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IN THE SUPREME COURT OF FLORIDA

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

KIMBERLY ANN MILES and JODY 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 SUPPLEMENTAL BRIEF

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INTRODUCTION

This Supplemental Brief is being filed on behalf of Respondent, Daniel Weingrad, M.D., pursuant to this Court's April 2, 2014 order permitting supplemental briefing regarding the application, if any, of the Court's recent decision in *Estate of McCall v. United States*, 2014 WL 959180, 39 Fla. L. Weekly S104 (Fla. March 13, 2014).

ARGUMENT

I. PETITIONERS' EQUAL PROTECTION CHALLENGE IS NOT PROPERLY BEFORE THIS COURT.

Petitioners' equal protection challenge is not properly before this Court because Petitioners failed to preserve this issue for appellate review.[1] Specifically, Petitioners' equal protection argument was not properly briefed and argued in the original proceeding before the Third District Court of Appeal. *See Murray v. Regier*, 872 So. 2d 217, 223 n.6 (Fla. 2002) (holding that once this Court properly has and accepts conflict jurisdiction, it may, in its discretion, address other issues that "have been properly briefed and argued and are dispositive of the case.").[2]

The issue that was briefed and argued below involves whether a retroactive application of section 766.118, Florida Statutes, is constitutionally permissible in

[1] Respondent maintains that this Court should not exercise jurisdiction to review this matter for the reasons set forth in the briefs on jurisdiction and on the merits.

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

this case. It is, for the reasons previously detailed in Dr. Weingrad's answer brief on the merits.

Petitioners long ago waived any argument that section 766.118 violates equal protection as applied to this case. *See Westerheide v. State*, 831 So. 2d 93, 105 (Fla. 2002) (an as-applied constitutional challenge to a statute cannot be asserted on appeal unless the challenge has been properly raised and argued below). Petitioners never asserted an equal protection violation in *Miles I*, even after Dr. Weingrad specifically argued in his initial brief that the statute was constitutional and addressed the equal protection challenge Petitioners raised in the trial court. By failing to dispute this point, Petitioners clearly abandoned any argument that the caps statute violates 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 have cited no authorities to support their claim that the alleged equal protection challenge could be revived on remand from the Third District, after the challenge was abandoned and the district court implicitly held the statute constitutional. But even if they could (which is denied), the issue still was not properly preserved because Petitioners never briefed – either in *Miles II* or in their

initial brief on the merits in this Court – how the statute violates equal protection. (R5:Tab A, pp.11-12; Tab C, pp.4-5; IB Merits, p.16). Petitioners' vague assertion in *Miles II* that section 766.118 violates equal protection, with no further explanation or supporting authorities, did not preserve the issue for review in this Court. *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).

Therefore, assuming that this Court properly has jurisdiction to review *Miles II* in the first instance, the Court should not consider Petitioners' belated equal protection challenge based upon *McCall* because it has not been preserved.

II. ON THE MERITS, *MCCALL V. UNITED STATES* DOES NOT AND SHOULD NOT BE APPLIED TO THIS CASE.

If the Court considers the equal protection challenge despite the foregoing, it should be denied on the merits. Initially, Respondent submits that *McCall* lacks precedential value beyond the facts of the case, as discussed in section B *infra*, since a majority of the Court disagreed with the reasoning and analysis of the plurality.

Alternatively, this Court should follow its holding in *St. Mary's Hospital, Inc. v. Phillipe*, 769 So. 2d 961, 980 (Fla. 2000), that "if at all possible, a statute

should be construed to be constitutional." This means that to the extent the Court finds that the aggregate caps are invalid, the caps statute should be construed to be constitutional and interpreted to apply on a per claimant basis in order to preserve the legislative intent to cap damages.

In addition, *McCall* has no precedential value regarding application of the "rational basis test" to the statute as a whole as a result of the plurality decision, and thus, this Court should give proper deference to the Legislature's prior determination that there was a rational basis for enacting section 766.118. Moreover, there is no evidence presented in this case that a rational basis for the caps does not exist today. Instead, it appears that the caps are working precisely as intended by the Legislature. Thus, the caps should be held constitutional.

A. Per Claimant Cap vs. Aggregate Cap.

Plaintiff incorrectly contends that *McCall* precludes application of the caps statute in this action. Because *McCall* is a plurality opinion and a majority of the Court disagreed with the reasoning and analysis of the plurality, *McCall* may lack precedential value beyond the facts of the case, as discussed *infra*. However, even if *McCall* has precedential value, this does not extend beyond a holding that the aggregate caps are unconstitutional.

In *McCall*, a majority of five justices concurred that the aggregate caps in section 766.118(2) violate the Equal Protection Clause of the Florida Constitution

as applied to wrongful death cases. Justice Lewis writing for the majority on this issue stated that *St. Mary's Hospital v. Phillipe*, 769 So. 2d 961, "guides our analysis as to the constitutionality of section 766.118." *McCall*, 39 Fla. L. Weekly at S108. In discussing the constitutionality of section 766.118, Justice Lewis explained:

> We clearly announced in *Phillipe* that aggregate caps or limitations on noneconomic damages violate equal protection guarantees under the Florida Constitution when applied without regard to the number of claimants entitled to recovery.

McCall, 39 Fla. L. Weekly at S107.

In *Phillipe*, the issue before this Court was "whether the $250,000 'per incident' limitation of non-economic damages in the arbitration provisions of the Medical Malpractice Act [766.207(b)] limits the total recovery of all claimants in the aggregate to $250,000 or limits the recovery of each claimant individually to $250,000." *Phillipe*, 769 So. 2d at 961. The Court found an ambiguity existed and held that to interpret the statute on the basis of an aggregate recovery would, under the rational basis test, violate the Equal Protection Clause of the Florida Constitution as being arbitrary, discriminatory and without a legitimate state objective. *Id.* at 972.[3]

[3] Where, like here, a statute does not involve fundamental rights or a suspect class, the rational basis test applies to any equal protection analysis and requires the court to determine whether a statutory classification that treats one person or group differently than others "bear[s] some reasonable relationship to a legitimate state

The Court further concluded as follows:

> It is a fundamental rule of statutory construction that, if at all possible, a statute should be construed to be constitutional. *See Van Bibber v. Hartford Accident & Indem. Ins. Co.*, 439 So. 2d 880, 883 (Fla. 1983). In fact, this Court is bound "to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent." *State v. Stalder*, 630 So. 2d 1072, 1076 (Fla. 1994) (quoting *State v. Elder*, 382 So. 2d 687, 690 (Fla. 1980)). Therefore, we conclude that the cap on noneconomic damages applies to each claimant individually. Our holding on this issue is consistent with the federal and Florida Constitutions and honors the legislative intent of the Medical Malpractice Act.

Phillipe, 769 So. 2d at 980.

The caps statute involved in *McCall* and this case is section 766.118(2), which provides for aggregate limits:

> (2)(a)… No practitioner shall be liable for more than $500,000 in noneconomic damages, regardless of the number of claimants.
>
> (2)(b) [permanent vegetative state or death] … [T]he total noneconomic damages recoverable from all practitioners, regardless of the number of claimants, under this paragraph shall not exceed $1 million. . . .
>
> (2)(c) [aggregate cap] The total noneconomic damages recoverable by all claimants from all practitioner defendants under this subsection shall not exceed $1 million in the aggregate.

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objective," and is not "discriminatory, arbitrary, or oppressive." *See, e.g.*, *Phillipe*, 769 So. 2d at 791-92.

Phillipe mandates that "if at all possible, a statute should be construed to be constitutional." 769 So. 2d at 980. The aggregate language in *Phillipe* of "per incident" was deemed ambiguous in context and interpreted by the Court to mean "per claimant" in order to preserve the constitutionality of the statute.

If the Court finds that the aggregate caps violate equal protection in this case, the holding in *Phillipe* should be applied to preserve the constitutionality of section 766.118. It is perfectly proper for a Court to narrow the construction of a statute in order to save its constitutionality, so long as the court's interpretation is consistent with the legislative intent. *See State v. Stalder*, 630 So. 2d 1072, 1076 (Fla. 1994) ("[W]henever possible, a statute should be construed so as not to conflict with the constitution."), citing *Firestone v. News-Press Public, Inc.*, 538 So. 2d 457 (Fla. 1989); *State v. Elder*, 382 So. 2d 687 (Fla. 1980) (same).

Similarly, this Court held in *Vildibill v. Johnson*, 492 So. 2d 1047 (Fla. 1986):

> In summary, we hold that an adult decedent's estate may recover loss of prospective net accumulations when the decedent is survived only by parents who may not maintain a cause of action in their own right. This holding is based upon the clear intent of the legislature and the fact that a strict and literal interpretation of the statute would violate the equal protection clause of the Florida Constitution.

Id. at 1050.

Alternatively, if the Court finds that the caps statute cannot reasonably be interpreted to impose per claimant caps, the Court should sever the language

imposing aggregate caps from the statute and interpret the statute so as to be constitutional. *See Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 493 (Fla. 2008) ("[W]hile we concur with the First District in finding that section 381.028 contains provisions that curtail rights granted by amendment 7, we do not agree that this requires the invalidation of the entire statute. Although section 381.028 does not contain a severability clause, this does not affect our ability to sever the unconstitutional portions of the statute.").

Here, the legislative intent to cap non-economic damages is clear. The narrow construction to apply caps on a per claimant basis rather than invalidate the statute is fully in accord with the Legislature's intent and this Court's rulings in the above cases.

B. Precedential Value of *McCall*.

The *McCall* decision did not strike the caps statute in its entirety. At most, a majority of justices agreed that the aggregate provisions in the statute are unconstitutional. The decision may not have precedential value at all, and has no precedential value regarding whether the statute as a whole passes the rational basis test. As an additional ground for finding a denial of equal protection, only two out of five justices (Lewis and Labarga) agreed with Justice Lewis's analysis that the legislative determination that the caps statute bears a rational relationship to a legitimate state interest was erroneous and unsupported.

In *McCall*, Justice Lewis reasoned, in part, that "the finding by the Legislature and the Task Force that Florida was in the midst of a bona fide medical malpractice crisis…is dubious and questionable at the very best." *McCall*, 39 Fla. L. Weekly at S110. As noted by Justice Pariente's "concurring in result" only opinion in which Justices Quince and Perry concurred:

> …I respectfully disagree with the plurality's application of the rational basis test in this case. Specifically, my primary disagreement is with the decision not to afford deference to the legislative findings in the absence of a showing that the findings were "clearly erroneous."…
>
> …I disagree with the plurality's independent evaluation and reweighing of reports and data, including information from legislative committee meetings and floor debate, as well as an article published in the Palm Beach Post newspaper, as part of its review of whether the Legislature's factual findings and policy decisions as to the alleged medical malpractice crisis were fully supported by available data.

Id. at S112-13 (citation omitted).

> [T]here has been no showing made in this case that the Legislature's findings as to the existence of a crisis at that time were "clearly erroneous."

Id. at S115.

At most, the concurrence in result agreed with the plurality in holding "that the arbitrary reduction of survivors' noneconomic damages in wrongful death cases based on the number of survivors lacks a rational relationship to the goal of reducing medical malpractice premiums," *id.* at S115, and that there was no evidence of a continuing crisis "that would justify the arbitrary reduction of

survivors' noneconomic damages in wrongful death cases based on the number of survivors," *id.* at S114. However, in reaching this conclusion, Justice Pariente did not purport to do a "clearly erroneous" analysis of the continuing viability of the statute. Such an analysis must be based upon evidence presented by the parties. No such evidence was presented in *McCall* or here, and Justice Lewis' personal research into the matter was only accepted by Justice Labarga.

Significantly, the two dissenting Justices (Polston and Canady) both agreed that the rational basis test was satisfied in all respects.

Consequently, the alternative ground of the "rational basis test" addressed by Justice Lewis, which Justices Pariente, Quince and Perry described as a "plurality" decision of two justices, cannot and should not properly serve as a basis to strike down the caps statute in its entirety.

This follows because there was no agreement by a majority of the justices that the caps statute as a whole fails the rational basis test. While Justice Pariente expressed general agreement with certain aspects of the plurality's reasoning, these statements should not be misconstrued. Justices Pariente, Quince, and Perry chose to concur only "in result," which indicates "agreement with the ultimate decision but not the opinion." *See Floridians for a Level Playing Field v. Floridians Against Expanded Gambling*, 967 So. 2d 832, 834 (Fla. 2007) (additionally explaining that "concurring in the judgment" is akin to "concurring in result only"

and holding: "We conclude that by 'concurring in the judgment' and failing to indicate his agreement with the decision to certify, Judge Benton's vote cannot be counted as agreeing with the certification'."). Thus, in *McCall*, a decision was created on the narrow ground that aggregate caps violate equal protection.

The Florida Constitution provides in pertinent part:

> (a) Organization.—The supreme court shall consist of seven justices. … Five justices shall constitute a quorum. The concurrence of four justices shall be necessary to a decision.

Art. 5, §3(a), Fla. Const.

In *Santos v. State*, 629 So. 2d 838 (Fla. 1994), the Court explained:

> Under the Florida Constitution, both a binding decision and a binding precedential opinion are created to the extent that at least four members of the Court have joined in an opinion and decision. *See* art. V, § 3(a), Fla. Const.

Santos, 629 So. 2d at 840.

In *Santos*, the Court noted that a "plurality" opinion had been issued in the case previously, in which three members joined. Two other members concurred in result only with an opinion, and two members concurred in part and dissented in part. *Id.* at 840. However, the Court explained that the trial court plainly erred when on remand it found that cold and calculated premeditation existed since it was "clear that five members of the Court joined in the conclusion that the factor of cold and calculated premeditation could not exist on the present record." *Id.*

The Court explained that in the context of that case, the "decision" was the result reached by the Court, whereas the "opinion" was "the entire written statement issued by the Court in reaching its decision in a case, including the analysis and reasoning." *Id.* at n.1, 2. Thus, *Santos* demonstrates that the "decision" of a three-member plurality and a two-member concurring in result opinion is binding as the law of the case. It does not, however, address the precedential effect of such an opinion.

In *Greene v. Massey*, 384 So. 2d 24 (Fla. 1980), this Court responded to several certified questions from the Eleventh Circuit regarding the effect of a per curiam opinion it had rendered in *Sosa v. State*, 215 So. 2d 736 (Fla. 1968), in which four justices concurred (Thomas, Drew, Thornal, and Ervin), in light of a specially concurring opinion authored by Justice Ervin which was joined in by Justices Drew and Thornal, who had joined in the per curiam opinion as well.

Addressing the effect of "a per curiam opinion with a special concurrence from a majority of the Justices joining in the per curiam opinion," the Court explained that such an opinion "constitutes the only opinion of the Court." The Court explained:

> In *Sosa v. State*, 215 So. 2d 736 (Fla. 1968), once the three members of the Court who joined in the special concurring opinion joined in the per curiam opinion, that opinion became the majority opinion of the Court in that case. <u>The special concurring opinion has no precedential value and it cannot serve to condition or limit the</u>

> concurrence in the per curiam opinion by the three who joined in the special concurring opinion.
>
> There is a procedure by which those who joined in the special concurring opinion would not have been bound by the language of the per curiam opinion. Had there simply been entered a judgment of reversal and a remand for a new trial with each of the justices concurring for the reason stated in separate opinions, then none would be bound by any opinion except that in which he joined. In that event, however, there would have been a judgment by the Court disposing of the case, but no opinion of the Court. In contrast, here there was a per curiam opinion which gained a majority and this opinion constitutes the only opinion of the Court.

Greene, 384 So. 2d at 27.

Finally, in *North Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612, 636 (Fla. 2003), this Court held that a precedential "opinion" was created in *In re T.W.*, 551 So. 2d 1186 (Fla. 1989), where three justices "concurred" in the opinion of the Court, and one justice "concurred specially" in that opinion. However, in *T.W.*, unlike in *McCall*, the justice who authored the specially concurring opinion expressly recognized the existence of a majority opinion and decision, and wrote only to elucidate his views on the definition of a term that made no difference in the outcome of the case. 551 So. 2d at 1197 (Ehrlich, C.J., concurring specially) ("I generally concur with the majority opinion and the result it reaches. I write only to express my disagreement with the definition of 'viability' adopted by the majority and to elucidate my views."). *See also Jones v. State*, 640 So. 2d 1084, 1091 n.11 (Fla. 1994) (Kogan, J., concurring)

("By customary practice of the Court, a 'specially concurring' or 'concurring specially' opinion is one in which a Justice elaborates on or explains some aspect of the plurality or majority opinion to which it is attached. … However, a specially concurring opinion typically agrees with the result and general thrust of the plurality or majority, as Justice Ehrlich's [concurring specially opinion in *T.W.*] did.").

In *McCall*, unlike *Greene* or *T.W.*, a majority of justices did not join in a majority opinion, and there was no "specially concurring" opinion that agreed with both the result and the general thrust of a majority opinion. Instead, two justices joined in a "plurality" opinion, three justices concurred only "in result" in a separate opinion that disagreed with the plurality's analysis and reasoning, and two justices dissented entirely. The *Greene* Court declined to answer a question regarding the precedential effect of a holding in which only a plurality of justices join, concluding, "[w]e do not believe that the precedential effect of a holding in which only a plurality of the justices join is at issue here since a majority of the justices of the Court did in fact join in a majority opinion." 384 So. 2d at 28.

Federal courts addressing this issue have held: (1) plurality opinions of the United States Supreme Court are not binding, but are persuasive authority; and (2) when the Supreme Court rules by means of a plurality opinion, inferior courts should give effect to the narrowest ground upon which a majority of the justices

supporting the judgment would agree. *See, e.g.*, *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'...."); *United States v. Gonzalez-Lauzan*, 437 F.3d 1128, 1139 n.8 (11th Cir. 2006) ("We recognize that this Court is not bound by a plurality opinion."); *Horton v. Zant*, 941 F.2d 1449, 1464 n.32 (11th Cir. 1991) ("Plurality opinions are only persuasive authority; they are not binding on this Court.").

Additionally, the United States Supreme Court has stated that a decision may be "of questionable precedential value" when "a majority of the Court expressly disagree[s] with the rationale of [a] plurality." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996).

While the determination of a two-member "plurality" and a three-member concurrence in result constitutes the law of the case in *McCall*, it is questionable whether *McCall* has any precedential effect beyond the facts of that case under the Florida Constitution. *See generally* Kogan & Waters, *The Operation & Jurisdiction of The Florida Supreme Court*, 18 NOVA L. REV. 1151, 1175 (1994) (stating that a "concurring in result only opinion" can constitute the fourth vote

needed for a decision but the result is that there is no precedent beyond the specific facts of that case).

If, however, *McCall* does have precedential value, it must be limited to the narrowest grounds upon which the plurality and concurring in result opinions agreed – that the aggregate cap is unconstitutional. Thus, even if the concurring in result opinion additionally suggested that the caps statute as a whole was unconstitutional, the opinion was not concurred in by a majority of the Court. Justice Pariente's opinion has no precedential value and cannot, in combination with a "plurality opinion" that is of "questionable precedential value," constitute a binding precedential "decision" on the application of the rational basis test to the entire statute since there is no majority as to analysis and reasoning.

Accordingly, *McCall* does not require the conclusion that section 766.118(2)'s caps violate equal protection in this case. If the Court chooses to independently analyze this issue in this case, it should give the proper deference to its past precedent and the Legislature's findings of public purpose and facts. *See Univ. of Miami v. Echarte*, 618 So. 2d 189, 196 (Fla. 1993) ("[L]egislative determinations of public purpose and facts <u>are presumed correct and entitled to deference, unless clearly erroneous</u>."). No showing was ever made in this case that the Legislature's findings regarding the need for the caps statute were clearly erroneous. To the contrary, the Legislature's findings were correct, and the

findings in *McCall* that no medical malpractice crisis currently exists show that the caps statute has worked precisely as intended by the Legislature.

When the correct standard is applied, Dr. Weingrad submits that section 766.118 as a whole easily passes the rational basis test.

C. Prospective Application Only.

To the extent the Court determines that *McCall* has precedential value, or independently concludes that any part of the caps statute is invalid, the Court's holding should apply prospectively only to actions that have not yet been filed. Since the 2003 enactment of the statute, physicians, hospitals and other healthcare providers have purchased liability insurance based on the caps. In addition, the defense bar, healthcare providers and insurance industry have placed enormous reliance on the non-economic damages caps in making decisions on other matters as wide-ranging as risk assessment, entering the Florida medical malpractice insurance market, setting reserves, issuing policies, setting premium rates, and deciding whether to settle or litigate cases and file appeals. A retroactive invalidation of the statute would work significant hardships on the substantial number of individuals and businesses who for the last eleven years have factored the existence of the medical malpractice caps into significant personal and business decisions.

This Court has long held that a decision invalidating a statute should be given prospective application only where retroactive application would work a hardship on, or effect organic rights acquired by, those who had previously relied on the enactment. *See Interlachen Lakes Estates, Inc. v. Snyder*, 304 So. 2d 433 (Fla. 1973); *Deltona Corp. v. Bailey*, 336 So. 2d 1163 (Fla. 1976); *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991). Although there is a small class of statutes that cannot be applied retroactively, as will be shown, this is not one of them. *See, e.g., Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991).

In *Interlachen*, 304 So. 2d 433, this Court was called upon to determine the constitutionality of a statute providing tax rates for certain platted lands. The Court held that the statute violated the constitutional provision requiring just valuation of all property for ad valorem taxation because it constituted an impermissible classification for taxation purposes. It noted that, by voting for the 1968 "just valuation" amendment to the Florida Constitution, the people of the State had taken from the Legislature the power to tax classes of property on different bases.

Despite its finding that the statute was unconstitutional, this Court held that its holding would have prospective effect only so that those who had relied on the statute would not suffer a compromise of their rights due to the subsequent invalidation, explaining: "This decision operates prospectively from the date the

opinion becomes final because persons relying on the state statute did so assuming it to be valid despite the new provisions of the 1968 State Constitution." *Id.* at 435.

Three years later in *Deltona*, 336 So. 2d 1163, a corporate taxpayer sought application of the same tax statute for its 1974 taxes, claiming that it should be entitled to the benefit of the statute because the *Interlachen* Court held that its invalidation of the statute was prospective only, and *Interlachen* became final in December of 1974. The trial court refused to apply the statute based on its finding that, absent a litigant's justifiable reliance on a stricken statute, a court does not have the power to apply a statute the has been deemed unconstitutional. *Id.* at 1165-66. This Court rejected the trial court's finding, noting that "an act of the Legislature is presumed constitutional until invalidated by a final appellate decision." *Id.* This Court went on to conclude that the holding in *Interlachen* that the statutory invalidation applied prospectively in all cases was clear, noting that "courts have on various occasions…applied the principle of prospective constitutional invalidity." *Id.* (citations omitted).

This Court reaffirmed this principle in *Martinez*, 582 So. 2d 1167. The *Martinez* Court held that the Legislature's 1990 comprehensive revisions to the workers' compensation laws (the "Act") violated the single subject provision of the Florida Constitution and were therefore invalid. However, while *Martinez* had been pending, the Legislature had reconvened in 1991 and enacted a constitutional

version of the Act, and in doing so specifically provided that the revised laws would be applied retroactively to the original effective date of the 1990 Act.

In determining whether its invalidation of the 1990 Act would have retroactive application, this Court recognized that it and the United States Supreme Court have consistently decreed the striking of statutes as prospective only, particularly where retroactive application would visit hardships on those who had relied on their validity. *Id.* at 1174-75, *citing, e.g., Gulesian v. Dade County Sch. Bd.*, 281 So. 2d 325, 327 (Fla. 1973) (decision finding taxing statute unconstitutional was given prospective application where retroactive application "would work great hardship on the school board out of proportion to the interest of the individual taxpayers as compared to the needs of school children of the county"); *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980) (Court struck Medical Mediation Act as unconstitutional in its entirety because it violated due process clause, but ruled that declaration of unconstitutionality would be prospective only); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (Supreme Court applied decision invalidating tax statute prospectively only where "[s]ignificant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect").

The *Martinez* Court went on to distinguish the class of statutes that are void ab initio, and thus can never be enforced retroactively, because the Legislature

never had the power to enact them in the first instance. 582 So. 2d at 1174, *citing* *McCormick v. Bounetheau*, 190 So. 882 (Fla. 1939). In *McCormick*, this Court explained:

> The enactment is void ab initio if it violates a command or prohibition express or implied of the Constitution, while if deficient because of form as distinguished from power there may be a de facto jurisdiction to protect organic rights created 'before the illegality of enactment is adjudged.'
>
> This de facto authority may be said to exist as a creature of the courts to protect organic rights acquired under a law prima facie valid but adjudged defective after these rights have come into existence.

Id. at 883-84.

The *Martinez* Court held the 1990 Act was not void ab initio under *McCormick* because "[h]ere, we are declaring chapter 90-201 unconstitutional not because the legislature lacked the power to enact it, but because of the form of its enactment." 582 So. 2d at 1174. The Court additionally held that the hardships that would result from applying retroactive invalidation to the 1990 workers' compensation Act dictated a prospective-only application:

> When the legislature enacted the 1991 curative statutes in special session, it expressly stated that those provisions were retroactively applicable to the effective date of chapter 90-201. Thus, it is evident that the legislature sought to avoid the uncertainties and problems arising from declaring this statute void ab initio. While we do not explicitly rule on the validity of the retroactivity provisions of the 1991 act, we acknowledge the legislature's perception of the substantial impact on the entire workers' compensation system if we were to hold chapter 90-201 void ab initio.

> Considering all of these factors, we conclude that we can, and should, hold that the effective date of voiding chapter 90-201 is the date of the filing of this opinion. Our decision shall operate prospectively only.

Id. at 1175-76 (footnote omitted).

Pursuant to *Martinez, Interlachen, Deltona Corp.* and the other cases cited above, if this Court concludes that section 766.118 violates equal protection concerns it can and should declare that the statute's invalidity is prospective only. Significantly, a majority of this Court in *McCall* did not find that there was no rational basis for enacting the caps statute in 2003 in order to respond to the medical malpractice insurance crisis. *McCall*, 39 Fla. L. Weekly at S114-15 (Pariente, J., concurring in result), *id.* at S115-22 (Polston, C.J., dissenting). Thus, *McCall* holds that the Legislature had the power to enact section 766.118 in 2003, meaning it can still be enforced as to pending cases.

Significantly, to invalidate the caps statute retroactively would violate the organic rights acquired by citizens working, doing business and litigating in this State under a law that was "adjudged defective after these rights have come into existence." Moreover, reliance on the statute has been entirely justified. Prior to *McCall*, no Florida appellate court had found section 766.118 to be unconstitutional, and in fact the statute was applied by the Third District in this very matter, *Weingrad v. Miles*, 29 So. 3d 406 (Fla. 3d DCA 2010), *rev. denied*, 75 So. 3d 1245 (Fla. 2011), and expressly found not to violate federal constitutional

provisions by the United States Eleventh Circuit in *Estate of McCall v. United States*, 642 F.3d 944 (11th Cir. 2011).

III. ALTERNATIVELY, THE COURT SHOULD HOLD SECTION 766.118'S CAPS CONSTITUTIONAL AS APPLIED TO PERSONAL INJURY ACTIONS THAT DO NOT INVOLVE A "PERMANENT VEGETATIVE STATE" OR A "CATASTROPHIC INJURY."

If the Court finds that section 766.118(2) denies equal protection because the statute unreasonably limits the recovery of the most severely injured claimants, then the Court should interpret the caps as constitutional as applied to personal injury actions, like this one, that do not involve a "permanent vegetative state" or a "catastrophic injury."

In finding an equal protection violation in the context of a tragic wrongful death action involving several statutory survivors, the *McCall* plurality stated that section 766.118 discriminates against claimants who have suffered "the most grievous injuries" and who have sustained "the greatest damage and loss[]" when they must share their capped damages with other claimants. *McCall*, Fla. L. Weekly at S107. The plurality supported this conclusion by citing to, among others, *Carson v. Maurer*, 424 A.2d 825, 837 (N.H. 1980), *overruled on other grounds, Community Resources for Justice, Inc. v. City of Manchester*, 917 A.2d 707, 721 (N.H. 2007), a decision from the New Hampshire Supreme Court which applied a "more rigorous judicial scrutiny than allowed under the rational basis

test" to condemn a $250,000 cap on noneconomic damages in medical malpractice cases. *Id.* at 830.

As the plurality noted in *McCall*, the *Carson* court concluded that it was "simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation." *McCall*, Fla. L. Weekly at S107.

Additionally, in its application of the rational basis test, the *McCall* plurality cited with approval to *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988). *McCall*, Fla. L. Weekly at S111. In *Lucas*, the Texas Supreme Court struck a cap on medical malpractice damages "as applied to catastrophically damaged malpractice victims" under that State's "open courts" provision. 757 S.W.2d at 690. In so doing, the Texas court held that "[i]n the context of persons catastrophically injured by medical negligence, we believe it is unreasonable *and* arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease." *Id.* at 691 (italics in original). The *McCall* plurality stated that it "completely agree[d] with and adopt[ed]" this particular position from *Lucas*. *McCall*, Fla. L. Weekly at S111. The plurality then concluded its rational basis analysis by stating:

> At the present time, the cap on noneconomic damages serves no purpose other than to arbitrarily punish the most grievously injured or their surviving family members. Moreover, it has never been demonstrated that there was a proper predicate for imposing the

> burden of supporting the Florida legislative scheme upon the shoulders of the persons and families who have been most severely injured and died as a result of medical negligence.

McCall, Fla. L. Weekly at S112.

In contrast to the tragic circumstances in *McCall* that led to the death of a young woman, the injury in this case resulted from the alleged negligent removal of tissue in the plaintiff's leg, which causes the plaintiff pain, swelling and neuropathy in her left leg. There was no loss of life, limb, sensory ability, or significant functionality.

As previously discussed, this Court has the authority and duty to narrow the construction of a statute to preserve its constitutionality, so long as the construction is consistent with the Legislature's intent. To the extent the Court finds that a cap on personal injury actions involving those who have been "the most grievously injured" fails to pass constitutional muster, Dr. Weingrad submits that the Court should narrowly construe the caps to apply only in personal injury actions that do not involve a "permanent vegetative state" or a "catastrophic injury." Alternatively, the Court should sever from the statute the portions capping damages in personal injury actions involving a "permanent vegetative state" or a "catastrophic injury," and interpret the statute so as to be constitutional.

Either interpretation would further the Legislature's stated purposes in capping noneconomic damages in medical malpractice cases to ensure that high-

quality health care is available to the citizens of Florida, and to alleviate the high cost of medical malpractice claims, without punishing the most seriously injured medical malpractice victims.

IV. THE OTHER CONSTITUTIONAL ARGUMENTS NEED NOT BE REACHED OR SHOULD BE DENIED ON THE MERITS.

The Court in *McCall* found it unnecessary to answer the other certified questions regarding the constitutionality of section 766.118 based upon the nature of the claim (wrongful death) and procedural posture of that case. This Court likewise need not reach the other constitutional challenges Petitioners have raised in this case. Petitioners' jury trial and separation of powers arguments were not preserved for appellate review, and should not be considered. Alternatively, these arguments, and Petitioners' challenge under Amendment 3 (Article I, section 26(a)), should be denied on the merits for the reasons previously stated in the answer brief on the merits.

To the extent the Court considers Petitioners' access to courts challenge, the Court should give the legislative determinations of public purpose and facts the proper deference and deny the challenge for the reasons previously stated in the answer brief on the merits, and for the reasons expressed by Chief Justice Polston in his dissent to *McCall*. *McCall*, Fla. L. Weekly at S119-22 (Polston, C.J., dissenting). As Chief Justice Polston found, there is no violation of access to courts "because the Legislature has shown an overpowering public necessity for

the cap on noneconomic damages and that there is no alternative method of meeting the public necessity…." *Id.* at S121. There is also no violation of separation of powers "because the challenged cap does not invade the province of the judiciary because it does not operate as a legislative remittitur." *Id.*

CONCLUSION

As set forth in the briefs on jurisdiction and on the merits, the Court should discharge its jurisdiction in this cause. Should the Court exercise its jurisdiction, it should find that Petitioners waived the right to assert equal protection violations.

In the event the Court reaches the merits of the constitutional issues, it should find that *McCall* has no precedential value in this case and that no constitutional concerns are implicated here.

If the Court finds that the aggregate caps violate equal protection in this case, the Court should uphold the constitutionality of the caps statute by interpreting it to contain a "per claimant" cap rather than an aggregate cap. Alternatively, the Court should sever the aggregate caps and allow the remainder of the statute to stand. Additionally, if the Court concludes that *McCall* has precedential value or that any portion of the statute is invalid, the Court's holding should apply prospectively only to actions that have not yet been filed.

Alternatively, the Court should hold section 766.118's caps constitutional as applied to personal injury actions that do not involve a "permanent vegetative state" or a "catastrophic injury."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **14th day of April 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.,

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

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