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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' REPLY BRIEF

ON DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

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ARGUMENT

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

Most of the Defendant's argument is defensive. He attempts to avoid the force of the abundant authorities which are against him: *Maronda Homes v. Lakeview Reserve Homeowners Ass'n*, 127 So. 3d 1258 (Fla. 2013), in which the Court held that "after it has accrued, a cause of action is a vested right that may not be eliminated or curtailed"; *American Optical Corp. v. Spiewak*, 73 So. 3d 120, 130 (Fla. 2011), in which the Court held that a diagnosis of a condition "constitutes an accrued cause of action that provides citizens vested rights to file actions based on the injuries"; *Raphael v. Schecter*, 18 So. 3d 1152 (Fla. 4th DCA 2009), in which the Fourth District held that a cause of action becomes a vested right upon accrual, and rejected the argument that the medical malpractice cap on damages could be applied retroactively; and *Fitchner v. Lifesouth Cmty. Blood Centers*, 88 So. 3d 269 (Fla. 1st DCA 2012), in which the First District expressly agreed with the Fourth District's opinion in *Raphael*.

On the offense, the Defendant relies principally on *Clausell v. Hobart Corp.*, 515 So. 2d 1275 (Fla. 1987). But this case is not particularly relevant to the issues presented here. The issue in *Clausell* was—in the words of the certified question—

whether retroactive application of a decision of this Court would "deprive the plaintiff of a right of due process guaranteed by the United States Constitution." 515 So. 2d at 1275.

The question was one arising under the federal Constitution, and the Court made its decision based on federal Constitutional law. The Court, in a brief opinion, found that because the plaintiff "had no vested right in his cause of action, he suffered no deprivation of due process under the United States Constitution." *Id.* at 1276. In reaching the conclusion, the Court cited to five judicial decisions—two decisions of the United States Supreme Court, a decision from the United States Court of Appeals for the Fifth Circuit, and two decisions from federal district courts in Florida.

The case before the Court, in contrast, does not present an issue of federal Constitutional law. Our argument, instead, is that the retroactive application of the cap on medical malpractice damages violates the Florida Constitution.

The Defendant also relies on *Doe v. America Online*, 718 So. 2d 385 (Fla. 4th DCA 1998), *approved*, 783 So. 2d 1010 (Fla. 2001), but that case too was governed by a federal law, the Communications Decency Act, which retroactively preempted certain claims against computer service providers. The Defendant quotes a passage from the Fourth District's opinion that "[n]o person has a vested right in a

non final tort judgment, much less an unfiled tort claim." [Answer brief, at 15] But that quote is from a federal court of appeals decision interpreting federal law. *Zeran v. America Online*, 129 F.3d 327, 335 (4th Cir. 1997).

The case before the Court involves a question of Florida Constitutional law. The Defendant's two main authorities are cases interpreting the federal Constitution, and thus not controlling (or even especially instructive).

Clausell is distinguishable for other reasons. *Clausell* dealt with the retroactive application of a judicial interpretation of a statute of repose, and in particular the confusion arising from this Court's decision in *Batilla v. Allis Chalmbers Mfg. Co.*, 392 So. 2d 874 (Fla. 1980), and its subsequent overruling in *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657 (Fla. 1985). As the Second District explained, "we can distinguish *Clausell* on the grounds that *Clausell* dealt with the abolition of the statute of repose in product liability cases. *Clausell* was therefore not concerned with the abolition of, or the interference with, the right of full recovery for an existing cause of action, but with a limitations defense to the right to pursue a cause of action." *City of Winter Haven v. Allen*, 541 So. 2d 128, 132 (Fla. 2d DCA 1989).

Clausell may be a correct statement of the law under the facts of that case—a case not involving reliance on Florida Constitutional law, and involving the retroactive application of a case interpreting a statute of repose. But outside that

narrow area, the case has little precedential weight, which may explain why it has been cited only once by this Court in the quarter century since it was decided.[1]

This case is governed by the many authorities cited above which hold that plaintiffs have a vested right in their claims when the claims accrue. This principle compels the conclusion that the cap on damages may not be retroactively applied to limit the Plaintiffs' recovery.

The Defendant, aside from relying on *Clausell*, takes issue with the authorities we rely on. He first argues that the cases we rely on are factually distinguishable because in those cases the statutory changes occurred after the plaintiffs had filed their lawsuit. But this factual distinction is irrelevant, since the Court has resolved the legal issue and held that there is a vested right when the cause of action accrues. The Defendant realizes this, stating: "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

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[1] This Court has issued many opinions on retroactivity over the last quarter century. *Clausell* is cited in only one, *Florida Hospital Waterman, Inc. v. Buster*, 984 So. 2d 478 (Fla. 2008). That case involved retroactive application of a newly-enacted constitutional amendment, not a statute as is at issue in this case. The Court held that the amendment, which made medical incident reports discoverable, could be applied retroactively since the prior law did not provide that the reports were privileged. There was no vested right in the secrecy of the records. *Cf. Smith v. Department of Insurance*, 507 So. 2d 1080, 1087 (Fla. 1987) (noting that there "exists a right to sue and recover noneconomic damages of any amount.").

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 1276." [Answer brief, at 18] As explained earlier, the Defendant has misunderstood *Clausell*, which did not involve a claim under the Florida Constitution. But the Defendant is absolutely correct that this Court has recently and repeatedly rejected his argument that under Florida law the Plaintiffs had no vested rights when their causes of action accrued.

The Defendant also argues that even if the Plaintiffs have a vested right, the right was not violated because the Legislature did not completely abrogate their causes of action, but only capped their damages. But this Court has rejected claims that there is no violation of a vested right as long as the Legislature has allowed partial damages to be recovered. After holding that absolute immunity could not be retroactively imposed, the Court later held that a limitation on damages could not be retroactively applied: "We see no reason why a different result should obtain here merely because the retroactive law limits the amount of recovery and does not completely abolish the cause of action. A vested right is not any less impaired in the eyes of the law merely because the impairment is partial." *Kaisner v. Kolb*, 543 So. 2d 732, 738-39 (Fla. 1989). *See also State Department of Transportation v. Knowles*, 402 So. 2d 1155, 1158 (Fla. 1981) (holding that a statute which limited a

plaintiff's recoverable damages could not be applied retroactively: "[t]he statute effects an abrogation of Knowles' right to his full tort recovery."). Applying the law equally, the Court held that a statute which *increased* the measure of damages in a bad faith action could not apply retroactively. *State Farm Mutual Automobile Insurance Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995).

The Defendant argues that the authorities we rely upon do not apply because "the damages caps statute provided a safe harbor giving claimants whose cause of action had accrued the opportunity to file their actions after the caps statute was enacted but prior to its effective date." [Answer brief, at 21] This argument should be rejected for three reasons. First, it is without support in Florida law. This Court has held that there is a vested right when a cause of action accrues, and laws which impair the vested right cannot be applied retroactively. There is no "safe harbor" exception. Second, there was no "safe harbor." The Plaintiffs became charged with notice of the new cap on damages not on the date that the statute was enacted, but only when it became effective. *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077, 1080 (Fla. 1978) ("The citizens of this State cannot be charged reasonably with notice of the consequences of impending legislation before the effective date of that legislation"). Since the Plaintiffs were charged with knowledge of the new law only on the day it was effective, they cannot be penalized for failing to file

their lawsuit or notice of intent before that date. Third, even if charged with knowledge of the law on the date it was enacted, the Plaintiffs still did not have an adequate safe harbor. The medical malpractice cap on damages was enacted on August 14, 2003, and became effective 32 days later, on September 15, 2003. A period as short as 32 days is not enough time to file suit. *See generally Cates v. Graham*, 451 So. 2d 475 (Fla. 1984); *University of Miami v. Bogorff*, 583 So. 2d 1000 (Fla. 1991); *Bauld v. J.A. Jones Construction Co.*, 357 So. 2d 401 (Fla. 1978); *Polk County BOCC v. Special Disability Trust Fund*, 791 So. 2d 581 (Fla. 1st DCA 2001). The Defendant's argument also ignores the fact that before filing a lawsuit, or even a notice to invoke, a medical malpractice claimant must conduct a pre-suit investigation, which cannot be performed in 32 days.

A cap on damages is substantive, not remedial. The Defendant's argument that the cap on damages is remedial, and therefore may be applied retroactively, is without merit. Changes to the amount of recoverable damages have consistently and without difficulty been held to be substantive, rather than remedial or procedural.

In *State Department of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981), this Court held that a statute which limited the amount of a plaintiff's recoverable damages was substantive, not procedural, and could not be applied

retroactively. The Court concluded that "[t]he statute effects an abrogation of Knowles' right to his full tort recovery, not merely a procedural adjustment of his remedies." *Id*. at 1158. A statute which increased the measure of damages in a bad faith action was similarly held to be substantive, not remedial. *State Farm Mutual Automobile Insurance Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995).

This Court has also held that a statute which changes which attorneys' fees are recoverable is substantive, rather than procedural. "[I]t cannot be reasoned that a statutory change that affects and changes the measure of damages is merely 're-medial' and thus, procedural, and, therefore is not a change in the substantive law giving the substantive right which is the basis for the damages." *L. Ross, Inc. v. R. W. Roberts Const. Co., Inc*., 481 So. 2d 484, 485 (Fla. 1986) (quoting *L. Ross, Inc. v. R.W. Roberts Construction Co*., 466 So. 2d 1096, 1098 (Fla. 5th DCA 1985)). *See also Bitterman v. Bitterman,* 714 So. 2d 356, 363 (Fla. 1998). The Court has gone further and held that a rule which merely creates a "safe period" to allow a party to avoid the payment of fees is substantive. *Bionetics Corp. v. Kenniasty*, 69 So. 3d 943, 948 (Fla. 2011); *Menendez v. Progressive Exp. Ins. Co., Inc*., 35 So. 3d 873, 879 (Fla. 2010).

The Third District in *Miles I* held that "the statutory cap on noneconomic damages affects an individual's right to a certain amount of damages. It does not

affect the means and methods a plaintiff must follow in a medical malpractice action but instead prescribes and regulates the rights parties have to a particular damage award. Thus, the provision is substantive in nature." *Weingrad v. Miles*, 29 So. 3d 406, 410 (Fla. 3d DCA 2010). The Fourth District reached the same conclusion in *Raphael v. Shecter*, 18 So. 3d 1152, 1157 (Fla. 4th DCA 2009).

It is, we submit, clear that a cap on damages is substantive, and may not be applied retroactively.

The claimed importance of the medical malpractice crisis. The Defendant claims that the cap on damages should be retroactively applied because "in enacting the caps statute, the Legislature concluded that a retroactive application was necessary to respond to an unprecedented medical malpractice insurance crisis." [Answer brief, at 25-26]

This is not a proper argument. If the Plaintiffs had a vested right to recover their full damages, then a statute cannot retroactively divest them of that right. But even if this were a proper argument, it is factually unsupported.

The legislative history demonstrates that the cap on damages was viewed as important, but the retroactive application of that cap was not treated as "necessary." The damage cap and other medical malpractice reforms were proposed by a task force, and that the task force viewed the cap on noneconomic damages as being its

most important recommendation. GOVERNOR'S SELECT TASK FORCE ON HEALTHCARE PROFESSIONAL LIABILITY INSURANCE 189-221 (Jan. 29, 2003). But the task force did *not* recommend that the cap on damages be applied retroactively. The comprehensive task force report, 345-pages long, never suggested that the cap on damages should be retroactive.

Similarly, while the Legislature prefaced the 2003 medical malpractice reform bill with specific findings, including three which specifically addressed the cap on non-economic damages, the Legislature did not make a finding which specifically addressed retroactivity. *See* Laws of Florida, Chapter 2003-416, § 1, ¶¶ 14-16.

There is nothing to indicate that the retroactive application of the cap on medical malpractice damages was thought to be necessary.

II. THE CAP ON DAMAGES IS UNCONSTITUTIONAL PROSPECTIVELY AS WELL AS RETROSPECTIVELY

The Defendant argues that we have waived the constitutional arguments other than due process. But in the first appeal to the Third District, we argued that the cap on damages violated the guarantee of access to courts and Article I, Section 26(a), (claimant's right to fair compensation, known as Amendment 3). [*Miles I* Answer brief, at 31-34] On remand in the trial court, after the Defendant moved to

apply the damages cap, we argued that the cap violated equal protection, access to the courts, trial by jury, and separation of powers. [R. 441] In the second appeal in the district court, we argued that the cap violated equal protection, trial by jury, separation of powers, Amendment 3, and access to the courts. [*Miles II* Initial brief, at 11-12] All grounds were thus argued in the trial court, and argued in the Third District. The issues were not waived.

On the merits, instead of burdening the Court with pages of argument on issues which the Court is considering in *Estate of McCall v. United States*, case no. SC11-1148, we rely on the briefs and oral argument in that case, which was argued on February 2, 2012.

III. THE COURT SHOULD NOT RECONSIDER ITS ORDER ACCEPTING JURISDICTION

The Court should not accept the Defendant's request that the Court reconsider its order accepting jurisdiction.

If the district court had merely affirmed the trial court in a PCA opinion, there would be no conflict jurisdiction. *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980). Similarly, if the district court had merely affirmed and cited to *Miles I*, then there would be no conflict jurisdiction. *Dodi Publishing v. Editorial America*, 385

So. 2d 1369 (Fla. 1980). *See generally Wells v. State*, 2014 WL 148557 (Fla. Jan. 16, 2014).

But the district court did more than merely affirm with a citation to *Miles I*. The district court went further, and made a statement of law: the court affirmed because it found "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)." *Miles v. Weingrad*, 103 So. 3d 259 (Fla. 3d DCA 2012).

This statement that there is no conflict between *Miles I* and *American Optical* is itself in conflict with *American Optical*. *American Optical* holds that a right is vested when a cause of action accrues, while *Miles I* holds that there is no vested right when a cause of action accrues. The conflict between *Miles I* and *American Optical* is clear, and the district court's explicit denial of that conflict in *Miles II* also conflicts with *American Optical*. The Court therefore has discretionary jurisdiction.

The Court should not reconsider its decision to exercise its discretion and hear this case. The Court has in recent years clarified the confusing law of retroactivity. The Third District—alone among the districts—has not recognized this now clarified law. The conflict among the districts on the retroactivity of the medical

malpractice caps will cause continued confusion, and will surely require guidance from this Court at some point. We ask the Court to provide the guidance now, so that these Plaintiffs can have their case resolved under the law as stated in *American Optical* and *Maronda*.

CONCLUSION

The decision of the Third District should be quashed, with instructions that the Plaintiffs are entitled to the full damages awarded by the jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

We hereby certify on this 5th day of February, 2014, that a copy of this document was e-filed with the Supreme Court of Florida and served by email 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.

_/s/ Robert S. Glazier_____