# 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 AN OPINION
OF THE THIRD DISTRICT COURT OF APPEAL

## RESPONDENT'S BRIEF ON JURISDICTION

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**





HICKS, PORTER, EBENFELD & STEIN, P.A.
799 BRICKELL PLAZA, 9TH FLOOR, MIAMI, FL 33131 • TEL. 305/374-8171 • FAX 305/372-8038

## TABLE OF AUTHORITIES

**PAGE**





HICKS, PORTER, EBENFELD & STEIN, P.A.
799 BRICKELL PLAZA, 9TH FLOOR, MIAMI, FL 33131 • TEL. 305/374-8171 • FAX 305/372-8038

**Statutes**



**Other**





HICKS, PORTER, EBENFELD & STEIN, P.A.
799 BRICKELL PLAZA, 9TH FLOOR, MIAMI, FL 33131 • TEL. 305/374-8171 • FAX 305/372-8038

## INTRODUCTION

In November 2011, this Court in an unanimous order denied conflict review in this very case. Not satisfied with this ruling, Petitioners/Plaintiffs (Miles and Haynes) filed an unauthorized motion for clarification in this Court (which was denied), and then re-appealed to the Third District Court of Appeal in the hopes that a new panel would rule differently. It did not. Now Petitioners ask this Court again to reverse itself and accept review based on the same arguments that it rejected in 2011, despite the fact that nothing has changed legally or factually since then. Respondent submits that this Court should, once again, deny review in this case and put this matter to rest.

## STATEMENT OF THE CASE AND FACTS

In 2010, the Third District issued an opinion partially reversing a damages award for the Petitioners and remanding for application of the statutory cap on noneconomic damages in medical malpractice actions, section 766.118, Fla. Stat. *Weingrad v. Miles*, 29 So. 3d 406 (Fla. 3d DCA 2010) ("*Miles I*"). The sole basis for the Court's opinion was that the cap could be retroactively applied to the particular facts.

Petitioners sought review in this Court in Case Number SC10-558, asserting conflict with a decision from the Fourth District Court of Appeal. On September 1, 2011, this Court ordered Respondent, Dr. Weingrad, to show cause as to why the


HICKS, PORTER, EBENFELD & STEIN, P.A.
799 BRICKELL PLAZA, 9TH FLOOR, MIAMI, FL 33131 • TEL. 305/374-8171 • FAX 305/372-8038

2010 decision was not in conflict with this Court's just-released opinion in *American Optical Corp. v. Spiewak*, 73 So. 3d 120 (Fla. 2011), which addressed the retroactive application of an unrelated statute that abolished causes of action in certain classes of pending and future asbestos actions. In response, Dr. Weingrad contended that *Weingrad v. Miles* was not in conflict with *American Optical* for a number of reasons. Petitioners in turn submitted that *American Optical* was binding on *Miles*.

On November 7, 2011, this Court issued the following order denying 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.

(App. A). Petitioners moved this Court for clarification of its denial of jurisdiction, and this motion was denied. Case No. SC10-558.

After remand, Petitioners filed a second appeal in the Third District in Case Number 3D12-779, asking it to disregard this Court's denial of jurisdiction and find conflict between *Miles I* and *American Optical*. The Third District panel unanimously rejected Petitioners' argument in a one-paragraph 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.



HICKS, PORTER, EBENFELD & STEIN, P.A.
799 BRICKELL PLAZA, 9TH FLOOR, MIAMI, FL 33131 • TEL. 305/374-8171 • FAX 305/372-8038

*Miles v. Weingrad*, 2012 WL 6602906 (Fla. 3d DCA Dec. 19, 2012) (App. B).

Petitioners now again ask this Court to find conflict between *Miles I* and *American Optical*, despite the rejection of their conflict arguments by both this Court in 2011 and the Third District in *Miles II*. For the reasons that follow, this Court should again find no conflict between *Miles I* and *American Optical*.

## SUMMARY OF ARGUMENT

Both this Court and the Third District have expressly rejected Petitioners' conflict argument in this very case. Petitioners have provided absolutely no reason, let alone a compelling one, for this Court to reverse itself and now find a conflict after rejecting Petitioners' argument over a year ago. As Dr. Weingrad has repeatedly set forth, there is no conflict between the decisions in *Miles I* and *American Optical*. The cases address the retroactive application of different statutes, involving different classes of plaintiffs, with diametrically different constitutional concerns. Dr. Weingrad respectfully submits that this Court should again reject Petitioners' argument in favor of conflict jurisdiction.

## ARGUMENT

There is no conflict between the Third District's one-paragraph decision in *Miles II* finding no conflict between *Miles I* and *American Optical*. These arguments have already been presented to and ruled on by this Court in 2011.



HICKS, PORTER, EBENFELD & STEIN, P.A.
799 BRICKELL PLAZA, 9TH FLOOR, MIAMI, FL 33131 • TEL. 305/374-8171 • FAX 305/372-8038

However, Dr. Weingrad will reiterate why *American Optical* is not dispositive of this case.

*American Optical* addressed the application of a vastly different statute than the one at issue in the instant proceeding. In *American Optical*, this Court affirmed a decision from the Fourth District Court of Appeal 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.

The *American Optical* opinion suggests 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 to recover damages which has not yet been filed. *See Clausell v. Hobart Corp.*, 515 So. 2d 1275, 1276 (Fla. 1987) ("The Plaintiff in the instant case had no vested contract or property right prior to the


HICKS, PORTER, EBENFELD & STEIN, P.A.
799 BRICKELL PLAZA, 9TH FLOOR, MIAMI, FL 33131 • TEL. 305/374-8171 • FAX 305/372-8038

*Pullman* decision; instead Plaintiff was merely pursuing a common law tort theory to recover damages ... [P]laintiffs 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.").[1]

However, even if the *American Optical* decision expanded vested rights to include inchoate causes of action that have not yet been filed, there is no language in *American Optical* even suggesting, let alone holding, that it applies to the completely different damages cap at issue in the instant case, which does not in any way deprive plaintiffs of the right to bring a cause of action.

To the contrary, Petitioners here were still permitted to maintain their medical malpractice action against Dr. Weingrad, from whom they recovered damages. 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.

While this Court in *American Optical* held that an accrued cause of action that is pending in the Florida court system constitutes a vested property right which

---

[1] 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).



HICKS, PORTER, EBENFELD & STEIN, P.A.
799 BRICKELL PLAZA, 9TH FLOOR, MIAMI, FL 33131 • TEL. 305/374-8171 • FAX 305/372-8038

cannot be destroyed without creating an alternative remedy, 73 So. 3d 120, the Court did not address the Third District's holding in *Miles I* that a claimant does not have a vested right to a particular damages award above and beyond a certain amount. Accordingly, the issue decided in *American Optical* – whether the right to maintain an accrued cause of action is a vested right – and the issue involved in *Miles I* – whether the right to noneconomic damages in excess of $500,000 is a vested right – are significantly different.

*American Optical* also does not apply to *Miles* because the Asbestos Act was adopted and immediately went into effect while the claimants' actions were pending, thus giving the plaintiffs no opportunity to avoid the effect of the statute and further depriving them of their due process rights. 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. In this case, Plaintiffs simply failed to avail themselves of the safe harbor. Although Petitioners' cause of action accrued in 2003, prior to the enactment of the caps statute and the end of the statutory safe harbor period, it was not until September 2005 that Petitioners filed their notice of intent. *American Optical* is distinguishable from the instant case on that basis as well.

In addition, in contrast to the Asbestos Act, the caps statute is remedial in nature. Although the courts will refuse to apply a statute retroactively if it impairs


HICKS, PORTER, EBENFELD & STEIN, P.A.
799 BRICKELL PLAZA, 9TH FLOOR, MIAMI, FL 33131 • TEL. 305/374-8171 • FAX 305/372-8038

vested rights, "[r]emedial ... statutes do not fall within the constitutional prohibition against retroactive legislation and they may be held immediately applicable to pending cases." *Campus Commc'ns, Inc. v. Earnhardt*, 821 So. 2d 388, 396 (Fla. 5th DCA 2002), *citing Village of El Portal v. City of Miami Shores*, 362 So. 2d 275, 278 (Fla.1978); *City of Lakeland v. Catinella,* 129 So. 2d 133 (Fla.1961); *Grammer v. Roman,* 174 So. 2d 443 (Fla. 2d DCA 1965)); *see also 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.").

A remedial statute is one that "confers or changes a remedy," *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296, 298 (Fla. 4th DCA 2005), corrects an existing law, redresses an existing grievance, or introduces a regulation conducive to the public good. *Adams v. Wright*, 403 So. 2d 391, 394 (Fla. 1981). The caps statute clearly falls into the category of a remedial statute, as it addresses and attempts to resolve what the Legislature in its findings deemed to be "a medical malpractice insurance crisis of unprecedented magnitude." Ch. 2003-416, § 1(1), Laws of Fla. Moreover, it does not alter a right of action, but simply a remedy.

Finally, Petitioners incorrectly assert that *Miles I* conflicts with the First District's recent decision in *Fitchner v. Lifesouth Community Blood Centers*, 88 So. 3d 269 (Fla. 1st DCA 2012), which addressed the retroactive application of yet


HICKS, PORTER, EBENFELD & STEIN, P.A.
799 BRICKELL PLAZA, 9TH FLOOR, MIAMI, FL 33131 • TEL. 305/374-8171 • FAX 305/372-8038

another unrelated statute – this one classifying blood banks as healthcare providers protected under the presuit screening statutes. (Brief p. 8).

*Fitchner* creates no such conflict. First, *Miles II*, from which Petitioners seek review, makes absolutely no mention of the *Fitchner* decision or its holding, so there is no express and direct conflict. Second, in reaching its decision the *Fitchner* Court expressly distinguished the caps statute at issue in *Miles*, noting that the Legislature had intended for the caps statute to apply retroactively, but made no such provision in the statute at issue in *Fitchner*. 88 So. 3d at 279-80. Although the Court suggested that its holding would be in conflict with *Miles I* if it was found that the Legislature intended the statute at issue to apply retroactively, *id.* at 281 n.3, this was pure *dicta*, as demonstrated by the fact that this Court denied review in *Fitchner* based on a lack of jurisdiction. 2012 WL 6757542 (Fla. Dec. 28, 2012). *See Ciongoli v. State*, 337 So. 2d 780 (Fla. 1976) (where conflicting language in decisions is *dicta*, Court will not exercise jurisdiction); *Hastings v. Demming*, 682 So. 2d 1107, 1112 (Fla. 2nd DCA 1996) (citing *Ciongoli* for same proposition).

Accordingly, Respondent, Dr. Weingrad, again submits that the Court's decision in *Miles II* is not in conflict with any decision of another district court or this Court.



HICKS, PORTER, EBENFELD & STEIN, P.A.
799 BRICKELL PLAZA, 9TH FLOOR, MIAMI, FL 33131 • TEL. 305/374-8171 • FAX 305/372-8038

WHEREFORE, Respondent, DANIEL WEINGRAD, M.D., respectfully submits that the Court should deny the Plaintiffs' Petition for Discretionary Jurisdiction.

Respectfully submitted,

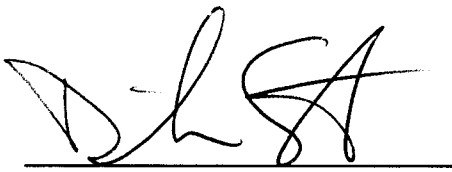
HENDERSON, FRANKLIN,
STARNES & HOLT, P.A.
P.O. Box 280
Ft. Myers, FL 33902
Tel: (239) 344-1100
Fax: (239) 344-1200
bruce.stanley@henlaw.com
*Counsel for Respondent,*
*Daniel Weingrad, M.D.*

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
eclerk@mhickslaw.com
*Appellate Counsel for Respondent*
*Daniel Weingrad, M.D.*

BY: _____
MARK HICKS
Fla. Bar No. 142436
DINAH STEIN
Fla. Bar No.: 98272

**CERTIFICATE OF SERVICE**

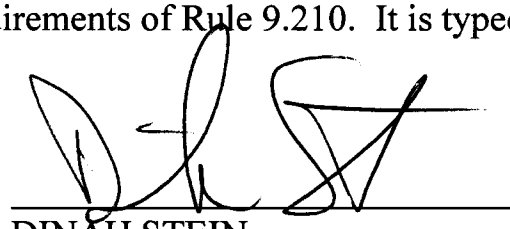
WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail this **1st** day of **February, 2013**, to: Robert S. Glazier, Esq., Law Office of Robert S. Glazier, 540 Brickell Key Drive, Ste. C-1, Miami, FL 33131, glazier@fla-law.com; Alex Alvarez, Esq., Herb R. Borroto, Esq., The Alvarez Law Firm, 355 Palermo Avenue, Coral Gables, FL 33134, alex@integrityforjustice.com.

BY: 

MARK HICKS
Fla. Bar No. 142436
DINAH S. STEIN
Fla. Bar No.: 98272

**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: 

DINAH STEIN
Fla. Bar No.: 98272



HICKS, PORTER, EBENFELD & STEIN, P.A.
799 BRICKELL PLAZA, 9TH FLOOR, MIAMI, FL 33131 • TEL. 305/374-8171 • FAX 305/372-8038

# Third District Court of Appeal

**State of Florida, July Term, A.D. 2012**

Opinion filed December 19, 2012.
Not final until disposition of timely filed motion for rehearing.

---

No. 3D12-779
Lower Tribunal No. 06-138

---

**Kimberly Ann Miles and Jody Haynes,**
Appellants,

vs.

**Daniel Weingrad, M.D.,**
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Jennifer Bailey, Judge.

Alex Alvarez; Robert S. Glazier, for appellants.

Henderson, Franklin, Starnes & Holt and Bruce M. Stanley, Sr. (Ft. Myers); Hicks Porter, Ebenfeld & Stein, Dinah Stein and Mark Hicks, for appellee.

Before WELLS, C.J., and SUAREZ, J., and SCHWARTZ, Senior Judge.

WELLS, Chief Judge.

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.