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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-54

KIMBERLY ANN MILES
AND **JODY HAYNES**, HER HUSBAND,

PETITIONERS,

VS.

DANIEL WEINGRAD, M.D.,

RESPONDENT.

PETITIONERS' INITIAL BRIEF

ON DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

In 2002 Plaintiff/Petitioner Kimberly Ann Miles was diagnosed with melanoma. (T 368-69). She received medical care, and the tumor was removed in an outpatient procedure on December 2, 2002. (*Id*.). While she understood that the tumor had been completely removed and no melanoma remained, to be safe she sought a second opinion, and went to see a surgical oncologist, the Defendant/Respondent. (T 372, 364, 375-77).

The Defendant provided a disturbing diagnosis. He told the Plaintiff that she had residual melanoma in her leg and that it had to come out as soon as possible. (T 380-81, 693-94). He told her that "the first excision didn't get it all." (T 693-95). The Plaintiff promptly underwent the surgery which the Defendant said was so urgent. The procedure was performed on January 31, 2003. (T 384).

After the surgery was performed, the test results came back and revealed that there had been no remaining melanoma after the first procedure. (T 408-09). In other words, the second operation had been unnecessary. (T 889-90).

Had the recovery from the second operation gone well, the Plaintiff would have been harmed by having to undergo an operation which turned out to have been completely unnecessary. But the operation did not go well. The Plaintiff suffered many complications. She was "in the most excruciating pain that I had ever

been in my life." (T 698). She had to readmitted to the hospital for four days to treat an infection. (T 415).

The Plaintiff continues to have excruciating pain. (*Id*.). "She has to deal with pain every day." (*Id*.). She is on slow-release morphine drip to deal with the pain. (T 432). Her leg is swollen, and the swelling is permanent. (T 428). Her mobility is limited. She can't walk long distances or stand for long periods of time. (T 428). She can't exercise. (T 730).

The Plaintiff's condition is permanent—there is nothing that can be done. (T 428).

THE LAWSUIT AND TRIAL

Ms. Miles and her husband sued the doctor for negligence. (R 8-12). The jury awarded the Plaintiffs $1.5 million in noneconomic damages and $16,104.00 in economic damages. (T 1366-68, 1444-45).

After the trial, the Defendant asked the trial court to reduce the award of noneconomic damages to $500,0000. (R 301, 341-71). He argued that a new statutory cap on noneconomic damages—enacted seven to nine months *after* his negligent care of the Plaintiff—should apply to limit his liability. The new law, Section 766.118, Florida Statutes, was signed into law on August 14, 2003, and had an ef-

fective date of September 15, 2003. The Plaintiffs sent their notice of intent to initiate litigation on September 9, 2005, and filed the lawsuit on January 4, 2006. (R 396).

The trial court (Judge Kevin Emas) rejected the Defendant's argument that the damages cap could be applied retroactively to limit the Plaintiffs' noneconomic damages. (R 396-408).

THE STATUTORY CAP REACHES THE DISTRICT COURTS

The case then went to the Third District Court of Appeal. At the same time, the issue of the retroactive application of the cap on medical malpractice damages was before the Fourth District Court of Appeal.

The Fourth District decided the issue first. In *Raphael v. Shecter*, 18 So. 3d 1152 (Fla. 4th DCA 2009), the court held that the cap on medical malpractice damages could *not* be applied retroactively.

The Fourth District relied on its then recent precedent in *Williams v. American Optical Corp*., 985 So. 2d 23 (Fla. 4th DCA 2008), in which the court had held that the provisions of a statute governing asbestos cases could not be applied retroactively. The Third District had reached a different conclusion on the asbestos

statute, holding in *DaimlerChysler Corp. v. Hurst*, 949 So. 2d 279 (Fla. 3d DCA 2007), that the provisions of the asbestos statute could be applied retroactively.

In this case, the Third District continued the conflict between the two districts on retroactivity, holding that the medical malpractice cap on damages could be applied retroactively. *Weingrad v. Miles,* 29 So. 3d 406 (Fla. 3d DCA 2010). A divided panel of the Third District held that the Plaintiffs had no "vested right" to their common law damages, and thus the cap on damages could be applied retroactively:

> Although the injury in the present case occurred in 2003, prior to the effective date of the amendment of section 766.118, because Appellees did not file their notice of intent to initiate litigation, file their complaint, or obtain a judgment prior to the enactment of the statute, they had at most a "mere expectation" or a prospect that they might recover damages of an indeterminate amount at an unspecified date in the future. ***The Appellees 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.***

Id. at 416 (emphasis added). Judge Cope dissented, stating that he agreed with the Fourth District's conclusion that the cap on damages could not be applied retroactively. *Id*. at 417.

The cases move to this Court, where they are stayed pending resolution of the asbestos cases

The Plaintiffs in this case and the Defendant in *Raphael* both sought review in this Court. The Court eventually stayed both cases pending review and disposition of *Williams v. American Optical Corp.,* 985 So. 2d 23 (Fla. 4th DCA 2008), the Fourth DCA case on retroactivity of the asbestos statute. (R 449).

On July 8, 2011, this Court issued its decision in *American Optical Corp. v. Spiewak*, 73 So. 3d 120 (Fla. 2011), and held that the application of the asbestos statute to claims which had already accrued would violate due process. The Court stated that "we affirm the holding of the Fourth District in *Williams v. American Optical Corp*., 985 So.2d 23 (Fla. 4th DCA 2008), that retroactive application of the Act to the Appellees, and other claimants who had accrued causes of action for asbestos-related disease pending on the effective date of the Act, is impermissible because it violates the due process clause of the Florida Constitution." 73 So. 3d at 133. The Court affirmed the Fourth District's conclusion that "where a right of action has already accrued, new legislation enacted after that accrual which substantively affects the cause of action may not be retroactively applied to that cause of action." 73 So. 3d at 123. The Supreme Court disapproved the Third District's decision in *DaimlerChrysler Corp. v. Hurst,* 949 So. 2d 279.

Having decided *American Optical,* the Court then issued show cause orders in the two conflicting medical malpractice cases.

In the *Raphael* case, in which the Fourth District refused to apply the damages cap retroactively, the Court asked the defendant to "show cause . . . why this Court's decision in *Williams v. American Optical,* Case Nos. SC08-1617 and SC08-1639, is not controlling in this case and why the Court should not decline to accept jurisdiction in this case." (R 470-71). The Court in *Raphael* eventually entered an order consistent with the show cause order: "the Court has determined that it should decline to accept jurisdiction in Case Nos. SC09-2153 and SC09-2154. Therefore, the petition for discretionary review is denied and the appeal is dismissed. *See American Optical Corp. v. Spiewak,* 36 Fla. L. Weekly S435 (Fla. 2011)." (R 471).

In the present case, from the Third District, the Court asked the Defendant to show cause why, under *American Optical*, he should not lose. The Defendant was ordered 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*, Case Nos. SC08-1617 and SC08-1639." (R 450). The Defendant responded that, rather than quashing, the Court should accept jurisdiction and decide the case on the merits. (R 451). But the

Defendant admitted that "the opinion appeared to deem an accrued cause of action as a vested right, thus suggesting that this Court may have implicitly receded from past precedent that a claimant has no vested property interest in merely pursuing a common law tort action to recover damages which has not yet been filed." (R 452).

The Plaintiffs replied that the Court should enter an order consistent with its show cause order—that is, summarily quash and remand for reconsideration in light of *American Optical*. (R 459-62).

The Court did not do as either the Plaintiffs or the Defendant requested. Instead, the Court declined to exercise discretionary review:

> 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).

(R 464).

The Plaintiffs filed a Motion for Clarification, arguing that (1) the Court had left in place the two conflicting district court decisions on the retroactive application of the cap on damages, (2) under *American Optical*, the cap cannot be applied retroactively, and (3) under the simple denial of review by the Court, the Plaintiffs'

recovery would be limited to $500,000, while the plaintiff in *Raphael* would recover $9.5 million. (R 465-69).

The Court eventually issued an order implicitly concluding that the Plaintiffs' Motion for Clarification was a Motion for Rehearing, and struck the motion as unauthorized under the Court's order denying review. (R 470).

The case returns to the lower courts

The case then returned to the trial court. The Defendant moved to vacate the prior $1.5 million judgment, and asked the court to enter a new judgment based on the $500,000 cap. (R 416-37). The Plaintiffs opposed this, based on the *American Optical* decision, but acknowledged that the trial court had no alternative but to follow the law of the case as stated in the Third District's Court's *Weingrad* opinion. (R 438-75). The trial court entered judgment based on the damages cap. (R 490-92).

The Plaintiffs appealed the ruling to the Third District, which affirmed the retroactive application of the statutory cap on damages. The opinion of the district court stated:

> 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 v. Weingrad, 103 So. 3d 259 (Fla. 3d DCA 2012).

SUMMARY OF THE ARGUMENT

Recent decisions from this Court have made clear that a plaintiff has a vested right in a cause of action which has accrued. The Third District's contrary ruling should be reversed, and the Plaintiffs should be awarded the full amount of their damages as determined by the jury.

The medical malpractice cap on damages is also unconstitutional prospectively under the access to courts and other provisions of the Florida Constitution.

ARGUMENT

The retroactive application of statutes can be unjust. As a leading authority notes, "A fundamental principal of jurisprudence holds that retroactive application of new laws is usually unfair." SUTHERLAND ON STATUTORY CONSTRUCTION § 41:2 (6th ed. June 2009). The retroactive operation of statutes "can be harsh and implicate due process concerns." *Metropolitan Dade County v. Chase Federal Housing Corp*., 737 So. 2d 494, 499 (Fla. 1999). Because of these concerns, the presumption is that laws operate prospectively. *See Old Port Cove Holdings v. Old Port Cove Condominium Association One,* 986 So. 2d 1279, 1284 (Fla. 2008).

The Legislature has generally recognized this. On the occasions when it has enacted limits on recoverable damages, it has generally followed the general principle that laws are to be applied prospectively. The Legislature has usually not attempted to apply the caps retroactively.[1] But in 2003 the Legislature departed from its prior practice and sought to retroactively impose the cap on medical malpractice damages. § 766.118, Fla. Stat. (2003).

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[1] *See* Tort Reform and Insurance Act of 1986, Chapter 86-160, Laws of Florida (caps on non-economic damages); Chapter 88-277, § 51, Laws of Florida (enacting § 766.207, Fla. Stat., capping damages in medical malpractice cases in which the defendant agreed to arbitration); 1999 Tort Reform Act, Chapter 99-225, § 36, Laws of Florida (enacting § 768.73, Fla. Stat., limiting recovery of punitive damages).

The Fourth District in *Raphael v. Shecter*, 18 So. 3d 1152 (Fla. 4th DCA 2009), properly held that the retroactive application of the cap on medical malpractice damages violates due process. The Third District's adherence to its contrary view that the medical malpractice cap on damages can be applied to retroactively limit claims is incorrect. As recent cases by this Court demonstrate, the Plaintiffs had a vested right in their claim, and the statute which limits their vested rights cannot be applied retroactively.

I. THE MEDICAL MALPRACTICE CAP ON DAMAGES MAY NOT BE APPLIED RETROACTIVELY TO CAUSES OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE STATUTE

The Third District held that "[b]ecause we find that [the Plaintiffs] had no vested right to a specific damage award at the time the injury occurred, we conclude that applying the cap to [the Plaintiffs'] noneconomic damage award is constitutional." *Weingrad v. Miles*, 29 So. 3d 406, 408 (Fla. 3d DCA 2010), *reaffirmed*, *Miles v. Weingrad*, 103 So. 3d 259 (Fla. 3d DCA 2012). This holding is incorrect, is a denial of due process, and should be quashed. *See* Art. I, § 9, Fla. Const.; Art. I, § 2, Fla. Const.

This Court in *American Optical Corp. v. Spiewak*, 73 So. 3d 120 (Fla. 2011),

repeatedly indicated that a plaintiff has a vested right in a cause of action which has accrued. The Court referred to "years of common law precedent . . . holding that ***a diagnosis of asbestos-related disease and injury***, without regard to any particular threshold level of impairment suffered, ***constitutes an accrued cause of action that provides citizens vested rights to file actions based on the injuries***." *Id.* at 130 (emphases added). The Court noted that each of the plaintiffs in that case suffered from injuries consistent with asbestos-related disease, that the plaintiffs therefore had "an accrued cause of action for the injuries," and that "these causes of action constituted a property interest in which the [plaintiffs] had a vested right." *Id.*. The Court quoted a district court statement that "once a cause of action has accrued, the right to pursue that cause of action is generally considered a vested right." *Id.* at 126 (quoting *R.A.M. of South Fla., Inc. v. WCI Communities*, Inc., 869 So.2d 1210, 1220 (Fla. 2d DCA 2004)). The Court also quoted a statement in one of its prior decisions that "[o]nce the defense of the statute of limitations has accrued, it is protected as a property interest just as the plaintiff's right to commence an action is a valid and protected property interest." *Id.* at 126 (quoting *Wiley v. Roof,* 641 So.2d 66, 68 (Fla.1994)).

The Court in *American Optical* thus made it clear that a plaintiff has a vested right in a cause of action when the cause of action accrues. The Third District's

holding to the contrary should be quashed. If there was any doubt on this point, that doubt was put to rest by this Court's recent decision in *Maronda Homes v. Lakeview Reserve Homeowners Association*, ___ So. 3d ___ (Fla. July 11, 2013) (case nos. SC10-2292 & 10-2336).

In *Maronda,* the Court clearly held that a plaintiff has a vested right in a cause of action which has accrued, and that the right cannot be adversely affected by a later-enacted law:

> **Vested Rights**
>
> Article I, section 2, of the Florida Constitution guarantees to all persons the right to acquire, possess, and protect property. *See American Optical Corp. v. Spiewak*, 73 So. 3d 120, 125 (Fla. 2011). Section 9 of article I provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. ***These constitutional due process rights protect individuals from the retroactive application of a substantive law that adversely affects or destroys a vested right;*** imposes or creates a new obligation or duty in connection with a previous transaction or consideration; or imposes new penalties. *See Metro. Dade Cnty. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 503 (Fla. 1999); *State Farm Mut. Aut. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995). For 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. *See Chase Fed.*, 737 So. 2d at 499.
>
> Remedial statutes operate to further a remedy or confirm rights that already exist, and a procedural law provides the means and methods for the application and enforcement of existing duties and rights. *See Alamo Rent-A-Car, Inc. v. Mancusi,* 632 So. 2d 1352, 1358 (Fla. 1994); *City of Lakeland v. Catinella*, 129 So. 2d 133, 136 (Fla. 1961). In contrast, a substantive law prescribes legal duties and rights and, once those rights and duties are vested, due process prevents the Leg-

> islature from retroactively abolishing or curtailing them. *See Chase Federal*, 737 So. 2d at 503; *Mancusi*, 632 So. 2d at 1358 ("[S]ubstantive law prescribes duties and rights . . . .").
>
> ***Generally, once a cause of action accrues, it becomes a vested right.*** *See Spiewak*, 73 So. 3d at 125-26. This is in accordance with United States Supreme Court precedent which holds that a cause of action is "a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co*., 455 U.S. 422, 428 (1982). It is also consistent with this Court's precedent which holds that ***after a cause of action accrues, it transforms into a protected property interest and becomes a vested right.*** *See Wiley v. Roof*, 641 So. 2d 66, 68 (Fla. 1994) ("Once the defense of the statute of limitations has accrued, it is protected as a property interest just as the plaintiff's right to commence an action is a valid and protected property interest."). Therefore, ***after it has accrued, a cause of action is a vested right that may not be eliminated or curtailed.*** *See, e.g., Spiewak*, 73 So. 3d at 125-30. A cause of action in tort accrues when the complaining party sustains damage and the last act necessary to establish liability occurs. *See id*. at 126.

Maronda Homes, ___ So. 3d at ___. (emphases added).

The *Maronda Homes* decision resolves the question of the retroactive application of the medical malpractice damages caps. The Court held: "For the retroactive application of a law to be constitutionally permissible, [1] the Legislature must express a clear intent that the law apply retroactively, and [2] the law must be procedural or remedial in nature." ___ So. 3d at ___.

While the Legislature expressed an intent that the cap on medical malpractice damages would apply retroactively, the law was not procedural or remedial in nature. Instead, the law limiting recovery was substantive, as the Third District it-

self noted. *Weingrad v. Miles*, 29 So. 3d at 410 ("[T]he provision is substantive in nature."). A law which limits recoverable damages is obviously substantive. *See Kaiser v. Kolb*, 543 So. 2d 732 (Fla. 1989) (refusing to apply retroactively a statute which limited recoverable damages). *See generally Kaho'ohanohano v. Department of Human Services*, 178 P.3d 538, 588 (Hawaii 2008) ("[C]ourts from other jurisdictions that have examined this particular issue have concluded that a change in the right of recovery is deemed to have altered the parties' vested rights and are substantive in nature.").

The Third District's conclusion that the cap on medical malpractice damages may be applied retroactively is contrary to *American Optical*; contrary to *Maronda Homes*; contrary to the Fourth District's decision in *Raphael v. Shecter*, 18 So. 3d 1152 (Fla. 4th DCA 2009); and contrary to the First District's decision in *Fitchner v. Lifesouth Cmty. Blood Centers, Inc.*, 88 So. 3d 269, 281 (Fla. 1st DCA 2012) ("To the extent that the decision in the case before this court turns on the existence of a vested right to assert the cause of action, we agree with the decision of the Fourth District in *Raphael* and Judge Cope's dissenting opinion in *Weingrad*."), *rev. denied*, case no. SC12–1326 (Fla. Dec. 28, 2012). The decision of the Third District should be quashed.

II. The cap on damages is unconstitutional prospectively as well as retrospectively

For the reasons stated above, the cap on medical malpractice damages cannot be applied retroactively. This case can be resolved on that basis.

In *Estate of McCall v. United States*, case no. SC11-1148 (oral argument on Feb. 2, 2012), the Court is considering arguments that the cap on damages is unconstitutional prospectively as well as retroactively. As we did in the lower courts, we assert that the cap on damages violates the rights of access to the courts (Art. I, § 21, of the Florida Constitution); equal protection (art. I, § 2); trial by jury (art. I, § 2); and the separation of powers (art. I, § 3). The cap also violates Article I, Section 26(a) (commonly known as "Amendment 3"), which guarantees claimants 90% of all damages in excess of $250,000.

CONCLUSION

The decision of the Third District should be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

We hereby certify that a copy of this document was served by email on this 11th day of November, 2013, to Bruce Stanley, Esq., bruce.stanley@henlaw.com, Henderson, Franklin, Starnes & Holt, P.A., P.O. Box 280, Fort Meyers, FL 33902-0280; and Mark Hicks, Esq., mhicks@mhickslaw.com, Dinah Stein, Esq., dstein@mhickslaw.com, and eclerk@mhickslaw.com, Hicks, Porter, Ebenfeld & Stein, P.A., 799 Brickell Drive, 9th Floor, Miami, FL 33131-2855.

We hereby certify that this brief is in Times Roman 14 point, and in compliance with the type requirements of the Florida Rules of Appellate Procedure.

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