IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC15-1858

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

Petitioners,

-vs-

SUSAN KALITAN, et al.,

Respondent.
_____/

ANSWER BRIEF ON THE MERITS

On appeal from the Fourth District Court of Appeal of the State of Florida

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STATEMENT OF THE FACTS[1]

On November 6, 2007, Plaintiff Susan Kalitan ("Kalitan") arrived at Broward General Hospital for out-patient carpal tunnel surgery to be performed by her orthopedist under general anesthesia (T6:868; T23:3278). During the administration of anesthesia by a team including a doctor and two nurses, an instrument punctured a hole in Kalitan's esophagus (T7:940, 945). No one noticed that Kalitan's esophagus had been perforated (T6:773-74, 777).

Kalitan's orthopedist successfully performed the carpal tunnel surgery (T8:1059). As Kalitan awoke in the post-anesthesia recovery room, she complained of chest and back pain (T23:3283). The anesthesiologist determined that her heart rate and rhythm appeared normal so he left without doing anything further to determine the source of Kalitan's pain (T20:2965).

Later, Kalitan was transferred from the PACU to the "same-day" unit, where nurses prepared her for discharge (T7:956). She complained of severe pain in her chest radiating to her back and of difficulty swallowing (T20:2858). Nurses continued to give her pain medications, but no one attempted to diagnose the

[1] In addition to challenging the Fourth District's ruling striking the damages cap, Defendants have asked this Court to quash the Fourth District's decision and remand for entry of a new trial based upon the presentment of the catastrophic damages issue to the jury. Although this is a fact based argument, Defendants have presented very few of the relevant facts. As such, Kalitan has included a comprehensive statement of the relevant facts here.

source of the pain (T6:784, 786-87, 801-02). At 2:45 p.m., Kalitan was discharged from Broward General and sent home (T6:806).

Kalitan's health deteriorated throughout the night and the following morning (T23:3287). She was eventually discovered by a friend and rushed to the emergency room at Westside Regional Medical Center ("Westside Regional"), where she was diagnosed with a perforated esophagus (T6:772; T8:1092, T9:1189; T21:3016; T23:3288). Due to the perforation, fluid and food travelled from Kalitan's esophagus into her chest cavity for more than 24 hours, causing a life-threatening infection (T9:1169).

A cardio-thoracic surgeon performed chest and neck surgery on Kalitan to drain the foreign material from her chest and remove the infection (T6:840-43; T21:3025). Due to the location of the perforation, the surgeon could not suture the perforation so he left it open, hoping it would heal naturally (T21:3020-21, 3025).

Kalitan remained on a respirator and was placed in a drug induced coma for three weeks while she recovered (T8:1064; T14:1953, 1963). A feeding tube was surgically placed into her abdomen to provide nutrition (T14:161).

While Kalitan was in this drug induced coma, she was examined by a neurologist who diagnosed her with ICU psychosis which causes delirium and hallucinations (T16:2175-76). This is a condition common in cases where patients are unconscious, intubated, and highly medicated for significant periods of time

(T16:2175-76). Kalitan was delirious and suffered intense nightmares and hallucinations during her time at Westside Regional (T16:2179; T23:3290-91).

After Kalitan awoke from her coma, she remained in the hospital for several weeks (T14:1967). She was kept on the feeding tube because she still could not eat (18:2532). She underwent speech pathology to learn to speak and swallow again (T23:3294). She also underwent physical therapy to regain her ability to walk (T23:3292-93). She was at Westside Regional for more than a month and a half before being discharged for further rehabilitation at home (T13:1762, 23:3381-82).

When Kalitan was released from the hospital she remained on a feeding tube for six months, had trouble walking, could not lift her shoulders, and could not care for herself (T15:2059, 16:2196-97, 18:2532, 23:3293, 3309). Shortly after returning home, Kalitan developed a hernia in her abdomen where the feeding tube had been placed, which she had to have surgically repaired (T23:3299-3300, 3313). She still has pain in that area of her stomach (T23:3317). Kalitan is also at significant risk for future bowel obstructions because of the abdominal scar tissue from surgery (T23:3303). Kalitan suffers from permanent pain in her neck, shoulders and hands when she moves, and does not have normal range of motion (T23:3317). She has tingling and numbness from her neck down into her arms and across her chest (T23:3317). She gets spasms on her side which go from her chest

into her back (T23:3317). Although she can eat by mouth now, food still gets stuck in her throat due to the injury (T23:3319).

Kalitan's body changed physically as a result of this ordeal. She lost all muscle tone in her body (T23:3317). She has scars on her neck, chest and abdomen (T23:3299). Additionally, because she was unconscious for so long, she never received physical therapy to her hand after the carpal tunnel surgery. As a result, her hand is weak and atrophied (T23:3318). She cannot grasp objects well and may be developing carpal tunnel syndrome again (T23:3318).

Kalitan also suffers from significant mental problems as a result of her ordeal. She has significant gaps in her short and long-term memory (T23:3316). She suffers from post-traumatic stress disorder and severe depression as a direct result of this incident (T16:2264). She suffers from panic attacks and anxiety (T23:3332, 3335). As a result of her prolonged hospitalization which led to her physical and mental deterioration, Kalitan lost her job as a dental assistant and now spends most of her time at home alone (T23:3306, 3315).

STATEMENT OF THE CASE

In 2008, Kalitan filed a medical malpractice suit against North Broward Hospital District ("NBHD"), which operates Broward General, and the doctors and nurses who administered the anesthesia and their employers (R1:1-35). The operative Complaint is the Third Amended Complaint (R25:4832-73).

Relevant Pre-Trial Proceedings

In August 2009, Defendants attempted to set a six-hour CME with a neuropsychologist. At the hearing, Kalitan's counsel objected, arguing that such an extensive exam was not permitted where she was "not claiming she has an organic brain injury, head trauma" (R49:7989, 12/2/09 hearing p.8). Nevertheless, the trial court authorized an initial CME to last up to two hours, with leave for Defendants to request further testing (R15:2698-99). Defendants never set the CME and never again sought to have Kalitan examined by a psychologist or psychiatrist.

Relevant Trial Proceedings

The case was tried in 2011 and lasted four weeks. At trial, Kalitan testified and also presented extensive testimony of fact and expert witnesses, including neurologist Dr. Waden Emery ("Dr. Emery") and psychiatrist Dr. Richard Seely ("Dr. Seely").

Dr. Emery examined Kalitan in 2009 and performed several tests (T15:2037). He determined that she has an upper motor neuron disease, which means spine or brain damage (T15:2040). After further testing, he determined that she had spinal cord dysfunction in the area directly behind the location of the perforation in her esophagus (T15:2042, 2044, 2047-48); and that the damage was a direct result of the injury to her esophagus (T15:2049, 2083).

Dr. Emery testified that spinal surgery would help Kalitan, but she is unwilling to undergo the procedure because it requires being put under anesthesia (T15:2078-79). The damage to her spine is permanent; the surgery would only prevent further damage (T15:2080-81, 2083).

Dr. Seely is Board Certified in Psychiatry (T16:2162, 2174). Dr. Seely first saw Kalitan in late 2009. In addition to examining her, he reviewed depositions taken in the case and Kalitan's extensive medical records (T16:2165-66). Dr. Seely testified that Kalitan's injuries from a psychiatric standpoint were catastrophic (T16:2192). Kalitan went from living a normal, happy, active life to being unconscious for several weeks having delusions and nightmares as a result of ICU psychosis (T16:2193-94).

According to Dr. Seely, Kalitan suffers from a lengthy list of mental disorders as a result of this incident, including: major depressive disorder; panic disorder/attacks; agoraphobia; significant short-term memory loss; decline in ability to focus and concentrate; and social anxiety disorder/social phobia (T16:2199-2204). Dr. Seely also diagnosed Kalitan with post-traumatic stress disorder, which means that she was severely traumatized; her cells were traumatized, her brain recalls that she went through a life-changing event (T16:2202). According to Dr. Seely all of these problems are permanent and were caused by the perforated esophagus and the myriad complications she experienced

thereafter (T16:2207). Kalitan needs psychiatric care and psychotherapy on an ongoing basis (T16:2206-07).

Kalitan also submitted her medical records into evidence, which showed that following the esophageal perforation, she had an abnormal EEG as a result of bihemispheric brain dysfunction and disorganization of the electrical activity of her brain (T28:4018). She also suffered sepsis, altered mental status, blunted affect, psychosis, mental lapses, and functional decline (T20:2949-50).

At the close of Kalitan's case, Defendants moved for partial directed verdict "on the issue of catastrophic injury" (T23:3418-19). They contended that Kalitan had not "met the threshold" for the catastrophic injury (T23:3419). The trial court deferred the issue until the charge conference (T23:3423).

During the charge conference, Kalitan requested that the jury be instructed to determine whether she had suffered a catastrophic injury (T32:4514-15). Defendants objected, arguing only that there was no evidence of catastrophic injury (T32:4514-30). The trial court ruled the issue was for the jury to decide (T32:4527). The verdict form included the following questions:

> 7. Did Susan Kalitan suffer a catastrophic injury meaning a permanent impairment constituted by either of the following conditions:
>
> a) Spinal cord injury involving severe paralysis of an arm, a leg, or the trunk?
>
> b) Severe brain or closed-head injury evidenced by a severe episodic neurological disorder?

(R42:7192).

Verdict

The jury found negligence on the parts of the anesthesiologist (50%), the nurse anesthetist (10%), a student nurse anesthetist (5%), and the nurses at NBHD (35%) (R42:7191). The jury awarded $4,718,000; $718,000 in economic damages and $4,000,000 in non-economic damages (R42:7193). The jury found Kalitan had suffered a severe brain or closed-head injury evidenced by a severe episodic neurological disorder, but not a spinal cord injury (R42:7192).

Post-Trial Proceedings

Defendants filed Renewed Motions for Directed Verdict and motions for JNOV, new trial, and to limit the judgment (R42:7251-58, 7323-29; 7331-37; R43:7339-45). Defendants argued, *inter alia*, that there was not sufficient evidence to support the jury's finding of a catastrophic injury (R42:7251-58, 7323-29; 7331-37; R43:7339-45). At the hearing on post-trial motions, NBHD suggested, **for the first time**, that the catastrophic injury issue had not been pled or had been waived pre-trial (R48:7966-7973, 8/13/11 hearing, p. 29).

The trial court deferred ruling and ordered Kalitan to file the trial transcripts which supported the finding of catastrophic injury (R48:7966-7933, 8/13/11 hearing, p. 37). Kalitan complied (R45:7605-7812) and, in their responses Defendants relied upon, **for the first time**, the December 2009 hearing when

Kalitan's counsel indicated there was no claim for "organic brain injury, head trauma" (R46:7888-7947, 12/2/09 hearing p. 8).

After hearing extensive argument and reviewing all of the relevant evidence, the trial court denied Defendants' Renewed Motion for Directed Verdict challenging the finding of catastrophic injury (R46:7948-56). The court noted, *inter alia*, Dr. Seely's opinion that the changes to Plaintiff's mental condition were both permanent and catastrophic (R46:7954-56). The trial court later reiterated at a hearing on Defendants' Motions for Rehearing that there was sufficient evidence to support the jury's finding that Kalitan suffered a catastrophic injury (SR:21-22).

Final Judgment

In their affirmative defenses, Defendants claimed that Kalitan could not recover more than $500,000, cumulatively, for non-economic damages, pursuant to §766.118, Florida Statutes (R26:4930). Kalitan challenged the constitutionality of the damage caps. The trial court ruled that §766.118 did not violate the Constitutions of Florida or the United States (R46:7953), and applied the caps in the Final Judgment as to each Defendant except for NBHD[2] (R52:8198-8200). Accordingly, the trial court entered Final Judgment in the total amount of

[2] Section 766.118(7), Fla. Stat (2007), provides that §766.118 and the caps it mandates does not apply to actions against sovereign immune entities such as NBHD. This is discussed further below (AB 40-43).

$2,793,011, which is $1,924,989 less than the damages determined by the jury (R52:8198-8200).

Defendants appealed as to the application of the "catastrophic" damages cap (among other issues) and Kalitan cross-appealed, raising the constitutional challenge to the caps. The Fourth District reversed, based upon this Court's decision in Estate of McCall v. United States, 134 So.3d 894 (Fla. 2014).[3] The court held that McCall mandated a finding that the caps in §766.118 are unconstitutional in single claimant personal injury cases. The court explained that "[t]o conclude otherwise would be disingenuous" N. Broward Hosp. Dist. v. Kalitan, 174 So.3d 403, 405 (Fla. 4th DCA 2015). Defendants moved for rehearing and rehearing *en banc*, and those motions were denied.

[3] McCall was issued while this case was pending at the Fourth District. Each party had the opportunity to address in a brief the application of this Court's decision in that case.

SUMMARY OF ARGUMENT

A majority of this Court determined in McCall that §766.118's caps on non-economic damage awards violate the equal protection clause of the Florida Constitution. Defendants' argument that McCall applies only to multiple claimant cases is incorrect. In McCall, five Justices agreed that caps on noneconomic damages without a provision to ensure that the savings are passed to doctors in the form of reduced premiums does not bear a rational relationship to the stated legislative objectives of reducing malpractice premiums, keeping doctors in the state, keeping doctors insured, and maintaining access to healthcare for Floridians. Those same five Justices also held that even if the alleged medical malpractice crisis ever existed, it no longer does. This reasoning by a majority of this Court applies to make the caps unconstitutional whether there is a single claimant or multiple claimants. Accordingly, the Fourth District properly determined that McCall applied to this case and that the Final Judgment applying the caps must be reversed for entry of judgment in accordance with the jury's verdict.

Even if this Court determines that the caps do not violate equal protection as applied to single claimants, the caps violate several other constitutional provisions. First, the caps violate the fundamental right to access to courts. This Court held long before McCall that caps on noneconomic damages improperly restrict "constitutional redress of injuries." Smith v. Dep't of Ins., 507 So.2d 1080, 1088

(Fla. 1987). Defendants did not, and cannot, establish that the caps of §766.118 accomplish an overpowering public necessity by the only available means.

Second, the caps violate the right to trial by jury because when the caps are applied to limit a jury's verdict, a plaintiff does not receive the damages awarded by the jury. Third, the caps violate separation of powers by removing the power of the trial court to enter a judgment for the amount of a proper jury verdict, or to determine if a verdict is excessive, and establishing a legislatively mandated remittitur. Thus, the Final Judgment should be reversed for entry in accordance with the verdict regardless of whether this Court finds that McCall applies to single claimant cases.

Should this Court determine that the caps of §766.118 are constitutional, it should affirm the Final Judgment in favor of Kalitan. Kalitan sufficiently pled and proved her claim that she suffered a catastrophic brain injury as a result of Defendants' negligence. Thus, a new trial is not warranted on that basis.

Finally, the trial court did not err in refusing to apply the caps as to NBHD. Subsection 766.118(7) expressly provides that §766.118 and the caps it mandates does not apply in actions against sovereign immune entities such as NBHD.

ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL DID NOT ERR IN DETERMINING THAT THE CAPS ON NON-ECONOMIC DAMAGES IN SECTION 766.118(2), (3) ARE UNCONSTITUTIONAL IN SINGLE CLAIMANT PERSONAL INJURY ACTIONS.

Standard of Review

Kalitan agrees with Defendants that the standard of review is de novo.

Merits

A. The Caps on Noneconomic Damages Violate Plaintiff's Right to Equal Protection Under the Florida Constitution

In Estate of McCall v. United States, 134 So.3d 894 (Fla. 2014), this Court held that the caps on noneconomic damages provided for in §766.118 violate the Equal Protection Clause of Florida's Constitution.[4] Defendants discount this Court's decision in McCall and contend that this Court's earlier decisions in University of Miami v. Echarte, 618 So.2d 189 (Fla. 1993), cert. denied, 510 U.S. 915 (1993) and St. Mary's Hospital, Inc. v. Phillipe, 769 So.2d 961 (Fla. 2000),

[4] Section 766.118, Florida Statutes includes multiple damage caps provisions. Section 766.118(2) provides that when the medical negligence of a "practitioner" is involved, as defined in (6)(b), there is a $500,000 cap on noneconomic damage awards. Subsection (2)(b) raises that cap to $1,000,000 if the negligence resulted in death, a permanent vegetative state, or catastrophic injury. Section 766.118(3) establishes caps of $750,000 and $1,500,000, respectively, where the negligence of a non-practitioner is involved. McCall involved only application of the practitioner caps in §766.118(2), while this case involves both subsections (2) and (3).

establish that the caps of §766.118 do not violate equal protection in a single claimant case. However, as discussed below, it is this Court's decision in McCall that controls the outcome here even though this case involves a single claimant as opposed to multiple claimants.

1. The *McCall* Decision

McCall was a wrongful death medical malpractice case brought on behalf of three survivors in federal district court pursuant to the Federal Tort Claims Act. 134 So.3d at 899. A bench trial was held and the trial court found the defendants liable for the decedent's death. Id. The court awarded a total of $2,000,000 in non-economic damages. Id. However, the court capped the claimants' recovery of non-economic damages at $1,000,000, pursuant to §766.118(2). Id.

On appeal to the Eleventh Circuit Court of Appeals, the estate argued, *inter alia*, that the cap violated various provisions of the Florida Constitution, including: (1) the separation of powers guarantee; (2) the right to trial by jury; (3) the right of access to the courts; and (4) the right to equal protection. Id. The Eleventh Circuit ultimately certified four questions to this Court regarding those constitutional challenges to the caps. Id. at 897, 899.

In McCall, a majority of this Court rephrased the first certified question[5] as:

[5] This Court declined to address the remaining certified questions as to the access to courts, jury trial, and separation of powers challenges because, in essence,

> Does the statutory cap on wrongful death noneconomic damages, Fla. Stat. §766.118, violate the right to equal protection under article I, section 2 of the Florida Constitution?

Id. at 897. A majority of this Court (5 of the 7 Justices) answered that question affirmatively. See id. at 897, 916, 922. However, the majority did not agree in all respects. Justice Lewis authored a plurality opinion (the "plurality"), joined by Justice Labarga; Justice Pariente authored a concurring in result opinion (the "concurrence"), joined by Justices Quince and Perry.

The plurality determined that the caps on noneconomic damages failed the *extremely deferential* rational basis test. In noting the arbitrary nature of the caps, the plurality explained that caps on noneconomic damages "**discriminate against claimants who have suffered the most grievous injuries, while benefitting the tortfeasor and/or the insurance company**." Id. at 902 (citing Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1075 (Ill. 1997)).

The plurality continued:

> Under the Equal Protection Clause of the Florida Constitution, and guided by our decision in [St. Mary's Hospital v.] Phillipe, [769 So.2d 961 (Fla. 2000)] **we hold that to reduce damages in this fashion is not only arbitrary, but irrational, and we conclude that it "offends the fundamental notion of equal justice under the law.**" Phillipe, 769 So.2d at 972.

McCall, 134 So.3d at 903.

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wrongful death claims did not exist at common law so those provisions did not apply. McCall, 134 So.3d at 915-16.

The plurality also determined that the caps violate equal protection because they bear no rational relationship to a legitimate state objective. Id. at 909. The plurality concluded that the Legislature's findings as to the existence of a medical malpractice crisis were "unsupported" and "dubious."[6] Id. at 905-09.

The plurality also held that even if the medical malpractice crisis were assumed to exist, the caps still violate equal protection because there was no evidence of "a rational relationship between a cap on noneconomic damages and alleviation of the purported crisis." Id. at 909. The plurality noted that without a statutory mandate that insurance companies lower premiums in response to caps, the caps may simply increase insurance company profits without decreasing the rates charged for medical malpractice insurance. Id. at 912 (citation omitted). The plurality explained that "[i]n the context of persons catastrophically injured by medical negligence . . . it is unreasonable and arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease." Id. at 912 (quoting Lucas v. United States, 757 S.W.2d 687, 691 (Tex. 1988)).

[6] The determination as to the legitimacy of the Legislature's purported purpose for the cap was the source of the disagreement between the plurality and the concurrence. The concurrence disagreed with the plurality, stating that the Court's precedent required it to defer to the Legislature's factual and policy findings when undertaking a rational basis analysis. See McCall, 134 So.3d at 921-22.

The concurrence agreed with the plurality that there was no rational relationship between the caps and the stated goal of alleviating the purported financial crisis in the medical liability insurance industry. McCall, 134 So.2d at 919 (quoting Phillipe, 769 So.2d at 971). The concurrence explained:

> **This critical missing link causes me to believe that the statutory cap on noneconomic damages in medical malpractice actions not only fails the smell test, but the rational basis test as well**, especially in light of the fact that subdivision (8) was repealed as "obsolete."[7]

McCall, 134 So.3d at 919-20 (internal citations omitted).

Finally, the plurality and concurrence agreed that even, assuming *arguendo*, a medical malpractice insurance crisis existed when §766.118 was enacted, it no longer did. Id. at 913-15, 920-21. After discussing the current robust financial state of the Florida malpractice insurance industry, the plurality explained:

> [I]**t should no longer be necessary to continue punishing those most seriously injured by medical negligence by limiting their noneconomic recovery to a fixed, arbitrary amount**.
>
> Thus, even if there had been a medical malpractice crisis in Florida at the turn of the century, the current data reflects that it has subsided. **No rational basis currently exists (if it ever existed) between the cap imposed by section 766.118 and any legitimate**

[7] The legislation enacting the caps required the Florida Office of Insurance Regulation to calculate a "presumed factor" reflecting the impact the legislation would have on insurance premiums. §627.062(8)(a)1., Fla. Stat. (2003). Insurers were notified of the presumed factor and directed to submit a rate filing for medical malpractice insurance reflecting a rate reduction "at least as great as the presumed factor." §627.062(8)(a)2, Fla. Stat. (2003). However, there were no mandated reductions, McCall, 134 So.3d at 911, and subdivision (8) was ultimately repealed as "obsolete" Ch.2011–39, §12, Laws of Fla., at 514, 536–37.

> **state purpose.** 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.

Id. at 914-15 (internal citation omitted).

2. *McCall* Applies to Single Claimant Cases, Including This Case

In McCall, the certified question was rephrased as whether "the statutory cap on wrongful death noneconomic damages, Fla. Stat. §766.118, violate the right to equal protection under article 1, section 2 of the Florida Constitution?" 134 So.3d at 897. The plurality and the concurrence answered affirmatively. This Court limited neither the certified question nor its response solely to multiple claimant cases, which it certainly would have done if its holding was so limited. Thus, McCall is controlling and mandates affirmance here.

Defendants argue that, in McCall, this Court determined that "aggregate caps" applied to multiple claimants violate equal protection, but that caps applied to single claimants, such as Kalitan, do not violate equal protection (IB 17-19). There is no support for that interpretation.

In McCall, a majority of this Court found that the caps of §766.118 did not bear a rational relationship to the stated purpose of alleviating the purported medical malpractice crisis. Id. at 909, 912, 919-20. A majority also found that even if a medical malpractice crisis existed at the time §766.118 was enacted, the crises

no longer existed. Id. at 913-15, 920-21. These conclusions apply with equal force to a single claimant case as to a multiple claimant case.

This conclusion is supported by the reasoning of the plurality which applies to single claimant cases. In determining that the cap did not meet the rational basis test, the plurality stated that imposing caps on the recovery of "those who *are the most grievously injured, those who sustain the greatest damage and loss*, ***and*** *multiple claimants* is arbitrary, irrational and offends the fundamental notion of justice under the law." Id. at 903 (emphasis added); see also id. at 912 (adopting the position of the Texas Supreme Court 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 914 (noting that "it should no longer be necessary to continue punishing those most seriously injured by medical negligence by limiting their noneconomic recovery to a fixed, arbitrary amount"); id. at 913 ("No rational basis currently exists (if it ever existed) between the cap imposed by section 766.118 and any legitimate state purpose"); id. at 914-15 ("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*"). These discussions appear in the parts of the plurality with which the concurrence agreed.

Defendants also imply that McCall is not controlling because it was a wrongful death case and this case is a personal injury case (IB 17-19). Defendants rely on a footnote in the plurality which noted that "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." McCall, 134 So.3d at 900, n.2. That footnote says that "the legal *analyses*" are not the same and, as argued *infra*, there are additional constitutional analyses applicable to personal injury claims, including access to courts, right to jury trial, etc. Footnote 2 says that the analysis of the caps in wrongful death cases is "limited." This is consistent with the focus in McCall on the equal protection argument. Nothing in that footnote implies that equal protection does not apply with equal force to personal injury claims.

Defendants next argue that if McCall applied to single claimant personal injury actions, this Court would have said so in Miles v. Weingrad, 164 So.3d 1208 (Fla. 2015), and not bothered to hold that the caps are not retroactive (IB 20-21). This argument is misplaced. The doctrine of constitutional avoidance provides that "an appellate court should not resolve a case on a constitutional basis unless that action is essential." In re E.B.L., 544 So.2d 333, 335 (Fla. 2d DCA 1989). In Miles, this Court did not need to reach the constitutional issue of whether the caps applied in single claimant personal injury cases, so it did not do so.

Furthermore, this Court accepted review of Miles based upon conflict regarding the *retroactivity* issue. While Miles was pending at this Court originally, this Court issued Am. Optical Corp. v. Spiewak, 73 So.3d 120 (Fla. 2011). Spiewak did not address §766.118, but addressed general principles of retroactivity. This Court remanded Miles to the Third District citing Spiewak. On remand, the Third District found that it's prior decision that the caps could be applied retroactively did not conflict with Spiewak. See Miles, 103 So.3d 259 (Fla. 3d DCA 2012). The case then returned to this Court on decisional conflict jurisdiction as to that issue. Thus, the retroactivity issue was the basis of this Court's jurisdiction in Miles and there was no reason for this Court to decide the case on any other basis. This Court's choice not to address an issue other than the decisional conflict cannot be relied on as meaning that the caps are constitutional in single claimant personal injury actions.

3. ***Echarte* and *Phillipe* Do Not Control**

Defendants contend that this Court's pre-McCall decisions in Echarte and Phillipe are controlling here. In those cases, this Court addressed the constitutionality of the damage cap in the medical malpractice arbitration provision, §766.207, Florida Statutes. In Echarte, this Court considered the constitutionality of a $250,000 cap on noneconomic damages for medical malpractice claims *where both parties agreed to arbitration*.

In McCall, the plurality noted that Echarte was inapposite:

> In upholding the constitutionality of the cap in medical malpractice arbitration proceedings, this Court in Echarte noted that arbitration provided commensurate benefits in exchange for the cap, such as saving the expense of attorney fees and expert witnesses. Conversely, under section 766.118, **survivors receive absolutely no benefit whatsoever from the cap on noneconomic damages, but only arbitrary reductions based upon the number of survivors**.

McCall, 134 So.3d at 904 (emphasis added).

In Phillipe, this Court again addressed the arbitration caps. There, the parties chose to utilize the statutory arbitration procedures, and the only issue certified by the Fourth District to this Court was whether the $250,000 damages cap in §766.207(7)(b), Fla. Stat., applied "per incident" or "per beneficiary." The only constitutional issue in Phillipe was how to construe that damages cap language. This Court determined that the arbitration caps should be applied "per claimant," and did not analyze whether the statutory scheme as a whole had a rational basis, or whether there was still a medical malpractice crisis.

4. *McCall* Established Binding Precedent

Defendants question the precedential value of McCall and urge this Court to refuse to apply that decision to any other case (IB 19-23). Defendants' position stems from the fact that the majority of the Justices agreeing with the McCall decision did not completely agree in every respect. However, a proper analysis of McCall compels the conclusion that it is binding precedent in this case.

The Florida Constitution requires four justices to concur in order to have a binding *decision*; Art. V, §3(a) Fla. Const.; Santos v. State, 629 So.2d 838, 840 (Fla. 1994). A "decision" is the result reached by the Court in the case, as distinguished from the "opinion." Id. at 840, n.1. The "opinion" is "the entire written statement issued by the Court in reaching its decision in a case, including the analysis and reasoning." Id.

In Florida, an opinion, or part of an opinion, joined by at least four justices is precedent, whether it is labeled a concurrence or otherwise. Greene v. Massey, 384 So.2d 24, 27 (Fla. 1980). Courts and parties must review plurality and concurring opinions issued by this Court to determine which points are agreed upon by at least four justices. Anstead, et. al., The Operation and Jurisdiction of the Supreme Court of Florida, 29 Nova L. Rev. 431, 460 (2005) (hereinafter referred to as "Anstead"). "[T]he Court's opinion for purposes of precedent would consist of those principles on which at least four members of the Court have agreed." Id. Even an opinion that "concurs in part and dissents in part" can provide the fourth vote to create binding precedent on areas of agreement; "a careful reading of the different opinions may be needed to ascertain the votes on a particular issue *or particular line of reasoning* and, hence, the actual precedent of the case." Id. at 461 (emphasis added).

Defendants argue that the concurrence agreed only with the ultimate decision or judgment of the plurality, not the opinion (IB 20-21). However, the concurrence is identified as "concurs in result with opinion," not as "concurring in result only," as Defendants imply. Furthermore, Defendants disregard the fact that the concurrence expressly stated agreement with several dispositive determinations of the plurality opinion, as discussed above. The concurrence even included a heading "Agreement with the Plurality Opinion." McCall, 134 So.3d at 918. The agreed aspects were sufficient to compel the affirmative answer to the certified question. Thus, McCall is not a case, as Defendants suggest, where the concurring judges concurred in result *only*.

Defendants' argument also disregards the jurisdictional basis for this Court's decision and the legal principles governing the Court's authority to answer certified questions from federal appellate courts. As discussed above, McCall was before this Court on a series of certified questions from the Eleventh Circuit. The Court's jurisdiction to answer those questions was based on Art. V, §3(b)(6) of the Florida Constitution, which states that the court "[m]ay review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida." As that provision indicates, an answer

to a certified question is not an advisory opinion, but is authorized only when the answer is "determinative of the cause."

In the context of a certified question from a federal court, the "decision" of this Court consists of the answer to the question at issue. This is to be distinguished from other appellate proceedings in which the result is the determination of the rights, liabilities, duties, status, etc. of the parties to the proceeding. When a federal court certifies a question to a state supreme court, it retains authority over the judgment between the parties, and while the state court's decision will be dispositive of the controlling legal issue, the state court does not have authority to affirm, reverse, or vacate the underlying federal judgment. See, e.g., Cray v. Deloitte Haskins and Sells, 925 P.2d 60, 62 (Okla. 1996).

Article V, §3(b)(6) of the Florida Constitution states that the Court's federal certified question jurisdiction exists only when a "question of law … is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida" (emphasis added). The purpose of this jurisdiction is to enable the federal court to obtain state Supreme Court precedent on unsettled issues of law to apply in diversity cases, as mandated by Erie R.R. v. Tompkins, 304 U.S. 64 (1983).

In McCall, the plurality rephrased the certified question as whether the cap "violates the right to equal protection under Article I, Section 2 of the Florida

Constitution?" Id. at 897. The concurrence agreed with this rephrasing and both opinions answered the rephrased question affirmatively. Id. at 897, 916, 922. As a result, McCall is binding precedent that the cap on wrongful death noneconomic damages in section 766.118 violates the right to equal protection.

Other states with similar certified question jurisdiction hold that the answers to such questions constitute binding legal precedent entitled to *stare decisis* effect. See Wolner v. Mahaska Industries, Inc., 325 N.W. 2d 39, 41 (Minn. 1982) (concluding that decisions on certification proceedings to federal court "will be legal precedent applicable in all future controversies involving the same legal question until and unless this court overrules its opinion" (Citation omitted)); see also In re Richards, 223 A.2d 827, 832 (Me. 1966); Penn Mutual Life Ins. Co. v. Abramson, 530 A.2d 1202, 1207 (D.C.App. 1987); Los Angeles Alliance Survival v. City of Los Angeles, 993 P.2d 334, 354 (Cal. 2000). Federal courts also recognize that decisions of state supreme courts which properly answer certified questions are binding precedent on the issue addressed. See Grover v. Eli Lilly Co., 33 F.3d 716, 719 (6th Cir. 1994); Reinkemeyer v. Safeco Ins. Co. of America, 166 F.3d 982, 984 (9th Cir. 1999).

Defendants' argument that McCall has no precedential value is wrong. Five Justices in McCall agreed that the purported medical malpractice crisis that served as the "legitimate state interest" supporting the caps no longer exists, if it ever did,

and five Justices agreed that the caps do not bear a rational relationship to any such crisis. These principles are binding precedent.

5. This Court Has Determined That The Caps in Section 766.118 Are No Longer Valid Under a Change In Condition Analysis

Defendants next argue that Kalitan "failed to present a proper record" to establish that, even if there was a medical malpractice crises when §766.118 was enacted, it no longer exists (IB 25). This Court does not need an independent factual record to apply McCall in this case. To accept Defendants' argument would mean that every time this Court made a constitutional ruling based on factual determinations subsequent litigants would have to recreate the factual record in order to obtain the benefit of that ruling. There is no legal authority for such a requirement.

Although Defendants' argument is framed as an attack on the record, in actuality, Defendants challenge the determination in McCall by a majority of the Justices that there is not currently a medical malpractice crisis. For instance, Defendants argue that "[t]his court should … reject any 'change in conditions' argument. The caps are currently working precisely as intended by the Legislature" (IB 26-27). Tellingly, Defendants find support in the dissent in McCall which the majority of the Court clearly rejected (IB 25-26). This Court should likewise reject Defendants' attempts to have this Court reexamine its own recent determination in McCall that there is currently no medical malpractice insurance crisis.

B. If This Court Determines That the Caps in Section 766.118 Are Unconstitutional in Single Claimant Personal Injury Actions, its Decision in This Case Should Apply to All Pending Cases

Defendants argue that if this Court determines that the caps in §766.118 are unconstitutional in single claimant personal injury cases, the Court should make its decision apply prospectively "only to actions that have not yet been filed" (IB 27). This argument must be rejected.

This case does not fit within the narrow type of case which allow for prospective application. The general rule is that "a judicial construction of a statute will ordinarily be deemed to relate back to the enactment of the statute, much as though the overruling decision had been originally embodied therein." Fla. Forest & Park Serv. v. Strickland, 18 So.2d 251, 253 (Fla. 1944). There is an exception "where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation." Id. This case does not fit within this exception because this Court has not previously found §766.118 to be constitutional in single claimant personal injury cases.

The cases relied upon by Defendants are inapposite. Many of them involve situations where there would be minimal impact on those whose constitutional rights were violated, but significant adverse consequences to the opposing party.

See, e.g., Gulesian v. Dade County Sch. Bd., 281 So.2d 325, 326 (Fla. 1973). Here, this Court in McCall already explained that the reverse is true; the cap "has the effect of saving a modest amount for many by imposing devastating costs on a few – those who are the most grievously injured, those who sustain the greatest damage and loss . . ." 134 So.3d at 903.[8]

Defendants next contend that they have a "vested/organic substantive right" to have §766.118's caps applied (IB 29). They rely on cases such as Spiewak for the proposition that statutes that operate to abolish or abrogate a preexisting right, defense, or cause of action cannot be applied retroactively. The flaw in this logic is plain. An opinion in this case holding §766.118 unconstitutional is not a statute abolishing a defense. The caps of §766.118 are an unconstitutional vehicle for limiting a plaintiff's right to recover her full damages. An opinion here finding the caps unconstitutional would invalidate a statute which improperly impinged on *plaintiffs'* rights.

Next, Defendants argue that a retroactive invalidation of the statute "would harm individuals and businesses who since 2003 factored the caps" into decisions

[8] In McCall, this Court did not limit its decision to prospective application. Likewise, in Phillipe, supra, one of the cases relied on by both the plurality and the concurrence in McCall, the Court did not limit its decision to prospective application, nor did it do so in Smith v. Dept. of Insurance, 507 So.2d 1080 (Fla. 1987), when it invalidated a statute imposing damage caps on all tort claims. This Court's decision in this case should likewise not be limited to prospective application.

such as risk assessment, setting reserves, issuing policies, setting premium rates, and deciding whether to settle cases (IB 29). Defendants' contention that insurance carriers and healthcare providers relied upon the caps statutes to make business and legal decisions is contradicted by McCall. In McCall, the plurality noted *testimony before the Legislature that insurance carriers recognized the likelihood of a legal challenge and therefore would not reduce rates based upon the passage of a cap*. Id. at 910-11. Furthermore, insurance carriers and healthcare providers who have already settled cases will not be harmed by retroactive application of McCall. To the contrary, insurance carriers and negligent healthcare providers have unfairly benefitted from the caps for far too many years; only the aggrieved claimants have suffered significant losses.

Defendants next argue that the concurrence in McCall concluded only that §766.118 was unconstitutional because there is no current medical malpractice crisis (IB 30-31). Thus, Defendants contend, the statute "was not void ab initio and was still constitutional" at the time Kalitan was injured by Defendants' malpractice. However, as discussed above, the concurrence also agreed with the plurality that there is no rational relationship between the desired goal of alleviating the purported crises and the imposition of caps on noneconomic damage awards. Thus, a majority of Justices determined that the statute was unconstitutional at its inception.

C. The Caps on Noneconomic Damages Violate Other Constitutional Provisions

As a result of the binding authority of McCall, this Court does not need to evaluate the other constitutional challenges raised by Kalitan below; however, in the event that this Court chooses to address them, any one of them establishes that the caps on noneconomic damages in §766.118 violate the Florida Constitution.

1. The Caps on Noneconomic Damages Violate the Right to Access to Courts

Article I, section 21 of the Florida Constitution creates a fundamental right that the courts "be open to every person for redress of any injury." Psychiatric Associates v. Siegel, 610 So.2d 419, 424 (Fla. 1992). The seminal Florida case construing the access guarantee is Kluger v. White, 281 So.2d 1 (Fla. 1973), which held that "the Legislature is without power to abolish [a preexisting common-law][9] right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." Id. at 4.

[9] A preexisting common law right is one that existed before the 1968 adoption of the Declaration of Rights of the Florida Constitution. See Kluger, 281 So.2d at 4. In McCall, this Court determined that the access to courts provision was inapplicable because the right to recover non-economic damages for wrongful death did not exist in the common law, nor by statute prior to 1968. 134 So.3d at 915.

There can be no question that the damage caps in §766.118 fail the first prong of the Kluger test. In Smith v. Dept. of Insurance, 507 So.2d 1080 (Fla. 1987), this Court struck an indistinguishable statutory cap on noneconomic damages in tort cases generally, as violative of the right to access to the courts. This Court stated (507 So.2d at 1088):

> Appellees also argue, and the trial court below agreed, that the legislature has not totally abolished a cause of action, it has only placed a cap on damages which may be recovered and, therefore, has not denied the right to access the courts. This reasoning focuses on the title to article I, section 21, "Access to courts," and overlooks the contents which must be read in conjunction with section 22, "Trial by jury." **Access to courts is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e.g., $1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at $450,000**. [Emphasis added.]

As §766.118 caps trigger the first prong of the Kluger test, the second prong must be met for the statute to be valid. The second prong requires that the Legislature show an overpowering public necessity for the abolishment of the right ***and*** that there is no alternative method of meeting such public necessity.

This Court is authorized to independently determine whether the Legislature presented sufficient proof that an overpowering public necessity exists and that no alternative means to meet that necessity is available. Kluger, 281 So.2d at 5. Legislative "statements of policy and fact 'do not obviate the need for judicial

scrutiny.'" N Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So.2d 612, 628 (Fla. 2003).

In McCall, a majority of this Court determined that the caps did not rationally serve a legitimate government purpose under the deferential rational basis test. The "public necessity" justifying enactment of §766.118 was the alleged medical malpractice crisis, which this Court concluded did not, in fact, exist. See McCall, 134 So.3d at 905. Additionally, the caps do not remedy that "public necessity" because there is no regulatory mechanism for insurance premiums to be reduced. Id. at 909-12, 919-20. It necessarily follows that the caps could not have been the least restrictive means to serve an alleged overwhelming public necessity since this Court determined they had **no** rational relationship to that public necessity.

Therefore, the damage caps in §766.118 violate the access to courts provision when applied to common law claims, such as Kalitan's, since the Legislature failed to show an overpowering public necessity and that there was no alternative method of meeting that public necessity.

2. The Caps on Noneconomic Damages Violate the Right to Trial by Jury

The Florida Constitution guarantees that "[t]he right of trial by jury shall be secure to all and remain inviolate." Art. I, §22, Fla. Const. This Court has explained, the word "inviolate" "does not merely imply that the right of jury trial

shall not be abolished or wholly denied, but that it shall not be *impaired*." Flint River Steamboat Co. v. Roberts, 2 Fla. 102, 113 (1848) (emphasis in original). It then concluded that "the plain and obvious meaning" of the inviolate right to a jury trial is that "the General Assembly has no power to impair, abridge, or in any degree restrict the right of trial by jury as it existed when the Constitution went into operation." Id. The right to jury-trial's status as "inviolate" means that it is not subject to the same balancing tests as other constitutional provisions, such as access to courts and equal protection. Moreover, it must not be narrowly construed. See O'Neal v. Florida A & M Univ. ex rel. Bd. of Trustees for Florida A & M Univ., 989 So.2d 6, 9 (Fla. 1st DCA 2008) (citation omitted).

One of the jury's responsibilities is the determination of facts, Perenic v. Castelli, 353 So.2d 1190, 1192 (Fla. 4th DCA 1977), including the assessment of compensatory damages, Miller v. James, 187 So.2d 901, 902 (Fla.2d DCA 1966) ("In a long line of cases, the appellate courts of Florida have held that the amount of damages to be awarded plaintiff in a negligence action is peculiarly the province of the jury"). Compensatory damages consist of both economic and noneconomic damages. No distinction is made with respect to the jury's authority over these two components of total damages. The jury's role in the determination of damages is especially critical with regard to noneconomic damages because such determination is "inherently difficult." R.J. Reynolds Tobacco Co. v. Townsend,

90 So.3d 307, 311 (Fla. 1st DCA 2012). Accordingly, "our judicial system places great faith in the jury's ability to assess the amount of these damages." Id. (citing Braddock v. Seaboard Air Line R.R. Co., 80 So.2d 662, 667 (Fla. 1955)); see also Angrand v. Key, 657 So.2d 1146, 1149 (Fla. 1995).

As discussed above, this Court struck a constitutionally indistinguishable cap on noneconomic damages in Smith, 507 So.2d at 1088-89, recognizing that it violated both the access to courts and jury-trial guarantees. The Court found that a plaintiff whose "jury verdict is being arbitrarily capped" is not "receiving the constitutional benefit of a jury trial as we have heretofore understood that right." Id.; see also Wiggins v. Williams, 18 So. 859 (Fla. 1896) (striking a statute that purported to assign the assessment of damages to a court). That ruling left no room for balancing a plaintiff's rights against other considerations such as claims of a "crisis," which were raised in Smith.[10] Id. at 1084.

The high courts of several other states have invalidated statutory caps on damages similar to those found in §766.118 as violative of the right to jury trial. Cf. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010) (striking down a noneconomic damage cap as inconsistent with the "inviolate"

[10] In Echarte, this Court upheld a noneconomic damage cap in medical malpractice cases submitted to arbitration. The decision is inapposite to the jury-trial issue. In Echarte, the parties' "agreement to participate in arbitration binds both parties to the arbitration panel's decision" (618 So.2d at 193) and, thus, operates as consent to waive the right to a jury trial. See Lopez v. Ernie Haire Ford, Inc., 974 So.2d 517, 518 (Fla. 2d DCA 2008).

right to a jury trial); Lakin v. Senco Products, Inc., 987 P.2d 463 (Or. 1999) (same); Moore v. Mobile Infirmary Ass'n, 592 So.2d 156, 158 (Ala. 1991) (same); Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989) (same); see also Klotz v. St. Anthony's Medical Center, 311 S.W.3d 752, 773-80 (Mo. 2010) (Wolff, J., concurring) (describing the cap's inconsistency with an "inviolate" jury-trial right); Rhyne v. K-Mart Corp., 594 S.E.2d 1, 12 (N.C. 2004) (distinguishing between a punitive damages cap as not inconsistent with the "inviolate" right to a jury trial and a cap affecting compensatory damages, which is).

The caps in §766.118 are constitutionally indistinguishable from the cap invalidated in Smith as violative of the right to trial by jury. They deserve the same fate.

3. The Caps on Noneconomic Damages Violate Separation of Powers

Article II, section 3 of the Florida Constitution divides government power into distinct and separate spheres, consisting of the "legislative, executive and judicial branches" and further provides that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." This Court applies "a strict separation of powers doctrine." State v. Cotton, 769 So.2d 345, 353 (Fla. 2000).

One of the fundamental prohibitions encompassed within this doctrine is that no branch may encroach upon the powers of another. Chiles v. Children A, B, C,

D, E, & F, 589 So.2d 260, 264 (Fla. 1991). Here, by enacting legislation capping noneconomic damage awards, the Legislature encroached upon the exclusive powers of the courts.

Florida's Constitution vests the judiciary "with the sole authority to exercise the judicial power," and "the legislature cannot, short of constitutional amendment, reallocate the balance of power expressly delineated in the constitution among the three coequal branches." Id. at 268-69. One indisputably judicial function is to render judgments in cases presented to the courts. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995). Another judicial function is the responsibility to assure that the judgment conforms to the evidence; a judgment at variance from the evidence constitutes plain error. See Heath v. First Nat'l Bank, 213 So.2d 883 (Fla. 1st DCA 1968) (holding it reversible error to order judgment different from the weight and competency of the evidence); see also, Kennon v. Gilmer, 131 U.S. 22, 29-30 (1889) (a "court has no authority . . . to enter an absolute judgment for any other sum than that assessed by the jury [unless] the plaintiff elected to remit the rest of the damages"). Section 766.118 requires a trial court to remit any damage award above a pre-determined, arbitrary amount, regardless of whether the trial court determines that the jury's verdict is supported by the evidence or that a lesser remittitur is warranted.

Reducing jury verdicts prior to the entry of judgment "shall be the responsibility of the court." §768.74(1), Fla. Stat. Even before the remittitur statute, Florida's common law required courts to reduce excessive jury awards to conform to the evidence. See Rowlands v. Signal Constr. Co., 549 So.2d 1380, 1382 (Fla. 1989).The purpose of a remittitur is to reduce damages when liability is established and where the only error in a jury's verdict is that the damages awarded are excessive, in that they are not supported by the evidence. See Id. at 1382 (Fla. 1989). Accordingly, a court's use of a remittitur is permissible only to the extent it accomplishes this purpose, and usurps the jury's function to the extent it accomplishes anything else. Id. at 1382, n.1. In fact, when a court orders a remittitur, it must still preserve to the plaintiff the right to opt for a new jury trial on damages. See Waste Mgmt., Inc. v. Mora, 940 So.2d 1105, 1109 (Fla. 2006).

Section 766.118 attempts to control judicial decision-making by taking away the judicial power of remittitur, exercising that authority legislatively by imposing a one-size-fits-all mandated remittitur, and by requiring a judge to enter judgment for an amount of damages at odds with the credible evidence adduced at trial. By revising the jury's fair and proper verdict in this case and other cases, the Legislature has taken on the mantle of "super-judiciary" in contravention of our Constitution's carefully balanced system of separated powers. Under that division

of powers, the Legislature has no authority to hear, decide, or determine the outcome of a case cognizable under the common law.

The highest court of at least one other state has agreed, determining that limits on noneconomic damages interfere with judicial authority, in part, by acting as a form of legislative remittitur. See Lebron v. Gottlieb Mem. Hosp., 930 N.E.2d 895, 908-09 (Ill. 2010); Cf. Sofie, 771 P.2d at 720-21.

Defendants rely on the federal trial court decisions in M.D. v. United States, 745 F. Supp. 2d 1274, 1278 (M.D. Fla. 2010) and McCall to support their argument that there is no separation of powers violation (IB 40). Those cases obviously have no precedential value.

Defendants also misguidedly rely on Echarte, Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981), and Smith to support their position that the caps do not violate the separation of powers doctrine (IB 41). Echarte is distinguishable for the reasons expressed above. Furthermore, this Court in Echarte expressly limited its discussion "to the validity of the statutes under the right of access to the courts." 618 So.2d at 191. Smith is equally irrelevant as to this issue because it did not decide whether a cap violated separation of powers; the Court decided that several other provisions of the statute in question involving punitive damages, violated separation of powers. Finally, Cauley involved the constitutionality of §768.28(5), which waives sovereign immunity to a maximum amount. Under the common law,

a plaintiff had no right to recover damages from the state. Thus, while §768.28(5) is described as a cap on damage recovery, it actually permits recovery which was not otherwise permitted under common law. Here, on the other hand, §766.118 limits plaintiffs' rights to recover what they were entitled to recover at common law.

In §766.118, the Florida Legislature impermissibly encroached on judicial authority, thereby invading the judicial function. This, it may not do. The Florida Constitution bars any such arrogation of power in one branch.

D. The Trial Court Did Not Err in Refusing to Apply the Cap to the Final Judgment Against NBHD

Section 766.118(7), Florida Statutes (2007) provides, simply: "This section shall not apply to actions governed by s. 768.28."[11]

This Court recently explained:

> **If the statute is clear and unambiguous, it is given its plain and obvious meaning without resorting to the rules of statutory construction and interpretation**, unless this would lead to an unreasonable result or a result clearly contrary to legislative intent. Florida courts are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications.

Koster v. Sullivan, 160 So.3d 385, 390 (Fla. 2015) (emphasis added).

[11] Section 768.28(1), Fla. Stat (2007), waives sovereign immunity for liability for torts for the state and state agencies; however, the statute also caps the state and state agencies' liability to pay any judgment at $100,000 per person and $200,000 per accident.

The trial court correctly determined that NBHD was a sovereign entity entitled to the protections of §768.28. NBHD does not contest this finding; in fact, NBHD raised §768.28 as an affirmative defense (R26:4925). Accordingly, pursuant to the plain language of §766.118(7), §766.118 "shall not apply" in Kalitan's action against NBHD.

NBHD argues that applying §766.118(7) as written, would lead to "absurd or unreasonable results" (IB 42). NBHD claims that 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" (IB 42). This argument is completely unsupported. If the Legislature intended what NBHD contends it did, there would have been no need for the provision at all. If subsection (7) had not been included, §§768.28 and 766.118 could have been applied harmoniously in the way NBHD contends they should be applied. Subsection (7) is one simple sentence. It is inconceivable that the Legislature did not know exactly what it was saying and the implications. It is not for NBHD or this Court to supply a "meaning" which contradicts the plain language of the statute itself. See Koster, 160 So.3d at 390.

NBHD's position is based on the misconception that it faces increased liability for noneconomic damages above and beyond that of non-immune entities (IB 41). Tort recovery from governmental entities is capped at $100,000 per person

and $200,000 per accident. §768.28(5), Fla. Stat. Although an "excess" judgment may be entered, a claimant cannot collect more than the caps, without filing a claim bill.[12] Breaux v. City of Miami Beach, 899 So.2d 1059 (Fla.2005).

A claim bill is not obtainable by right upon a claimant's proof of entitlement. See Wagner v. Orange County, 960 So.2d 785, 788 (Fla. 5th DCA 2007) (emphasis added) (internal citations omitted). Rather, one is granted strictly as a matter of Legislative grace. Noel v. Sheldon J. Schlesinger, P.A., 984 So.2d 1265, 1267 (Fla. 4th DCA 2008). In considering a claim bill, the Legislature conducts a *de novo* hearing and comes to a conclusion independent of any prior judicial determination. State, Dept. of Envtl. Prot. v. Garcia, 99 So.3d 539, 545-46 (Fla. 3d DCA 2011). Thus, even if a claimant submits a claim bill to the Legislature in the full amount of a judgment, the decision as to whether to pass it and, if so, whether to pay all of a claim or just a fraction is a legislative function. See id. As such, a judgment for the full amount of the verdict will not be determinative as to the amount Kalitan could recover if she pursues a claim bill.

Finally, NBHD argues that Kalitan "waived" any reliance on §766.118(7) by not specifically pleading "the statutory exception in a reply" (IB 43). NBHD raised

[12] A claim bill is "a legislative measure that directs the Chief Financial Officer of Florida, or if appropriate, a unit of local government, to pay a specific sum of money to a claimant to satisfy an equitable or moral obligation. Legislative claim bills are utilized either after procurement of a judgment in an action at law or as a mechanism to avoid an action at law altogether." Wagner v. Orange County, 960 So.2d 785, 788 (Fla. 5th DCA 2007) (citation omitted).

as affirmative defenses the protections of §§768.28 and 766.118 (R26:4930-31); Kalitan filed a Reply, denying all affirmative defenses (R27:5080). This was all that was required. An avoidance is, in essence, "an allegation of additional facts intended to overcome an affirmative defense." Buss Aluminum Products, Inc. v. Crown Window Co., 651 So.2d 694 (Fla. 2d DCA 1995) (citation omitted). Here, Kalitan did not need to introduce additional facts in order to establish that NBHD was not entitled to the protections of §766.118; NBHD had already affirmatively alleged its entitlement to the protections of sovereign immunity. Thus, Kalitan did not have to file an avoidance and did not "waive" applicability of subsection (7) by not filing one. Accordingly, the trial court did not err in applying §766.118(7) as it was written and refusing to apply the cap in entering judgment against NBHD.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTION FOR NEW TRIAL.

Standard of Review

The standard of review of a trial court's ruling on a motion for a new trial is abuse of discretion. See Brown v. Estate of Stuckey, 749 So.2d 490, 497 (Fla. 1999).

Merits

In addition to determining the constitutional challenge upon which jurisdiction in this Court rests, Defendants asks this Court to review the trial court's decision to deny their motion for new trial. Defendants argue that Kalitan's presentment to the jury of the question whether she suffered catastrophic injuries, so as to entitle her to an enhanced cap under §766.118, entitled them to a new trial must be rejected.

A. Kalitan Was Not Procedurally Barred From Presenting Evidence of Catastrophic Injury

Defendants claim that Kalitan should have been barred from submitting her claim for catastrophic injury to the jury because she did not plead catastrophic injury and because she "stipulated" before trial that she was not asserting such a claim (IB 44). These arguments fail for several reasons.

First, this issue was not preserved for appeal. To preserve an issue, a litigant must: 1) make a timely contemporaneous objection in the trial court; 2) state the legal grounds for that objection; and 3) **raise the specific argument in the appellate court that was asserted as the legal ground for the objection or motion made in the trial court**. Harrell v. State, 894 So.2d 935, 940 (Fla. 2005) (emphasis added).

At trial, Defendants moved for directed verdict on Kalitan's catastrophic injury claim, arguing only that she had not "met the threshold for catastrophic injury" (T23:3418-19). When the issue was revisited during the charge conference, Defendants argued only that Kalitan had not presented evidence of a catastrophic injury (T32:4515-20). Defendants did not argue that the issue had not been pled, that they were surprised by the issue, or that Kalitan had waived her claim for catastrophic injuries pre-trial.

Similarly, in their post-trial motions, none of the Defendants argued that the issue had not been pled, that they were surprised by the issue, or that it had been waived. It was not until the hearing on the post-trial motions that counsel for NBHD, for the first time, alluded to an argument that this issue had not been pled or that it had been waived pre-trial (R48:7966-7973, 8/18/11 hearing, p. 29). It was not until after the hearing on the post-trial motions that Defendants filed the transcript from the 2009 hearing where Kalitan's counsel indicated that she was

not making a claim for "organic brain injury, head trauma" (R48:7966-973, 8/18/11 hearing, p. 8).

This Court's decision in Aills v. Boemi, 29 So.3d 1105 (Fla. 2010), controls here. In Aills, the defendant objected during plaintiff's closing argument, arguing that there was no evidence that the defendant doctor's postoperative care was negligent. The trial court overruled the objection. The defendant appealed, arguing that the trial court erred in failing to grant a new trial based on the remarks concerning postoperative negligence during plaintiff's closing argument. The Second District reversed, finding that the issue of postoperative negligence had not been plead or tried by consent. Id. at 1108. This Court quashed the Second District's decision, finding that the ground upon which the Second District based its reversal had not been preserved by the defendant because his objection was directed solely at the insufficiency of the evidence. Id. at 1109-10. This case is virtually indistinguishable from Aills. Accordingly, pursuant to this Court's decision in Aills, these belated claims must be rejected.

Second, even if this argument was properly preserved, it would be unavailing. In her original Complaint, Kalitan alleged that, as a result of Defendants' negligence, she was:

> **seriously and severely injured**, in and about her body, and she was thereby rendered sick, sore, lame, **and otherwise disabled mentally and physically**; and as a direct and proximate result thereof, the Plaintiff has in the past suffered, and will in the future suffer great

> pain and anguish of body **and mind**, and loss of capacity for the enjoyment of life, all of which are conditions that are permanent in nature.

(R1:0009). These allegations remained virtually the same in the Amended Complaint (R12:2123-68), and the operative Complaint (R25:4832-73). Thus, Kalitan sufficiently pled her claim for catastrophic brain injury. See Cummings v. Warren Henry Motors, Inc., 648 So.2d 1230, 1232 (Fla. 4th DCA 1995) ("generally a pleading is sufficient if it sets forth a short and plain statement of the ultimate facts on which the pleader relies and informs the defendant of the nature of the cause of action against him"). Moreover, the Third Amended Complaint was filed almost a year after the December 2009 hearing relied upon by Defendants, thus reviving the claim.

Kalitan's counsel's remarks at the December 2009 hearing occurred 16 months before trial and before discovery was complete. After the hearing in question, medical experts were deposed, including Dr. Seely. Dr. Seely testified at trial consistent with his deposition testimony. Although he did not use the word "catastrophic" in deposition, as he did at trial, his discussion of the physical and mental injuries Kalitan suffered as a result of the medical malpractice remained the same. This is supported by the fact that Defendants did not object to his testimony at trial as being inconsistent with his deposition testimony or "new" opinions. Defendants also had Kalitan examined by expert neurologist Bruce Zaret, M.D.

and psychologist Arnold Zager, M.D., among others. After these depositions and examination, it became clear that Kalitan had suffered a catastrophic brain injury, as that term is defined in §766.118.

Third, even if this Court determines that Defendants' objection was preserved and that Kalitan's claim was not properly pled, reversal would still not be permitted because the issue was tried by consent. At trial, Kalitan introduced the testimony of both herself and Dr. Seely to establish the extent of her injuries. Dr. Seely testified that Kalitan's injuries were both permanent and catastrophic, within reasonable medical probability (T16:2243). Defendants did not challenge his competency to give such an opinion or object to this line of testimony. Kalitan also introduced her medical records, which supported the claim. Defendants did not move to strike this evidence. Furthermore, as mentioned above, Defendants moved for directed verdict at the close of Kalitan's case as to the catastrophic injury issue *arguing only sufficiency of the evidence*. At the charge conference, Defendants again argued only that Kalitan had not presented evidence to support that element of damages. Defendants would not have moved for directed verdict if they did not know that the claim was at issue. Moreover, by not objecting on the basis that the claim for catastrophic injury had not been pled, Defendants recognized that it was a triable issue in the case. Thus, the issue was tried by the consent of the parties.

See Fla.R.Civ.P. 1.190(b); LRX, Inc. v. Horizon Associates Joint Venture ex rel. Horizon-ANF, Inc., 842 So.2d 881, 887 (Fla. 4th DCA 2003).

B. Kalitan Presented Sufficient Evidence to Support Her Claim of Catastrophic Injury

Dr. Seely testified that Kalitan suffered a catastrophic injury, psychosis, severe depression, post-traumatic stress disorder, alterations in memory and the ability to focus, an inability to concentrate or think clearly or read, long and short term memory problems, social phobias, agoraphobia, panic attacks, a sense of impending doom, and permanent changes to her mental status (T16:2203-04). Dr. Seely testified that all of these conditions were directly related to the perforated esophagus and the resulting treatment, including the induced coma (T16:2207).

Kalitan testified that during and after her hospitalization, she suffered from panic attacks and flashbacks. She also testified that she suffers from short and long-term memory lapses and has large blanks in her memory. Furthermore, she suffers from depression, anxiety and social disorder.

Kalitan also submitted her medical records into evidence, which showed that while at Westside Regional she had an abnormal EEG result which, according to her physicians, was suggestive of bihemispheric brain dysfunction (T28:4018). She also suffered sepsis, altered mental status, blunted affect, psychosis, mental lapses, and functional decline (T20:2949-50). The testimony of Dr. Seely and Kalitan

combined with the medical records that were admitted were sufficient to create an issue for the jury as to whether Kalitan suffered a catastrophic brain injury.

C. Presentment of the Catastrophic Injury Issue to the Jury Did Not "Fatally Infect the Trial"

Next, Defendants argue that the injection of the brain injury issue was highly prejudicial and served to confuse the jury (IB 43-45). However, Defendants do not point to anything specifically confusing or misleading in either the jury instruction on catastrophic injury or the question on the verdict form. Without any specific guidance as to what Defendants find to have been confusing and misleading, Kalitan can only say that the terms of the jury instruction and the verdict form were unambiguous, and not confusing.

The trial court did not abuse its broad discretion in denying Defendants' Motions for New Trial. See Kuebler v. Ferris, 65 So.3d 1154, 1156-57 (Fla. 4th DCA 2011). The court considered this issue extensively post-trial, holding multiple hearings and accepting extensive evidentiary support for the finding that there was evidence to support the jury's determination (see R46:7955-56).

CONCLUSION

For the reasons discussed above, the decision of the Fourth District Court of Appeal should be approved.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on January 28, 2016.

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CERTIFICATE OF TYPE SIZE & STYLE

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