IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1858
L.T. Case Nos. 4D11-4806, 4D11-4833, 4D11-4834, 08-29706 19

NORTH BROWARD HOSPITAL DISTRICT, ROB ALEXANDER, M.D., ANESCO NORTH BROWARD, LLC and EDWARD PUNZALAN, CRNA, et al.,

Petitioners,

vs.

SUSAN KALITAN, et al.,

Respondents.

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIFTH DISTRICT COURT OF APPEAL

PETITIONERS' INITIAL BRIEF ON THE MERITS

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INTRODUCTION

This brief is filed on behalf of Appellants/Defendants, North Broward Hospital District d/b/a Broward General Medical Center ("NBHD"), and Rob Alexander, M.D., Anesco North Broward, LLC, and Edward Punzalan, CRNA (collectively, the "Anesthesiologists"). This Court has mandatory direct appeal jurisdiction pursuant to Article V, Section 3(b)(1) of the Florida Constitution because the Fourth District, on a stated "issue of first impression," declared Florida Statute §766.118's noneconomic damage caps unconstitutional in all personal injury medical malpractice cases and irrespective of whether they involve a "single claimant," such as the case at bar, or "multiple claimants." *See N. Broward Hosp. Dist. v. Kalitan*, 174 So. 3d 403, 405-11 (Fla. 4th DCA 2015).

The Appellee/Plaintiff, Susan Kalitan, sustained injury after undergoing carpal tunnel surgery in November 2007. (R.46.7498). Kalitan filed a malpractice action in 2008. (R.1.1). The case went to trial and the jury found for Kalitan and awarded $4 million in noneconomic damages. (R.42.7191-93). On post-trial motions, the trial court applied §766.118's "per claimant" noneconomic caps (and reduced the award by close to $2 million) and rejected Kalitan's constitutional challenge. (R.46.7948-56; 52.8198-204). On appeal, the Fourth District reversed and ruled that §766.118's caps in personal injury cases violated the equal protection clause of the Florida Constitution. 174 So. 3d at 405. The Fourth District found

that this Court's decision in *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014) "mandates" such a finding. *Id.*

Defendants respectfully submit that, for multiple reasons, the Fourth District's ruling is erroneous and that the splintered 2-3-2 *McCall* decision does not preclude this Court from upholding the constitutionality of §766.118's per claimant personal injury caps:

(1) In *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993), this Court upheld the constitutionality of medical malpractice caps, and in *St. Mary's Hospital, Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000), this Court expressly upheld such caps when interpreted on a "per claimant" basis. 618 So. 2d at 190-91; 769 So. 2d at 971-72. Not only were the holdings in *Echarte* and *Phillipe* reconfirmed in *McCall*, but Justice Pariente's 3-member "concurring in result" opinion concluded that *Phillipe* is "directly on point" and "controlling precedent." 134 So. 3d at 919. Section 766.118's caps do not violate equal protection if applied per claimant and there is no need to independently engage in a rational basis analysis.

(2) Under longstanding legal principles, *McCall*'s fractured application of the rational basis test is not binding precedent and the Court's decision merely constituted law of the case. Even if *McCall* had precedential value to other cases, however, its holding was narrowly limited to finding §766.118's aggregate/per incident caps unconstitutional in a multiple claimant wrongful death case. *McCall*

did not strike down §766.118 in its entirety and did not address single claimant personal injury actions. It would be entirely consistent with *Echarte*, *Phillipe*, and *McCall* for this Court to find §766.118's per claimant caps constitutional.

(3) Justice Pariente's 3-member "concurring in result" opinion in *McCall* recognized §766.118 was "constitutionally valid when enacted." 134 So. 3d at 920. In this case, Kalitan failed to meet her burden of proof to show any "change in conditions" which would render §766.118's per claimant caps currently invalid under the rational basis test. There is no proper factual record before this Court. Thus, *McCall*'s "change in conditions" analysis does not apply or, alternatively, is not persuasive and should not be followed.

(4) If this Court finds §766.118's per claimant personal injury caps unconstitutional, its decision should be prospective only and not retroactively applied to the parties in this case. Under the reasoning of Justice Pariente's concurring in result opinion in *McCall*, §766.118 was not void ab initio and was still constitutional at the time of Kalitan's medical incident. Defendants have an equitable and vested/organic substantive right to have §766.118's per claimant damage caps applied in this case.

(5) The Court should reject the other constitutional arguments Kalitan made below, and also find that the caps statute applies to sovereign bodies.

Finally, Defendants urge this Court to exercise its discretion to address a key

new trial argument which the Fourth District erroneously determined was mooted by its equal protection ruling. Kalitan was improperly allowed to inject a baseless and highly prejudicial "catastrophic brain/closed-head injury" issue into the case which poisoned the proceedings and requires a new trial on liability and damages. (T.4619, 4905-39; R.42.7255; 43.7340).

STATEMENT OF THE CASE AND FACTS

A. Section 766.118's per claimant personal injury caps.

In 2003, the Florida Legislature enacted statutory limitations on noneconomic damages in medical negligence actions. §766.118, Fla. Stat. Section 766.118 applies to both "personal injury" and "wrongful death" actions and contains both "per claimant" and "aggregate" caps. §766.118(2) & (3). The Legislature enacted these caps in response to conclusions rendered by a task force, created by Florida's governor, which studied the state of health care in Florida and issued a report on topics such as improving the quality of care, tort reform, alternative dispute resolution, and insurance reform. *See* GOVERNOR'S SELECT TASK FORCE ON HEALTHCARE PROFESSIONAL LIABILITY INSURANCE, REPORT AND RECOMMENDATION, at iii.[1] The Legislature enacted the caps with the intent to reduce the cost of medical malpractice insurance premiums and health care and ensure health care's availability. Ch. 2003-416 §1, Laws of Fla.

[1]Available at http://floridahealthinfo.hsc.usf.edu/GovTaskForceInsReform.pdf.

In a report issued October 1, 2010, the Florida Office of Insurance Regulation analyzed the state of the medical malpractice insurance market in Florida and determined that the changes to the law had benefited policyholders, significantly decreased malpractice premiums, and strengthened the solvency of medical malpractice carriers. Fla. Office of Ins. Reg., *2010 Annual Report* (Oct. 1, 2010) (http://www.floir.com/siteDocuments/MedicalMalReport10012010.pdf).

B. Course of Proceedings.

The case was tried in 2011 and the jury returned a verdict finding Defendants liable and awarding Kalitan $718,011 for economic damages and $4,000,000 for noneconomic damages. (T.4941-44; R.42.7191-93). In an attempt to recover the increased cap amounts under §766.118, Kalitan persuaded the trial court (over objection) to submit "catastrophic injury" claims to the jury. (T.3418-20, 4515-30; R.42.7284).[2] Pursuant to §766.118(1)(a)(3)(d), the jury found, by special interrogatory, that Kalitan suffered a "severe brain or closed-head injury evidenced by a severe episodic neurological disorder." (R.42.7192).

[2]Claims against "practitioners" and "nonpractitioners" are capped at $500,000 and $750,000 "per claimant," respectively. §766.118(2)(a) & (3)(a). The Legislature allows injured patients to pierce the caps and recover increased amounts ($1 million against practitioners, and $1.5 million against nonpractitioners) when a statutorily-defined catastrophic injury is found. *See* §766.118(2)(b) & (3)(b). Here, the Anesthesiologists claim entitlement to the lower $500,000 cap. In addition to the sovereign-immunity protections of §768.28, NBHD claims entitlement to the lower $750,000 cap. (12/3/12 I.B. 40-44).

After denying Defendants' motions for new trial and directed verdict/JNOV on Kalitan's "catastrophic brain/closed-head injury" claim and finding a manifest injustice would occur unless increased noneconomic damages were awarded, the trial court entered final judgments applying the increased damage caps under §766.118(2)(b) to the Anesthesiologists but finding the caps did not protect or apply to NBHD as a sovereign immune entity under §768.28 (which limits execution to $100,000 with further recovery conditioned upon the Legislature's approval of a claims bill). (R.46.7948-56; 52.8198-8204; 7/22/13 A.B./I.B.20).

All parties appealed and the Fourth District issued an opinion affirming in part and reversing in part. 174 So. 3d at 413-14. While noting that *McCall*'s equal protection ruling was limited to wrongful death cases, the Fourth District held that "*McCall* mandates a finding that the caps in section 766.118 personal injury cases are similarly unconstitutional." *Id.* at 405. Accordingly, the Fourth District reversed the trial court's reduction of the damage award based on the caps. *Id.* As further detailed below, the Fourth District also ruled that its caps holding rendered the issues raised on appeal by Defendants "moot." *Id.*

Defendants' motions for rehearing and rehearing en banc were denied, and a timely notice of appeal invoking this Court's mandatory appeal jurisdiction followed. Defendants alternatively requested this Court to invoke its discretionary jurisdiction based on express and direct conflict.

STANDARD OF REVIEW

"The determination of a statute's constitutionality and the interpretation of a constitutional provision are both questions of law reviewed de novo[.]" *Shands Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co. of Fla.*, 97 So. 3d 204, 209 (Fla. 2012). "[T]his Court is 'obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible.'" *State v. Adkins*, 96 So. 3d 412, 416-17 (Fla. 2012). "[O]ne who asserts the unconstitutionality of an act of the legislature has the burden of demonstrating clearly that such act is indeed invalid." *Village of N. Palm Beach v. Mason*, 167 So. 2d 721, 726 (Fla. 1964). With regard to the rational basis test, the challenger carries "[t]he burden ... to show that there is *no* conceivable factual predicate which would rationally support the classification under attack. Where the challenging party fails to meet this difficult burden, the statute or regulation must be sustained." *See Fla. High Sch. Activities Ass'n, Inc. v. Thomas*, 434 So. 2d 306, 308 (Fla. 1983).

An order denying a motion for new trial is reviewed for an abuse of discretion. *See Hurtado v. Desouza*, 166 So. 3d 831, 835 (Fla. 4th DCA 2015).

SUMMARY OF ARGUMENT

On de novo review, this Court should quash the Fourth District's ruling and hold that §766.118's per claimant personal injury caps do not violate equal

protection. The Fourth District's analysis is fatally flawed and conflicts with governing case law and legal principles. This Court's decisions in *Echarte* and *Phillipe*, which were reaffirmed in *McCall*, establish that per claimant caps do not violate equal protection.

Further, even if *McCall*'s splintered 2-3-2 decision constituted binding precedent, it is not controlling given that a majority of justices at most agreed that §766.118's aggregate/per incident caps were invalid in multiple claimant wrongful death cases. Justice Lewis's 2-member "plurality" opinion and Justice Pariente's 3-member "concurring in result" opinion, however, did not create any binding precedent. They only formed a "decision" -- not an "opinion" -- establishing law of the case. Moreover, even if this Court was required to independently engage in a "rational basis" analysis, Kalitan failed to meet her heavy burden of proof. There is an inadequate record in this case to prove that §766.118's per claimant personal injury caps became invalid due to a "change in conditions." If this Court finds the caps unconstitutional, however, the ruling should be prospective only. Defendants have an equitable and vested/organic right to have the caps applied in this case.

The other constitutional arguments raised by Plaintiff below must be rejected. This Court expressly held in *Echarte* that a cap on damages does not violate the constitutional rights of access to courts or to a jury trial. These findings are consistent with the vast majority of jurisdictions, and all federal courts,

deciding the same issue. There is also no support for Plaintiff's argument below that the caps statute violates separation of powers, and in fact the Legislature is specifically tasked with enacting substantive law such as caps on damages.

In addition, the caps statute must be applied equally to the hospital district, a sovereign. The trial court misinterpreted the caps statute to not apply to sovereigns despite potential claims bill liability. This had the nonsensical result of allowing private defendants to enjoy the benefits of the cap, but not a division of the state. The trial court misinterpreted language in the caps statute which was intended to preserve the sovereign immunity limits on execution to mean that sovereigns receive no caps protection whatsoever. This finding must be rejected.

Significantly, this Court should also remand for a new trial on liability and damages due to Kalitan's highly prejudicial infusion of the "catastrophic brain/closed-head injury" issue. The Fourth District erroneously found this issue moot based on its constitutional ruling. Defendants were entitled to a directed verdict and the injection of the issue misled the jury and tainted its verdict.

ARGUMENT

I. SECTION 766.118'S CAPS ARE CONSTITUTIONAL WHEN APPLIED TO KALITAN'S SINGLE CLAIMANT PERSONAL INJURY ACTION.

The Fourth District's cap rulings are erroneous for a multitude of reasons. Significantly, the decision below incorrectly extends *McCall* and holds that the

caps statute violates equal protection by discriminating against claimants with more serious injuries, a conclusion that no majority of this Court has ever reached. This is a dangerous precedent that this Court should not allow to stand, as it could have far-reaching yet unintended consequences as to other useful and beneficial damages caps. In addition, precedent mandates that this Court reject Plaintiff's alternative constitutional arguments. Rules of statutory construction also require that the cap be applied equally to NBHD, a sovereign.

A. The *Echarte* and *Phillipe* decisions establish that per claimant caps do not violate equal protection.

In *Echarte*, this Court examined the statutory cap "on noneconomic damages in medical malpractice claims when a party requests arbitration." 618 So. 2d at 190. Even though the case involved three claimants, this Court held that the statutory caps set forth in §§766.207 and 766.209, Fla. Stat. (Supp.1988), which limited a claimant's noneconomic damages to either $250,000 or $350,000 "per incident," did "not violate...equal protection guarantees." *Id.* at 191, 193. Section 766.209 caps noneconomic damages in instances where the case "proceeds to trial" after a claimant does not voluntarily agree to arbitrate. *Id.* at 193.

Significantly, the *Echarte* majority necessarily rejected the argument set forth in Chief Justice Barkett's dissenting opinion -- which is identical to the argument made by Kalitan and adopted by the Fourth District -- that a damage cap which limited an individual claimant's recovery violated equal protection by

creating disparate classes. Justice Barkett argued: "The statutes also violate equal protection guarantees by creating two classes of medical malpractice victims, those with serious injuries whose recovery is limited by the caps and those with minor injuries who receive full compensation." *Id.* at 198 (Barkett, C.J., dissenting).

Seven years later, this Court in *Phillipe* clarified that the holding in *Echarte* was limited to situations involving single claimants, but that the caps potentially violated equal protection when applied to multiple survivors bringing a wrongful death claim. 769 So. 2d at 971. In *Phillipe*, the issue was "whether the $250,000 'per incident' limitation on non-economic damages in the arbitration provisions of the Medical Malpractice Act limits the total recovery of all claimants in the aggregate to $250,000 or limits the recovery of each claimant individually to $250,000." *Id.* at 961. Finding the statute ambiguous, this Court interpreted the aggregate "per incident" language to mean "per claimant" in order to further the Legislative goal of encouraging arbitration. The Court went on to note:

> [W]ere we to interpret the noneconomic damages cap to apply to all claimants in the aggregate, we conclude that such an interpretation would create equal protection concerns. Franzen correctly points out that this Court in *Echarte* addressed the constitutionality of sections 766.207 and 766.209; however, in that case we were not presented with the specific challenge that this case poses. [FN3] The instant case poses the question of how section 766.207(7)(b) relates to a circumstance where there is one medical malpractice incident and multiple claimants versus the situation where there is one medical malpractice incident and only a single claimant. Therefore, *Echarte* does not control our decision here.

> FN3. In *Echarte*, the issue presented was whether sections 766.207 and 766.209 violate a claimant's right of access to the courts. *Echarte*, 618 So.2d at 190. While the Court did consider other constitutional challenges and held that the statutes do not violate equal protection guarantees, the equal protection argument addressed in that case concerned whether the cap on noneconomic damages created two classifications of medical malpractice victims-those with insignificant injuries who are compensated in full, and those with serious injuries who are deprived of full compensation.
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> * * *
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> 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 & Indemn. 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 is consistent with the federal and Florida Constitutions and honors the legislative intent of the Medical Malpractice Act.

Phillipe, 769 So. 2d at 971-72 (all emphasis added unless otherwise noted).

Based on *Echarte* and *Phillipe*, this Court should likewise interpret §766.118 in a manner that renders it constitutional in personal injury actions. This can be done by applying the per claimant cap that is expressly provided in the statute, while disapproving the additional aggregate caps. *See* §766.118(2)(a) ("...noneconomic damages shall not exceed $500,000 per claimant").

It makes no difference whether the lower or increased caps for "catastrophic

injuries" apply in this case. *Echarte*'s and *Phillipe*'s rejection of the "uncompensated serious injury" versus "compensated minor injury" distinction is consistent with other courts finding malpractice damage caps not to violate equal protection. *See Lucas v. United States*, 807 F.2d 414, 421 (5th Cir. 1986) ("[W]e are at a loss to see how this "classification" violates equal protection notions. *Every* malpractice victim is limited by the statute.").

This Court "is eminently qualified to give Florida statutes a narrowing construction to comply with our state and federal constitutions," and in fact it is the Court's "*duty* to save Florida statutes from the constitutional dustbin whenever possible." *Doe v. Mortham*, 708 So. 2d 929, 934 (Fla. 1998) (emphasis in original). Had this Court in *Phillipe* believed there to be an equal protection problem with applying the caps to individual claimants, it would have simply struck down the cap in its entirety.

Alternatively, this Court could sever any language imposing aggregate caps 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.").

B. *McCall* confirms validity of per claimant caps and fails to support the Fourth District's analysis.

1. *McCall* reaffirmed holdings in *Echarte* and *Phillipe*.

As further detailed below, a majority of the justices in *McCall* narrowly held that the cap on noneconomic damages found in §766.118 violated equal protection in the same way that the cap found in §§766.207 and 766.209 did so in *Phillipe* -- when applied in the aggregate to multiple claimants on a "per incident" basis in a wrongful death case. *McCall* specifically limited its holding of unconstitutionality to situations where each survivor's recovery in a wrongful death action is negatively impacted based on the number of other survivors also seeking to recover (i.e., the "per incident" aggregate cap), and cited *Echarte* and *Phillipe* as enduring viable precedent for the proposition that the "per claimant" individual cap remained constitutional. 134 So. 3d at 919 (Pariente, J., concurring in result).

The "per claimant" versus "aggregate"/"per incident" distinction set forth in *Echarte* and *Phillipe* was reaffirmed in both Justice Lewis's 2-member (Lewis & Labarga) "plurality" opinion and Justice Pariente's 3-member (Pariente, Quince & Perry) "concurring in result" opinion:

> [T]he statute imposing the cap in *Echarte* was later addressed by this Court in *Phillipe*. In *Phillipe*, we held that the cap applied *per claimant* rather than *per incident*, and noted that to hold otherwise would create equal protection concerns. 769 So.2d at 971. In reaching this conclusion, we expressly stated that "*Echarte* does not control our decision." *Id.* Similarly, *Echarte* does not compel a different result here. Rather, *Phillipe*, which recognized that *Echarte*

> did not address a circumstance in which similarly situated survivors would receive different, arbitrarily reduced noneconomic damage awards solely based upon the number of survivors, is the decision which guides our analysis as to the constitutionality of section 766.118. *See Phillipe*, 769 So.2d at 971 (noting that "the loss of a survivor is not diminished by the mere fact that there are multiple survivors").

McCall, 134 So. 3d at 904 (Lewis, J.) (italics in original).

> ... I agree with the plurality's conclusion that the statutory cap on noneconomic damages is unconstitutional as applied to wrongful death actions. In my view, the Court's controlling precedent in *St. Mary's Hospital, Inc. v. Phillipe*, 769 So.2d 961, 971 (Fla.2000), is directly on point in holding that this type of statutory scheme is improper because "[d]ifferentiating between a single claimant and multiple claimants bears no rational relationship to the Legislature's stated goal of alleviating the financial crisis in the medical liability insurance industry." *Id.*
>
> [A]s the plurality correctly notes, this Court "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." Plurality op. at 901 (Lewis, J.). I agree with the plurality that this inherently discriminatory action and resulting invidious discrimination do not pass constitutional muster." *Id.*

McCall, 134 So. 3d at 919 (Pariente, J., concurring in result).

Chief Justice Polston's 2-member (Polston & Canady) dissenting opinion likewise found *Echarte* to be "precedent" in this regard:

> McCall also argues that the noneconomic damages cap violates equal protection because the more severely injured may not recover their full damages, unlike those whose damages fall under the cap. However, if this were an equal protection violation, no cap on damages could survive equal protection review because all caps have that effect. And this Court has rejected equal protection challenges to

> caps on damages previously. *See Echarte*, 618 So.2d 189; *see also Phillipe*, 769 So.2d 961.

McCall, 134 So. 3d at 931 (Polston, C.J., dissenting).

The fact that §766.118 was declared invalid as applied to multiple claimants in a wrongful death case does not mean §766.118 is invalid as applied to single claimant personal injury cases. *See McCall*, 134 So. 3d at 900 n.2 (Lewis, J.) ("The legal analyses for personal injury damages and wrongful death damages are not the same. The present case is exclusively related to wrongful death, and our analysis is limited accordingly."); *see also Seaboard Air Line Ry. v. Robinson*, 67 So. 139, 140 (Fla. 1914) ("A statute may be valid as applied to one state of facts, though under another state of facts an application of the statute may violate rights secured by the organic law.").

Indeed, the Fourth District overlooked this Court's recent post-*McCall* decision in *Miles v. Weingrad*, 164 So. 3d 1208 (Fla. 2015). In *Miles*, this Court held that, because the plaintiff's rights vested at the time her medical incident occurred, §766.118's cap on noneconomic damages could not be applied retroactively to a personal injury action accruing prior to the effective date of the statute. *Id.* at 1209-13. If *McCall* had already determined that §766.118's per claimant personal injury caps violated equal protection and the statute was invalid, *Miles* would have never decided the retroactivity issue.

2. *McCall* narrowly found aggregate caps invalid in a multiple claimant wrongful death case.

An analysis of Justice Lewis's and Justice Pariente's opinions show that, at most, *McCall* narrowly held that §766.118's aggregate caps violated equal protection in wrongful death cases.

In the "plurality" opinion, Justice Lewis concluded that the statutory cap was unconstitutional in multiple claimant wrongful death cases. 134 So. 3d at 901. Justice Lewis repeatedly emphasized that the basis for finding a violation of equal protection was the aggregate cap's diminishment of each survivor's recovery due solely to the happenstance of the number of additional survivors also seeking recovery based on the same incident of malpractice. These statements include:

> "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." *Id.* at 901.
>
> "The plain language of this statutory plan irrationally impacts circumstances which have multiple claimants/survivors differently and far less favorably than circumstances in which there is a single claimant/survivor and also exacts an irrational and unreasonable cost and impact when ... the victim of medical negligence has a large family, all of whom have been adversely impacted and affected by the death." *Id.* at 901-02.
>
> The aggregate cap imposes "devastating costs" on multiple claimants" for whom judicially determined noneconomic damages are subject to division and reduction simply based upon the existence of the cap." *Id.* at 903.

> The statutory cap "arbitrarily reduces damages based upon the number of survivors who are entitled to recovery." *Id.*
>
> The statutory cap reduces damages "based solely upon a completely arbitrary factor, i.e., how many survivors are entitled to recovery" and "[t]he greater the number of survivors who are eligible to recover noneconomic damages in a medical malpractice death action, the lesser the award each individual survivor will receive." *Id.* at 904.
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> The statutory cap imposes "arbitrary reductions based upon the number of survivors." *Id.*
>
> "Health care policy that relies upon discrimination against Florida families is not rational or reasonable when it attempts to utilize aggregate caps to create unreasonable classifications." *Id.* at 915.

Justice Pariente's 3-member "concurring in result" opinion was clear in stressing that it was only agreeing with Justice Lewis's opinion to the limited extent that it found an "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 916. Like Justice Lewis, Justice Pariente repeatedly points to the aggregate nature of the cap as causing the constitutional infirmity. *See id.* at 918 (finding violation of equal protection because "each individual survivor was treated differently as to his or her noneconomic damage award because there was more than one survivor entitled to noneconomic damages"); *id.* at 920 (holding that "an aggregate cap on damages without regard to the number of claimants" is unconstitutional); *id.* at 921 (criticizing "the arbitrary reduction of survivors' noneconomic damages in

wrongful death cases based on the number of survivors").

Moreover, like Justice Lewis, Justice Pariente expressly limited her opinion to wrongful death cases. *See id.* at 916 (agreeing that cap is "unconstitutional as applied to wrongful death actions").

Thus, even if *McCall* created binding precedent outside the specific facts of that case (which is denied), its holding that §766.118's aggregate caps in multiple claimant wrongful death cases violated equal protection has no applicability to the case at bar. *See Weaver v. Myers*, 170 So. 3d 873, 881 (Fla. 1st DCA 2015) ("The holding of *McCall* was limited by its terms to wrongful death litigation involving medical malpractice and the limited holding that there was no reasonable basis for treating two medical malpractice claimants in the same litigation differently with one claimant possibly being fully compensated and one not.").

3. *McCall* does not establish binding precedent outside case regarding application of rational basis test.

The Fourth District held that it was "compelled" by the "*McCall* plurality and concurring opinions" to conclude that the medical malpractice crisis no longer exists and that, accordingly, §766.118 presently lacks a rational and reasonable relation to any state objective and renders the caps unconstitutional in single claimant personal injury cases. 174 So. 3d at 411. The Fourth District is incorrect and ignores the dictates of *Echarte* and *Phillipe*. Moreover, even if an independent analysis of the rational basis test were required, *McCall* establishes no binding

precedent outside the facts of that case.

Justice Pariente referred to Justice Lewis's opinion in *McCall* as a "plurality opinion." 134 So. 3d at 916. Even if this description was correct,[3] it is well settled that a plurality opinion establishes no binding precedent. *See, e.g.*, *Foster v. Bd. of Sch. Comm'rs of Mobile County, Ala.*, 872 F.2d 1563, 1570 n.8 (11th Cir. 1989) ("A plurality opinion is not binding on this Court"); *Brown*, 872 A.2d at 1165 (Castille, J., concurring) ("Plurality opinions, by definition, establish no binding precedent for future cases.").

The Fourth District disregarded that Justice Pariente authored a "concurring in result" opinion -- not a "concurring" opinion -- and expressly disagreed with Justice Lewis's reasoning. 174 So. 3d at 410; 134 So. 3d at 916; *see also id.* ("I do not join in the plurality opinion because I respectfully disagree with the plurality's application of the rational basis test in this case.").

A "concurring in result" opinion carries a distinct legal ramification in Florida. By authoring such an opinion, Justice Pariente, as a matter of law, was

[3] A plurality opinion is "[a]n opinion lacking enough judges' votes to constitute a majority, but receiving more votes than any other opinion." *Tedder v. State*, 12 So. 3d 197, 198 n.2 (Fla. 2009) (Lewis, J., specially concurring) (quoting *Black's Law Dictionary* 1125 (8th ed. 2004); *see also Commonwealth v. Brown*, 872 A.2d 1139, 1165 (Pa. 2005) (Castille, J., concurring) ("a 'plurality' opinion is '[a]n opinion of an appellate court in which more justices join than in any concurring opinion (though not a majority of the court)'"). Justice Lewis's opinion received the same number of votes as Chief Justice Polston's dissent and one less than Justice Pariente's concurrence in result.

only agreeing with the ultimate "decision" or "judgment" -- i.e., finding §766.118's cap unconstitutional as applied to the wrongful death action in *McCall* -- and was not agreeing with Justice Lewis's "opinion." *See Floridians For A Level Playing Field v. Floridians Against Expanded Gambling*, 967 So. 2d 832, 834 (Fla. 2007) ("'[C]oncurring in judgment' is akin to 'concurring in result only,' which 'expresses agreement with the ultimate decision but not the opinion.'").

As explained in Harry Lee Anstead, Gerald Kogan, Thomas D. Hall and Robert Craig Waters, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431 (2005) which this Court cited with approval in *Floridians*, 967 So. 2d at 834:

> A concurring in result only opinion indicates agreement only with the decision, that is, the official outcome and result reached, but a refusal to join in the majority's opinion and its reasoning. A separate opinion that concurs in result, only can constitute the fourth vote necessary to establish a decision under the Florida Constitution, but the effect in such a case is that there is no majority opinion of the Court and thus **no precedent beyond the specific facts of the controversy at hand**. There may be cases in which a Justice writes a concurring in result only opinion that appears to agree with more than just the result. However, it seems doubtful that such an action could constitute the fourth vote needed to give the opinion validity as precedent.

29 Nova L. Rev. at 460-61.

Because Justice Pariente declined to join in Justice Lewis's opinion or author a "concurring," "specially concurring," or "concurring in part" opinion, and only authored a "concurring in result" opinion, a "decision" and "judgment" was created

but no binding precedential "opinion" which applied to other cases outside of *McCall*. *See Floridians*, 967 So. 2d at 834; *Greene v. Massey*, 384 So. 2d 24, 27-28 (Fla. 1980); *see also* Art. 5, §3(a) of Fla. Const. ("The concurrence of four justices shall be necessary for a decision."). Justice Pariente solely concurred with the "result" and the so-called "plurality's decision," making it "law of the case" only. *See McCall*, 134 So. 3d at 916, 922; *see also Jacobs v. Major*, 407 N.W.2d 832, 843 (Wis. 1987) ("In the *Alderwood* case, the concurring opinion added to the plurality decision making it a majority result, and the law of the case only.").[4]

Accordingly, because *McCall* created no binding precedent outside the case, *Echarte* and *Phillipe* alone present "controlling precedent" for the case at bar. 134 So. 3d at 919. Neither Justice Lewis's nor Justice Pariente's analysis and application of the rational basis test in *McCall* is controlling. Under *Echarte* and *Phillipe*, per claimant caps do not create the same equal protection concerns that aggregate/per incident caps do.

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[4]By comparison, in *Santos v. State*, 629 So. 2d 838 (Fla. 1994), a binding precedential opinion was formed by the combination of a 3-member "plurality" opinion (Shaw, Overton & Harding) and a 2-member opinion "concurring in part, dissenting in part" (Kogan & Barkett). *Id.* at 840. Significantly, the other 2-member opinion "concurring in result only" (Grimes & McDonald) did not form the binding precedential opinion. *Santos v. State*, 591 So. 2d 160, 164-65 (Fla. 1991). Similarly, in *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So. 2d 612 (Fla. 2003), a binding precedential opinion was formed by the combination of an opinion in which three members concurred and a specially concurring opinion by another member which expressly "concurr[ed] with the *majority opinion*." *Id.* at 636 (emphasis in original).

Kalitan's argument below that *McCall* is binding precedent in other cases because it was decided in response to certified questions from the Eleventh Circuit is totally without merit. (5/23/14 R.B.12-14). To the extent *McCall* constituted law of the case only, it was "determinative of a cause pending" in the federal court. *See* 134 So. 3d at 897 (Lewis, J.). The certified-question procedure does not mandate that the Court issue an "opinion" as opposed to only a determinative "decision." *See* Art. V, §3(b)(6), Fla. Const.; *see generally* P. Padovano, *Florida Appellate Practice* §27.7 pp.664-65 (2007 ed.) ("[T]he [certified] state law issue must be determinative of the cause pending before the federal court.").

4. Kalitan failed to meet her burden of proving that per claimant personal injury caps are no longer valid under a "change in conditions" analysis.

The Fourth District found §766.118's personal injury caps unconstitutional solely based on *McCall*'s holdings and not based on any record evidence or fact findings in this case. The Fourth District reasoned that the "plurality" and "concurring" opinions in *McCall* held "that, even assuming there was a legitimate interest when section 766.118 was enacted, 'the current data reflects that it has subsided' and no legitimate interest remains." 174 So. 3d at 410. According to the Fourth District, *McCall* "concluded that the medical malpractice 'crisis' no longer exists" and consequently the caps have no "rational relationship to the goal of reducing medical malpractice premiums." *Id.* at 411.

As detailed above, *Echarte* and *Phillipe* control the per claimant caps issue, not *McCall*. Further, even if Kalitan could have attempted to challenge the "current" validity of §766.118's per claimant caps based on the principle discussed in *McCall* that "[a] statute may be constitutionally valid when enacted but may become constitutionally invalid because of changes in the conditions to which the statute applies," *McCall*, 134 So. 3d at 913, Kalitan woefully failed to meet her burden of proof. *See Fla. High Sch.*, 434 So. 2d at 308 ("There being no compelling evidence in the record which discredits the integrity of these proposed goals of Rule 5, this Court, under the 'rational basis' standard, will assume there is a legitimate state interest in achieving these objectives."); *see also Kress Dunlap & Lane v. Downing*, 286 F.2d 212, 215 (3d Cir. 1960) ("it was incumbent on the [trial court] to receive evidence as to the existence or non-existence of an 'emergency'" as prerequisite to determine whether a law ceased to be constitutional); *E. N.Y. Sav. Bank v. Imar Realty Co.*, 51 N.Y.S.2d 53, 54 (N.Y. Spec. Term 1944) ("The proposition as to whether the emergency has passed is, of course, a question of fact.... 'If the plaintiff upon the trial is able to prove to the satisfaction of the court that the emergency has passed, then the statute is unconstitutional.").

As the United States Supreme Court stated in *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U.S. 194 (1934), in facing plaintiff's argument that a statutory provision violated equal protection:

> ... [W]here the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support.

Borden's, 293 U.S. at 210-11.

Here, Kalitan failed to present a proper record for this Court to conclude that §766.118's per claimant caps are no longer constitutionally valid. *See McCall*, 134 So. 3d at 921 (Pariente, J., concurring in result) (distinguishing rational basis analysis in *North Florida* because there "a trial court had made *findings of fact* based on a trial where both parties had the opportunity to present evidence on the underlying issues").

Further, even if Kalitan had produced some evidence suggesting a crisis no longer exists, this hardly invalidates the statute. As Chief Justice Polston observed in *McCall*:

> Justice Lewis notes that medical malpractice filings have decreased significantly since fiscal year 2003-04 and that Florida, according to a 2011 report, is now retaining a fairly high percentage of Florida-trained medical students. *See* plurality op. at 913-14 (Lewis, J.). While he uses this information to support the plurality's argument that the statutory caps are no longer justified because a medical malpractice crisis does not currently exist, this information just as easily (and more likely) supports the argument that the cap has had its

> intended effect and that, if the cap is eliminated, the medical malpractice crisis would return in full force.

McCall, 134 So. 3d at 931-32 n.14 (Polston, C.J., dissenting).

Moreover, the Fourth District's analysis overlooks that the Legislature not only sought to reduce malpractice premiums but, among other things, ensure healthcare's availability. *See* Ch. 2003-416 §1, Laws of Fla. Evidence that the crisis may have been relieved in one aspect does not establish that it has been resolved in all aspects. Section 766.118 retains utility.

Any attempt by Kalitan to attack the Florida Legislature's reliance on the California experience with its damage caps should also be rejected. (7/22/13 A.B./I.B.77). California courts have upheld their caps on equal protection challenges and rejected the "change in conditions" argument accepted by the Fourth District in this case. *See, e.g.*, *Chan v. Curran*, 188 Cal. Rptr.3d 59, 68-75 (Cal. Ct. App. 2015); *Stinnett v. Tam*, 130 Cal. Rptr.3d 732, 742-48 (Cal. Ct. App. 2011). As recently stated in *Chan*:

> The role of "changed circumstances" in constitutional analysis is fraught with institutional tension and analytical difficulties. "It is not...easy for courts to step in and say that what was rational in the past has been made irrational by the passage of time, change of circumstances, or the availability of new knowledge. Nor should it be. Too many issues of line drawing make such judicial decisions hazardous. Precisely at what point does a court say that what once made sense no longer has any rational basis? What degree of legislative action, or of conscious inaction, is needed when that (uncertain) point is reached? These difficulties -- and many others -- counsel restraint, and so powerfully." (*United States v. Then* (2d

> Cir.1995) 56 F.3d 464, 468 (con. opn. of Calabresi, J.); see generally *Changed Circumstances and Judicial Review* (2014) 89 N.Y.U. L.Rev. 1419.)

Chan, 188 Cal.Rptr.3d at 68.

This Court should similarly reject any "change in conditions" argument. The caps are currently working precisely as intended by the Legislature. This Court must give proper deference to the Legislature's findings of public purpose and facts which are not clearly erroneous.

C. If this Court finds §766.118's per claimant caps unconstitutional, its decision should only apply prospectively and not to the parties/facts before it.

In the event this Court agrees with the Fourth District and determines, on "an issue of first impression," that the caps in personal injury cases are unconstitutional, 174 So. 3d at 405, the Court should make its decision apply prospectively only to actions that have not yet been filed. As the Fourth District acknowledged: "The Florida Supreme Court 'has the sole power to determine whether [its] decision should be prospective or retroactive in application.'" *Id.* at 411 (quoting *Benyard v. Wainwright*, 322 So. 2d 473, 474 (Fla. 1975)). Significantly, under the reasoning of Justice Pariente's concurring in result opinion in *McCall*, §766.118 was not void ab initio and was still constitutional at the time of Kalitan's medical incident and injury in 2007. 134 So. 3d at 919-20. Defendants have an equitable and vested/organic substantive right to have

§766.118's per claimant caps applied in this case.[5]

This Court has long held that a decision declaring a statute unconstitutional would be applied prospectively only where persons had relied on the validity of the statute or it would otherwise be inequitable to apply the decision retroactively. *See Martinez v. Scanlan*, 582 So. 2d 1167, 1174-76 (Fla. 1991) (holding statute was not void ab initio and that, based on equitable considerations and to protect organic rights, decision ruling statute unconstitutional would be prospective only); *Aldana v. Holub*, 381 So. 2d 231, 238 (Fla. 1980) (finding Medical Mediation Act unconstitutional but that decision would have prospective application only); *Deltona Corp. v. Bailey*, 336 So. 2d 1163, 1166-67 (Fla. 1976) (applying principle of "prospective constitutional invalidity"); *Interlachen Lakes Estates, Inc. v. Snyder*, 304 So. 2d 433, 435 (Fla. 1973) (decision finding statute unconstitutional would operate prospectively only where persons relying on statute did so assuming it to be valid); *Gulesian v. Dade County Sch. Bd.*, 281 So. 2d 325, 326-27 (Fla. 1973) (ruling that statute was unconstitutional would, out of equitable considerations, not be given retroactive effect). *See also Cipriano v. City of*

[5]The Fourth District's statement that the trial court limited Kalitan's damage awards "by the caps provided in section 766.118, Florida Statutes (2011)" is patently incorrect. 174 So. 3d at 407. Defendants requested application of the 2007 version of §766.118 (R.51.8148-49; 12/4/12 I.B.21), and Kalitan conceded on appeal that the 2007 version was at issue. (7/22/13 A.B./I.B.21) ("Four of the five issues raised by Defendants involve application of section 766.118, Florida Statutes (2007)").

Houma, 395 U.S. 701, 706 (1969) ("Where a decision of this Court could produce substantial inequitable results if applied retroactively, the is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.").

Here, since §766.118 was enacted in 2003, healthcare providers have purchased liability insurance based on the caps, and the defense bar, healthcare providers, and insurance industry have relied on the caps in making decisions on matters such as risk assessment, entering the Florida medical malpractice insurance market, setting reserves, issuing policies, setting premium rates, and deciding whether to settle cases and file appeals. A retroactive invalidation of the statute would harm individuals and businesses who since 2003 factored the caps into significant personal and business decisions.

Moreover, based on the facts of the case and timing of Kalitan's medical incident and injury, Defendants herein have a vested/organic substantive right to have §766.118's caps applied. *See, e.g.*, *Martinez*, 582 So. 2d at 1175 n.8 ("substantive rights are fixed at the time of injury"); *Am. Optical Corp. v. Spiewak*, 73 So. 3d 120, 133 (Fla. 2011) ("statutes that operate to abolish or abrogate a preexisting right, defense, or cause of action cannot be applied retroactively"); *Wiley v. Roof*, 641 So. 2d 66, 68-69 (Fla. 1994) (once a defense has accrued under a then-valid law, it is a protected property right); *Fla. Forest & Park Serv. v. Strickland*, 18 So. 2d 251, 253 (Fla. 1944) (where property rights have been

acquired under accordance with statute such rights should not be cut off by subsequent overruling court decision given a retroactive operation).

This Court recently recognized in *Miles* that, for retroactivity purposes, litigants' rights vest at the time the malpractice incident occurs and that §766.118 is a substantive statute that may affect litigants' vested rights. 164 So. 3d at 1211-13. To the extent §766.118's caps were not void ab initio, and subsequently became invalid after Kalitan's medical incident, Defendants' organic rights under the statute vested.

In *McCall*, the 3-member concurring in result and 2-member dissent rejected the notion that there was no medical malpractice crisis in 2003 when §766.118 was enacted. *See* 134 So. 3d at 922 (Pariente, J.) ("[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 922 (Polston, C.J.) ("[U]nder our precedent, the cap does not violate Florida's constitutional guarantee of equal protection.").

The "plurality" and "concurring" opinions at most agreed that §766.118 was constitutionally valid when enacted but ceased to operate when events in 2010 and thereafter showed that the caps would not alleviate the crisis and that the crisis no longer existed. *See* 134 So. 3d at 912-14 (relying on repeal of §627.062(8) in 2011, "2013 Annual Report," and "current data" from 2010-2013). Because §766.118's per claimant caps were not void ab initio, were constitutionally valid at

the time of Kalitan's medical incident, and at most became invalid thereafter, this Court should make its decision prospective only. *See Firestone Tire & Rubber Co. v. Acosta*, 612 So. 2d 1361, 1363 (Fla. 1992); *Martinez*, 582 So. 2d at 1175-76; *see also Linkletter v. Walker*, 381 U.S. 618, 621-22 (1965) ("A ruling which is purely prospective does not apply even to the parties before the court.").

Reliance on the statute has been justified. Prior to this Court's decision in *McCall*, no Florida appellate court had found §766.118's wrongful death or personal injury caps invalid. In fact, the statute was expressly found not to violate federal constitutional provisions in *Estate of McCall v. United States*, 642 F.3d 944 (11th Cir. 2011) and was applied by the Third District in *Weingrad v. Miles*, 29 So. 3d 406 (Fla. 3d DCA 2010).

Finally, the Fourth District's discussion of the "pipeline rule" is irrelevant. 174 So. 3d at 412. This Court indisputably has the power to make its decision in this case prospective only. *See Benyard*, 322 So. 2d at 474. Accordingly, if this Court determines §766.118's per claimant personal injury caps are unconstitutional, the decision should not apply to the parties herein and should apply prospectively only to actions that have not yet been filed.

D. Kalitan's other constitutional arguments must be rejected.

Due to its reliance on *McCall*, the Fourth District did not reach the other constitutional arguments raised by Kalitan. These arguments should be rejected

for the reasons expressed by Chief Justice Polston in his dissent in *McCall*, 134 So. 3d at 922-38, as well as numerous other federal[6] and state[7] courts addressing similar statutes, and on the grounds set forth below.

1. Access to Courts

Kalitan's "access to courts" challenge must be rejected. A highly deferential "rational basis" standard of review applies to an access to courts challenge to §766.118's medical malpractice damage caps. *See Echarte*, 618 So. 2d at 194-98

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[6] *See, e.g., Learmonth v. Sears, Roebuck and Co.*, 710 F.3d 249 (5th Cir. 2013); *Smith v. Botsford General Hosp.*, 419 F.3d 513 (6th Cir. 2005); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174 (9th Cir. 2002); *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986); *Watson v. Hortman*, 844 F. Supp.2d 795 (E.D. Tex. 2012); *Estate of Sisk v. Manzanares*, 270 F. Supp.2d 1265 (D. Kan. 2003); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989); *Clemons v. United States*, 2013 WL 3943494 (S.D. Miss. Jun. 13, 2013).

[7] *See, e.g., L.D.G., Inc. v. Brown*, 211 P.3d 1110 (Alaska 2009); *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985); *Stinnett v. Tam*, 130 Cal. Rptr.3d 732 (Cal. Ct. App. 2011); *Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993); *In the Matter of Kirkland*, 4 P.3d 1115 (Idaho 2000); *Miller v. Johnson*, 289 P.3d 1098 (Kan. 2012); *Oliver v. Magnolia Clinic*, 85 So. 3d 39 (La. 2012); *Dixon v. Ford Motor Co.*, 70 A.3d 328 (Md. 2013); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. Ct. App. 2002); *Gourley v. Nebraska Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003); *Salopek v. Friedman*, 308 P.3d 139 (N.M. 2013); *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1 (N.C. 2004); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007); *Zauflik v. Pennsbury Sch. Dist.*, 72 A.3d 773 (Pa. Cmwlth. Ct. 2013); *Giannini v. S. Carolina Dep't of Transp.*, 664 S.E.2d 450 (S.C. 2008); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004); *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999); *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525 (Va. 1989); *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405 (W.Va. 2011).

(applying deferential standard of review); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 646, n.74 (Fla. 2003) (noting that *Echarte* was not reviewed under strict scrutiny standard) (Pariente, J., concurring); *Berman v. Dillard's*, 91 So. 3d 875, 877 (Fla. 1st DCA 2012) ("the proper standard for Claimant's access to court claim is rational basis review"; "*North Florida*...was limited to the right of privacy and does not require application of strict scrutiny to all fundamental rights."

"The rational basis test requires that a statute bear a reasonable relationship to a legitimate state interest, and the burden is on the challenger to prove that a statute does not rest on any reasonable basis or that it is arbitrary." *Amerisure Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 897 So. 2d 1287, 1290 n.2 (Fla. 2005).

The right of access to courts is analyzed under the test enunciated in *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). Under *Kluger*, a common law or statutory right can be abolished or impaired where the Florida Legislature provides either (1) a reasonable alternative remedy or commensurate benefit, or (2) there is a public necessity for the action and no alternative method of meeting the public necessity is available. *Id.* at 4. *See also Samples v. Florida-Birth Related Neurological Injury Comp. Ass'n*, 114 So. 3d 912, 920 (Fla. 2013).

M.D. and *McCall* correctly rejected plaintiffs' access to courts challenge to §766.118 on the basis that *Kluger*'s second prong was satisfied. *See M.D. v. United*

States, 745 F.Supp.2d 1274, 1277-78; *Estate of McCall v. United States*, 663 F. Supp.2d 1276, 1298-1302 (N.D. Fla. 2009), *affirmed in part, and questions certified*, 642 F.3d 944 (11th Cir. 2011). The federal district courts' holdings are eminently correct and should be followed in this case.

This Court's analysis in *Echarte* is controlling. 618 So. 2d at 195-98. The *Echarte* Court rejected an access to courts challenge to two statutes that, among other things, limited noneconomic damage awards in medical negligence cases to (a) $250,000 in cases submitted to arbitration, and (b) $350,000 in cases which the plaintiff proceeded to trial after rejecting defendant's offer to enter arbitration. *Id.* at 193. The Court explained that the damage caps satisfied *Kluger*'s second prong, and therefore did not violate the Florida Constitution's access to court provision, because the legislature had made specific findings supporting the cap, including a "medical malpractice insurance crisis" and "overpowering public necessity," *id.* at 196-97, and that no alternative or less onerous method of addressing the crisis existed, *id.* at 197. The Court recognized that:

> The Legislature has the final word on declarations of public policy, and the courts are bound to give great weight to legislative determinations of fact. ... Further, legislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous. ... Because the Legislature's factual and policy findings are presumed correct and there has been no showing that the findings in the instant case are clearly erroneous, we hold that the Legislature has shown that an "overpowering public necessity" exists.

Echarte, 618 So. 2d at 196-97.

Echarte also held that the Legislature had demonstrated that no alternative method would meet this necessity. *Id.* at 197. As the Court stated: "[I]t is clear that both [§§766.207 and 766.209] ... and the strengthened regulation of the medical profession are necessary to meet the medical insurance crisis. ... [N]o alternative or less onerous method of meeting the crisis has been shown. Therefore, we hold that the second prong of *Kluger* is satisfied." *Id*. at 197-98.

As explained above, the *McCall* two-justice plurality's rejection of the legislature's findings in support of §766.118 was rejected by five other justices and is thus not dispositive of whether §766.118 satisfies the second prong of *Kluger*. In addition, Kalitan failed to meet her burden in this case of establishing any change in conditions which would render §766.118's per claimant caps currently invalid under the *Kluger* test.

In fact, the caps statute satisfies the *Kluger* test. Here, as in *Echarte*, the Florida Legislature enacted §766.118's damage caps after specifically finding that "Florida is in the midst of a medical malpractice insurance crisis of unprecedented magnitude" that "threatens the quality and availability of health care for all Florida citizens." Ch.416, §§1(1), (2), Laws of Fla. (2003). The Legislature also found that numerous "overwhelming public necessities" – including "making quality health care available to the citizens of this state," "ensuring that physicians

continue to practice in Florida," and "ensuring that those physicians have the opportunity to purchase affordable professional liability insurance" – justified imposition of the caps. *Id.* §1(14). These findings are supported by substantial competent evidence. *See* GOVERNOR'S SELECT TASK FORCE ON HEALTHCARE PROFESSIONAL LIABILITY INSURANCE, REPORT AND RECOMMENDATIONS.

Any reliance on *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987), is wholly misplaced. In *Smith*, this Court declined to address *Kluger*'s second prong because the issue was neither raised nor ruled upon below. 507 So. 2d at 1089. *Smith* ruled that the noneconomic damage limitation of the 1986 Tort Reform and Insurance Act denied claimants' access to courts solely on the basis that there was no commensurate benefit under *Kluger's* first prong. *Id.* at 1087-89. "*Smith* does not control the decision in this case." *McCall*, 663 F.Supp.2d at 1302; *see also M.D.*, 745 F.Supp.2d at 1277 ("*Smith* significantly differs and is easily distinguishable from the case at hand").

Courts in other jurisdictions have likewise rejected access to court challenges to other similar medical malpractice and statutory damage caps. *See, e.g.*, *Murphy*, 601 A.2d at 113-14; *Judd*, 103 P.3d at 139-41. As a federal district court stated in upholding the Texas Medical Malpractice and Tort Reform Act of 2003 limiting recovery of noneconomic damages:

> H.B. 4 meets the rational basis test because the plaintiffs have not shown that the damages cap is clearly arbitrary and irrational. *See*

> *Hodel v. Indiana*, 452 U.S. 314, 331-32, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981). The cap on noneconomic damages is reasonably related to the State of Texas's goals of reducing malpractice insurance premiums and improving access to care. ... Although the plaintiffs put forth a variety of statistical evidence and studies to challenge the Texas Legislature's findings, this evidence is insufficient to show that the legislation lacks a rational basis, particularly in light of the record that was before the Legislature at the time of the adoption of H.B.4.

Watson v. Hortman, 844 F. Supp.2d 795, 801 (E.D. Tex. 2012).

Section 766.118's noneconomic damage cap has a "rational basis."

2. Trial by jury

This Court has squarely held that statutory damage caps and other legislative limitations on damage recovery do not violate jury trial rights under the Florida Constitution. *See Echarte*, 618 So. 2d at 191 ("[W]e have also considered the other constitutional claims and hold that the statutes [capping medical malpractice noneconomic damages] do not violate the right to trial by jury"); *Cauley v. City of Jacksonville*, 403 So. 2d 379, 387 (Fla. 1981) ("The statute [capping damage recovery] does not violate the right to. . . jury trial"); *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 22 (Fla. 1974) (statutory provisions abolishing recovery of specific items of damage "do not violate the [r]ight to trial by jury").

All federal courts that have addressed the issue,[8] and the vast majority of state courts, have likewise squarely rejected plaintiff's contention that medical malpractice and other statutory damage caps violate the constitutional right to trial by jury. *See, e.g.*, *Learmonth*, 710 F.3d at 258-64; *Smith*, 419 F.3d at 519; *Hemmings*, 285 F.3d at 1200-02; *Davis*, 883 F.2d at 1159-65; *Boyd*, 877 F.2d at 1196; *Sisk*, 270 F.Supp.2d at 1277-79; *Franklin*, 704 F. Supp. at 1330-35; *Stinnett*, 130 Cal. Rptr.3d at 748-49; *Kirkland*, 4 P.3d at 1117-20; *Miller*, 289 P.3d at 1108-13; *Dixon*, 70 A.3d at 340-46; *Murphy*, 601 A.2d at 116-18; *Zdrojewski*, 657 N.W.2d at 736-37; *Gourley*, 663 N.W.2d at 74-75; *Rhyne*, 594 S.E.2d at 10-14; *Arbino*, 880 N.E.2d at 430-32; *Zauflik*, 72 A.3d at 787-89; *Judd*, 103 P.3d at 144-45; *Pulliam*, 509 S.E.2d at 312-15; *MacDonald*, 715 S.E.2d at 414-15.

Again, any reliance on *Smith* is misplaced. As previously noted, *Smith* found that a noneconomic damage cap in the Tort Reform and Insurance Act of 1986 did not satisfy *Kluger*'s first prong. 507 So. 2d at 1087-89. *Smith* did not address (except in *dicta*) whether the cap violated jury trial rights under Article I, section 22 of the Florida Constitution. This Court in *Echarte*, *Cauley* and *Lasky*

[8]This Court has stated that federal decisions construing the Seventh Amendment guarantee to the right of trial by jury "are helpful and persuasive in construing this state's constitutional provision of like import." *In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433, 434-35 (Fla. 1986). "Federal courts uniformly have held that statutory damage caps do not violate the Seventh Amendment." *Sisk*, 270 F.Supp.2d at 1277-78; *accord McCall*, 663 F. Supp.2d at 1298 n.37.

squarely held that the statutory damage caps did not violate plaintiffs' constitutional rights to a jury trial. Holdings control, not *dicta*.

Moreover, Kalitan's argument confuses factual findings with the determination of the legal consequences of those findings. "[O]nce the jury has made its findings of fact with respect to damages, it has fulfilled its constitutional function; it may not also mandate compensation as a matter of law." *Boyd*, 877 F.2d at 1196. "[I]t is not the role of the jury to determine the legal consequences of its factual findings." *Id.* "That is a matter for the legislature." *Id.* "[T]he court simply implements a legislative policy decision to reduce the amount recoverable to that which the legislature deems reasonable." *Sisk*, 270 F.Supp.2d at 1278.

3. Separation of powers

By enacting §766.118, the Legislature did not encroach upon the exclusive powers of the court in violation of the Florida Constitution's separation of powers. "Article II, section 3 of the Florida Constitution prohibits one branch of government from exercising 'any powers appertaining to either of the other branches unless expressly provided herein.'" *Massey v. David*, 979 So. 2d 931, 936 (Fla. 2008). "Generally, the Legislature is empowered to enact substantive law while th[e] [Supreme] Court has the authority to enact procedural law." *Id.* "Substantive law . . . creates, defines and regulates rights, or that part of the law which courts are established to administer." *State v. Raymond*, 906 So. 2d 1045,

1048-49 (Fla. 2005).

Section 766.118's medical malpractice damage caps are substantive in nature and prescribe "duties and rights." *See Raphael v. Shecter*, 18 So. 3d 1152, 1155-57 (Fla. 4th DCA 2009). The Legislature is constitutionally empowered to make substantive changes in the law and does not encroach upon the judiciary when doing so. *See State v. Cotton*, 769 So. 2d 345, 349-50 (Fla. 2000). Section 766.118 "does not 'impermissibly interfere with the function of the judiciary,' but rather 'defines the substantive and remedial rights of the litigants.'" *See M.D.*, 745 F.Supp.2d at 1281; *see also MacDonald*, 715 S.E.2d at 415 ("'[I]f the legislature can, without violating separation of powers principles, establish statutes of limitation, establish statutes of repose, create presumptions, create new causes of action and abolish old ones, then it can limit noneconomic damages without violating the separations of powers doctrine[.]'").

The district courts in *M.D.* and *McCall* properly rejected the separation of powers argument. *See M.D.*, 745 F.Supp.2d at 1281; *McCall*, 663 F.Supp.2d at 1306-07. Section 766.118's damage caps do not amount to a "legislature remittitur" or invade judicial power. *Id.* Virtually the entire body of American jurisprudence analyzing medical malpractice and other statutory damage caps – save for one lone Illinois decision (*Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895 (Ill. 2010)) – have rejected a constitutional separation of powers challenge.

See, e.g., *Learmonth*, 710 F.3d at 264-67; *Hemmings*, 285 F.3d at 1200-02; *Boyd*, 877 F.2d at 1195; *Franklin*, 704 F.Supp. at 1336; *Garhart*, 95 P.3d at 581-83; *Kirkland*, 4 P.3d at 1121-22; *Miller*, 289 P.3d at 1121-24; *Zdrojewski*, 657 N.W.2d at 739; *Gourley*, 663 N.W.2d at 76-77; *Salopek*, 308 P.3d at 157; *Rhyne*, 594 S.E.2d at 7-10; *Zauflik*, 72 A.3d at 785-87; *Judd*, 103 P.3d at 145; *Pulliam*, 509 S.E.2d at 319; *MacDonald*, 715 S.E.2d at 415.

Florida case law has likewise held that statutes imposing damage caps or concerning other substantive matters do not violate separation of powers under article II, section 3 of the Florida Constitution. *See Smith*, 507 So. 2d at 1092 & n.10 (1986 Tort Reform and Insurance Act provisions did not violate separation of powers provision); *Cauley*, 403 So. 2d at 387 ("The statute does not violate ... the separation of powers rule."); *see also Echarte*, 618 So. 2d at 191 & n.9 ("we have also considered the other constitutional claims and hold that the statutes do not violate...the non-delegation doctrine" under Art.II §3).

E. Failure to extend §766.118 cap protection to NBHD.

The trial court also erred in failing to extend any noneconomic damage cap protection to NBHD under §766.118. The Legislature in enacting the caps statute did not intend to increase a sovereign-immune entity's liability for noneconomic damages above that of non-immune entities. Section 766.118(7), Fla. Stat. (2007), provides: "This section shall not apply to actions governed by s.768.28." The

purpose of §766.118(7) is to prohibit any argument that the enactment of the caps statute waived a sovereign immune body's protection to the statutory immunity cap provided in §768.28. A broad literal meaning should not be applied to statutory language where it would lead to absurd or unreasonable results. *See State v. Flansbaum-Talabisco*, 121 So. 3d 568, 577 (Fla. 4th DCA 2013) ("[E]ven the plain meaning of a statute which produces patently absurd results will be avoided.").

Kalitan erroneously asserted below that §766.118(7) would be rendered "meaningless" and "useless surplusage" if Defendants' argument was adopted. (A/I.B.44). As noted above, §766.118(7) was intended to bar any argument that the caps statute waived sovereign immunity. The same effect would not have been accomplished had the Legislature not included §766.118(7) at all. In that situation, parties would be left to argue whether the later-in-time enactment of section 766.118 waived the protections of §768.28. *See Jordan v. Food Lion, Inc.*, 670 So. 2d 138, 140-41 (Fla. 1st DCA 1996) (noting "important maxim of statutory construction...that the last expression of the legislature prevails" and holding that "[t]he provisions adopted later in time should be viewed as controlling").

In light of the Legislative Claims Bill process, NBHD is entitled to have any money judgment in this legal action properly calculated.

Lastly, the applicability of the "sovereign-immunity" exception under §766.118(7) should be deemed waived based on Kalitan's failure to plead any non-

application of the caps statute, as Kalitan's general denial of all affirmative defenses was insufficient. "It is well established that a reply should never be used to simply deny an affirmative defense." *Buss Aluminum Prods., Inc. v. Crown Window Co.*, 651 So. 2d 694, 694 (Fla. 2d DCA 1995). If §766.118(7) applied to avoid NBHD's damage-limitation affirmative defense under §766.118 (R.26.4930), Kalitan was obligated to specifically plead the statutory exception in a reply. Her failure to do so resulted in waiver. *See, e.g., Hunt v. Corrections Corp. of Am.*, 38 So. 3d 173, 175-77 (Fla. 1st DCA 2010) (plaintiffs in failing to plead an avoidance were procedurally barred from using a statutory exception to defeat defendant's statutory immunity defense). Kalitan's §766.118(7) arguments are substantively and procedurally defective.

II. A NEW TRIAL IS WARRANTED BY KALITAN'S INJECTION OF BASELESS AND HIGHLY PREJUDICIAL "CATASTROPHIC BRAIN/CLOSED-HEAD INJURY" ISSUE WHICH FOURTH DISTRICT ERRONEOUSLY DEEMED MOOT.

Defendants implore this Court to exercise its discretion to consider an additional key issue which requires a new trial and which the Fourth District erroneously determined was rendered moot on appeal by its cap constitutionality ruling. 174 So. 3d at 405. *See State v. Sigler*, 967 So. 2d 835, 844-45 n.4 (Fla. 2007) (noting in direct appeal from decision holding statute invalid "that once we have jurisdiction of a case we can address any issue that may affect the case").

As detailed in Defendants' briefs to the Fourth District, a new trial on liability and damages is required because of Kalitan's injection of a "catastrophic brain/closed-head injury" issue which was procedurally/equitably barred and unsupported by the evidence, and fatally infected the trial and the jury's deliberations and verdict. (12/4/12 I.B.1-40; 12/2/13 R.B./A.B.1-11; R.43.7345).

Long before trial, and consistent with her failure to plead the matter, Kalitan's counsel had stipulated in open court that she was "not claiming [she] has an organic brain injury, head trauma." (R.46.7886). Based on Kalitan's stipulation, the trial court ruled Defendants were not entitled to extensive neuropsychological testing of Kalitan. (R.15.2699; 49.7982). At trial, Kalitan not only failed to present any supporting medical testimony, but her own expert affirmatively testified that Kalitan did not sustain any brain damage. (T.2042).

In a calculated attempt to persuade the jury to find liability and inflated damages, Kalitan successfully requested an instruction and verdict form question asking the jury whether, as a result of Defendants' negligence, Kalitan sustained a "catastrophic injury" in the form of "[a] severe brain or closed-head injury as evidenced by severe episodic neurological disorders." (T.4624). This was based on the provisions of §766.118 which permitted the recovery of higher noneconomic damage amounts if the plaintiff proved such a statutorily-defined injury. *See* §766.118(1)(a)(3)(d), (2)(b)(2) & (3)(b)(2).

The trial court agreed there was no evidence, stated it was a "silly issue" and Kalitan was "asking for trouble" because "[t]here's not any evidence to support" her requested jury charge, but charged the jury anyway stating there was "no way the jury" would find in favor of Kalitan and if it did the court was "not going to let it stand." (T.4524-29). The trial court also denied Defendants' motion for directed verdict on the brain/closed-head injury issue. (T.3418-20, 4908).

During deliberations, the jury demonstrated its confusion asking whether a "no" answer to the catastrophic injury questions would deter the plaintiff from being awarded "punitive damages" -- an inflammatory non-issue. (T.4906; R.42.7183). Defendants' motion for mistrial was denied. (T.4933-39). Despite the lack of any evidence, the jury found that Kalitan sustained a brain/closed-head injury and awarded $4 million in noneconomic damages. (T.4941-43).

Notwithstanding its in-trial representations that it would not let a brain injury finding stand, after the verdict the court flip-flopped and let the verdict stand, including the $4,000,000 non-economic damages award (albeit capped) that was plainly based on a finding of a brain injury that was not supported by any evidence. (R.46.7954-55).

Contrary to Kalitan's argument below, the jury was not permitted to "infer" such a complex medical condition, and the instruction and verdict form were highly prejudicial. (12/3/12 I.B.25-26; 12/2/13 R.B./A.B.3).

Moreover, contrary to the Fourth District's holding, the jury instruction and verdict form argument was "still at issue" and not rendered "moot" by its equal protection ruling. 174 So. 3d at 405; (12/2/13 R.B./A.B.1) ("[A] new trial would be warranted even if the caps statute were unconstitutional."). Defendants have been denied appellate review of the merits of their new trial claim. The issue-injection error was blatantly prejudicial and mandates reversal. *See Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1265 (Fla. 2014) ("the test for harmless error requires the beneficiary of the error to prove that the error complained of did not contribute to the verdict").

Thus, irrespective of whether this Court finds §766.118's per claimant caps constitutional or applicable, the Court should reverse and remand for a new trial due to the improper injection of the "catastrophic brain/closed-head injury" issue which misled the jury and tainted its liability finding and exorbitant $4 million noneconomic award. Alternatively, because Defendants were entitled to a directed verdict/JNOV, the enhanced awards under §766.118 based on the jury's "catastrophic injury" determination should be stricken and the judgment reduced accordingly. (R.52.8198-8200).

CONCLUSION

Based on the foregoing reasoning and authorities, this Court on de novo review should hold §766.118's per claimant personal injury caps constitutional and apply it to all defendants in this case, including NBHD. Alternatively, if the Court finds the caps invalid, its decision should be made prospective only. Further, the Court should reverse and remand for a new trial on liability and damages or, alternatively, strike the enhanced "catastrophic injury" damage awards under §766.118 and remand for a reduction in the final judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the Court's E-Portal and furnished via electronic mail this **3rd day of December, 2015** to: Crane A. Johnstone, Esq., Sheldon J. Schlesinger, P.A., 1212 S. E. Third Avenue, Fort Lauderdale, FL 33316, SLOPA.Service@SchlesingerLawOffices.com, rhoehn@schlesingerlaw.com; Jeffrey R. Creasman, Esq., Quintairos, Prieto, Wood & Boyer, 9300 South Dadeland Blvd., 4th Floor, Miami, FL 33156, rortiz@qpwblaw.com; Thomas A. Valdez, Esq., Quintairos, Prieto, Wood & Boyer, 4905 West Laurel Street, Suite #200, Tampa, FL 33607,

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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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