

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' SUPPLEMENTAL BRIEF

ON DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

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TABLE OF AUTHORITIES

Estate of McCall v. United States,
case no. SC11-1148 (Fla. March 13, 2014) _____ *passim*

OTHER AUTHORITIES CITED

Florida Constitution Article I, Section 2 _____ *passim*

Florida Statute Section 766.118 _____ *passim*

INTRODUCTION

As explained in the main briefs, the cap on medical malpractice damages cannot be applied to the Plaintiffs in this case because their causes of action accrued before the effective date of the cap on damages. We now submit this supplemental brief, arguing that based on this Court's holding in *Estate of McCall v. United States*, case no. SC11-1148 (Fla. March 13, 2014), application of the cap on damages against these Plaintiffs would also violate their rights to equal protection. Art I, Sec. 2, Fla. Const.

STATEMENT OF THE CASE AND FACTS

After the first round of appeals in this case, the case returned to the trial court. The Defendant then moved to vacate the original final judgment (which awarded \$1,475,000 in non-economic damages) and have a new judgment entered, based on the statutory cap on non-economic damages. R. 416-37.

The Defendant argued that the non-economic damages of two Plaintiffs were limited to the statutory cap of \$500,000: "the non-economic damages awarded to Ms. Miles and Mr. Haynes, collectively, shall not exceed \$500,000." R. 417. Claiming that the damages of each should be reduced, the Defendant argued that Ms. Miles was entitled to \$491,500 in non-economic damages, and Mr. Haynes

was entitled to \$8,500. R. 418. Agreeing with the Defendant, the trial court entered judgment based on those figures (with modest awards in economic damages added, which brought the final judgment to a total of \$541,106). R. 490, 493.

SUMMARY OF THE ARGUMENT

The cap on damages, which would require the multiple Plaintiffs to share the capped damages, violates equal protection. For this reason, and because the statute cannot be applied retroactively, the cap does not apply to limit the Plaintiffs' damages, as determined by the jury.

ARGUMENT

THE MEDICAL MALPRACTICE CAP ON DAMAGES VIOLATES THE PLAINTIFFS' EQUAL PROTECTION RIGHTS, AS IT FORCES THE TWO PLAINTIFFS TO SHARE THE CAPPED DAMAGES, IN VIOLATION OF THE RULING STATED IN ESTATE OF MCCALL V. UNITED STATES

As explained in our prior briefs, the cap on non-economic damages cannot be applied to limit the Plaintiffs' recovery, since their causes of action accrued before the effective date of the statute. But the application of the cap on damages against these Plaintiffs is improper for an additional reason: by forcing the two Plaintiffs to share the capped damages, the statute violates equal protection of the law. Art. 1, Sec. 2, Fla. Const. This is the holding of *Estate of McCall v. United States*, case no. SC11-1148 (Fla. March 13, 2014).

In *McCall*, this Court held that where a cap on damages applies to limit the damages of multiple claimants, the cap violates equal protection under the Florida Constitution. The plurality opinion explained:

The statutory cap on wrongful death noneconomic damages fails because it imposes unfair and illogical burdens on injured parties when an act of medical negligence gives rise to multiple claimants. In such circumstances, medical malpractice claimants do not receive the same rights to full compensation because of arbitrarily diminished compensation for legally cognizable claims.

Estate of McCall, case no. SC11-1148, at 9-10. “[S]ection 766.118 arbitrarily reduces damages without regard to the fault of a tortfeasor simply based upon the number of survivors who are entitled to recovery.” *Id.* at 15.

The concurring opinion, speaking for three justices, reached the same conclusion: “I agree with the ultimate conclusion 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.” *Estate of McCall*, at 44.

This holding compels the conclusion that the cap on damages, as applied to these multiple Plaintiffs, violates equal protection. The statute arbitrarily reduces damages without regard to the fault of a tortfeasor simply based on the number of plaintiffs who are entitled to recovery.

It is true that *McCall* involved a wrongful death claim, while this case is a personal injury action. *See McCall*, page 7, n.2. But the legal analysis is no different. If the cap is applied in this case, the Defendant is able to reduce the amount he is obligated to pay as compensation to each Plaintiff, merely because his negligence harmed more than one person. This is irrational and violates equal protection, and this is so in both wrongful death and personal injury actions. Indeed, since wrongful death actions are a statutory creation, while a claim for personal injuries has long been part of the common law, if anything greater constitutional protection should be afforded to personal injury actions. The statutory cap on damages violates equal protection where there are multiple claimants.

The equal protection issue was preserved. We anticipate that the Defendant will argue that the equal protection argument was not preserved for appeal. But the issue was raised in the trial court, the district court, and in this Court. When the Defendant moved in the trial court to vacate the final judgment and have a new final judgment entered, based on the cap of damages, we argued that the statutory cap violated equal protection. R. 445. We noted that the issue was before this Court in *Estate of McCall v. United States*, and that the case had been argued on February 2, 2012. R. 445. On appeal, we again argued that the statute violated equal protection, and again noted that the issue was before this Court in *McCall*. [*Miles II Ini-*

tial brief, at 11-12] After this Court granted review, we again argued equal protection, and again noted that the issue was before this Court in *McCall*. [Initial brief, at 15-16].

The equal protection argument was thus presented to the trial court, the district court, and to this Court in the main briefs. The requirements of preservation require no more. We acknowledge that the issue was not briefed at length, but equal protection was specifically identified, as was the pendency of the issue in this Court in *McCall*. The issue was preserved for appeal.

CONCLUSION

Because the cap on damages cannot be applied retroactively, and because it violates equal protection when applied to multiple plaintiffs, the cap cannot be applied to limit the recovery of these Plaintiffs. 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 16th day of March, 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