. Bar No.: 98272
SHANNON KAIN
Fla. Bar. No.: 16656

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **8th day of January 2014**, the foregoing was e-filed with The Supreme Court of Florida via the Florida ePortal and served via e-mail to: Robert S. Glazier, Esq., Law Office of Robert S. Glazier, 540 Brickell Key Drive, Ste. C-1, Miami, FL 33131, glazier@fla-law.com; Alex Alvarez, Esq., Herb R. Borroto, Esq., The Alvarez Law Firm, 355 Palermo Avenue, Coral Gables, FL 33134, alex@integrityforjustice.com.

BY: /s/ *Dinah S. Stein*
MARK HICKS
Fla. Bar No. 142436
DINAH S. STEIN
Fla. Bar No. 98272
SHANNON KAIN
Fla. Bar No. 16656

## CERTIFICATE OF COMPLIANCE

This brief complies with the font requirements of Rule 9.210. It is typed in Times New Roman 14 point type.

BY: /s/ *Dinah S. Stein*
DINAH S. STEIN
Fla. Bar No. 98272