>> ALL RISE.
HEAR YE, HEAR YE, HEAR YE, THE FLORIDA SUPREME COURT IS NOW IN SESSION.
ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR.
YOU SHALL BE HEARD.
GOD SAVE THIS THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT.
>> LADIES AND GENTLEMEN, THE SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.
>> WELCOME TO THE FLORIDA SUPREME COURT.
FIRST CASE FOR THE DAY IS MILES VERSUS WEINGRAD.
YOU MAY PROCEED.
>> MAY IT PLEASE THE COURT, I AM PHILLIP BURLINGTON HERE ON BEHALF OF THE PETITIONERS AND WITH ME AT COUNSEL TABLE IS ALEX ALVAREZ, WHO'S TRIAL COUNSEL.
WE ARE HERE BEFORE THE COURT SEEKING REVIEW OF A DECISION OF THE THIRD DISTRICT COURT OF APPEAL THAT REAFFIRMED ITS PRIOR DECISION HOLDING THAT THE MEDICAL MALPRACTICE CAP 766.118 CAN BE RETROACTIVELY APPLIED.
>> IF YOU WOULD KEEP YOUR VOICE UP FOR ME, PLEASE.
I'M HAVING A LITTLE PROBLEM.
>> OH, I'M SORRY.
I'M THE ONE WEARING A HEARING AID.
I'M SORRY.
OKAY.
I'LL GET A LITTLE CLOSER.
IT'S HARD FOR ME TO HEAR THE PA.
SO ANYWAY THE THIRD DISTRICT PREVIOUSLY HELD THAT THE MEDICAL MALPRACTICE CAPS COULD BE APPLIED RETROACTIVELY AND IN THEIR SECOND OPINION THEY ADHERED TO THAT DECISION AND SPECIFICALLY STATED THAT IT WAS CONSISTENT WITH THIS COURT'S DECISION IN AMERICAN OPTICAL AND

I WOULD SUBMIT THAT THAT IS NOT
A CORRECT INTERPRETATION OF
AMERICAN OPTICAL AND THAT THE
CONFLICT IN THE LAW CREATED
THEREBY REQUIRES RESOLUTION AND
IT IS HIGHLIGHTED BY THE FACT
THAT THIS COURT'S DECISION IN
AMERICAN OPTICAL DISAPPROVED OF
THE DAIMLERCHRYSLER CASE WHICH
IN THE MILES FIRST DECISION THEY
CITED WITH APPROVAL.
THIS COURT IN AMERICAN OPTICAL
APPROVED OF THE FOURTH
DISTRICT'S DECISION IN AMERICAN
OPTICAL VERSUS WILLIAMS, A
DECISION SPECIFICALLY
DISAPPROVED BY THE THIRD
DISTRICT IN ITS FIRST MILES
DECISION.
THERE WAS ALSO, AS MY OPPONENT
ACKNOWLEDGES, IN FOOTNOTE 7,
THAT THERE IS OBVIOUSLY STILL A
DIRECT CONFLICT BETWEEN THE
MILES DECISION AND THE FOURTH
DISTRICT DECISION IN RAFAEL,
WHICH DEALS WITH THE MEDICAL
MALPRACTICE CAPS.
>> LET ME ASK YOU THIS ON THE
JURISDICTIONAL QUESTION.
IS THERE ANY CASE WHERE WE HAVE
BASED OUR JURISDICTION NOT ON
SOMETHING THAT IS SAID IN THE
OPINION FOR THE DECISION ON
REVIEW, BUT ON STATEMENTS MADE
IN AN EARLIER OPINION?
IS THERE ANY CASE LIKE THAT?
THE COURT'S TAKEN JURISDICTION.
I THINK ESSENTIALLY BASED ON
WHAT'S SAID NOT IN THE -- IT'S
WHAT'S NOT ON THE -- NOT
SOMETHING ON THE FACE OF THIS
ONE SENTENCE OPINION THAT'S ON
REVIEW HERE NOW, BUT ON THINGS
THAT ARE SAID IN THE EARLIER
OPINION.
ISN'T THAT CORRECT?
>> WELL, NO, NOT REALLY, BECAUSE
THEY ARE SAYING THAT THEIR FIRST
DECISION DOESN'T CONFLICT WITH
AMERICAN OPTICAL.

AMERICAN OPTICAL DIDN'T EXIST AT
THE TIME THEY WROTE THEIR
INITIAL OPINION.
SO THAT'S A NEW STATEMENT.
>> BUT IN ORDER TO UNDERSTAND
THAT, YOU'VE GOT TO GO BACK AND
LOOK AT THAT EARLIER OPINION.
>> NO QUESTION.
>> IS THERE ANY CASE WHERE WE
HAVE TAKEN JURISDICTION WHERE WE
HAVE DONE THAT, WHERE OUR
JURISDICTION HAS BEEN BASED ON
THAT KIND OF LOOKING -- LINKING
TWO OPINIONS, THAT THE OPINION
ON REVIEW AND UNDERSTANDING IT
AND FINDING CONFLICT BASED ON AN
EARLIER OPINION IN THE SAME
CASE?
>> I THINK THE CLOSEST ANALOGY
-- I DO NOT KNOW ONE DIRECTLY ON
THE POINT YOU'RE SPEAKING OF.
>> OKAY.
>> BUT THE CLOSEST ANALOGY WOULD
BE WHERE A DECISION CITED A CASE
THAT WAS PENDING BEFORE THIS
COURT ON CONFLICT AND THEN YOU
WOULD RELY ON WHAT WAS SAID IN
THE OTHER OPINION TO DETERMINE
--
>> ARE YOU TALKING ABOUT OUR TAG
PROCESS?
>> YES.
YES.
>> OKAY.
ALL RIGHT.
>> BUT HERE WE HAVE A STATEMENT
THAT WAS NOT IN THE INITIAL
OPINION, WHICH IS THAT IT'S
CONSISTENT WITH A SUBSEQUENT
DECISION OF THIS COURT AND IT
CLEARLY IS NOT AND THERE CAN BE
NO QUESTION THAT THIS SECOND
DECISION CREATES DECISIONAL
CONFLICT ON MANY LEVELS.
>> BUT WHAT DOES THE FOUR
CORNERS RULE -- WE TALKED ABOUT
THE FOUR CORNERS RULE.
WHAT DOES THAT MEAN?
WHAT'S YOUR UNDERSTANDING OF THE
FOUR CORNERS RULE?

>> THE FOUR CORNERS IS YOU LOOK AT THE OPINION TO DETERMINE WHETHER THERE IS CONFLICT.
AND HERE THERE IS MISAPPLICATION OF PRECEDENT, WHICH IS A GROUNDS FOR CONFLICT JURISDICTION.
>> I DON'T SEE HOW IN THE WORLD YOU CAN TELL THAT FROM LOOKING AT THAT ONE SENTENCE.
YOU'VE GOT TO LOOK BEYOND THE FOUR CORNERS OF THE OPINION THAT IS ON REVIEW HERE TO CONCLUDE ANYTHING ABOUT CONFLICT OR THE FACTS OR--
>> WELL, THEY ARE ESSENTIALLY READOPTING THEIR PRIOR OPINION.
>> BUT YOU GOT TO LOOK BEYOND THE FOUR CORNERS TO DETERMINE THAT, DETERMINE WHAT THAT MEANS.
ISN'T THAT CORRECT?
>> WELL, JUST LIKE YOU WOULD IN A TAG-ALONG CASE.
BUT I UNDERSTAND YOUR POINT.
>> I WILL CEASE.
>> THE POLICY OF CONFLICT JURISDICTION IS CLEARLY -- CLEARLY REQUIRES ACTION IN THIS SITUATION, BECAUSE YOU HAVE DIRECT CONFLICT WITH RAFAEL AS TO THE MEDICAL MALPRACTICE CAPS THEMSELVES.
>> BUT WHAT HAPPENED REALLY -- AND I DON'T KNOW WHETHER THERE IS PRECEDENT FOR THIS.
THIS COURT SHOULD HAVE TAKEN JURISDICTION BECAUSE THERE WAS CLEAR CONFLICT WITH RAFAEL AT THE TIME THAT THIS CASE WAS PROBABLY ERRONEOUSLY TAGGED TO AMERICAN OPTICAL BECAUSE THERE'S CLEAR CONFLICT.
WE'VE GOT -- AND IN THE THIRD DISTRICT, IF YOU -- SO NOW THE QUESTION IS -- JUST -- IS WHETHER OUR CONFLICT JURISDICTION AND THE FOUR CORNERS, WHICH WAS CREATED TO NARROW OUR JURISDICTION, SHOULD BE MECHANICALLY APPLIED WHERE YOU'VE GOT A CLEAR CONFLICT.

AND WHAT YOU'RE SAYING HERE IS
THAT THE SPIEWAK CASE GIVES THE
HOOK, AN ERRONEOUS DENIAL OF
JURISDICTION THE FIRST TIME
AROUND.
>> CORRECT.
BECAUSE I THINK IF YOU APPLY THE
FOUR CORNERS RULE TO ALLOW THE
THIRD DISTRICT DECISION TO
STAND, YOU ARE LEAVING OBVIOUS
CONFLICT AMONGST THE DISTRICT
COURT CASES NOT ONLY ON THE
MEDICAL MALPRACTICE ISSUE, WHICH
OF COURSE CANDIDLY YOU COULD
RESOLVE OTHERWISE ON THE
CONSTITUTIONAL CHALLENGES TO THE
CAP ITSELF, BUT ALSO ON THE
FUNDAMENTAL PRINCIPLE OF DOES A
CAUSE OF ACTION BECOME VESTED
WHEN IT ACCRUES.
AND THIS COURT HAS CLEARLY HELD
THAT IN THE AMERICAN OPTICAL AND
THE SUBSEQUENT MARONDA HOMES.
AND SO YOU WOULD BE LEAVING THAT
OUT THERE.
AND SO I DON'T THINK IT REALLY
IS DIFFERENT THAN A TAG-ALONG
CASE IN THE SENSE OF WHY DO YOU
TAKE THEM, WHY DO YOU CONSIDER
THEM, WHAT IS YOUR GOAL.
AND THE GOAL HERE IS TO HAVE
UNIFORMITY IN THE LAW AND THAT'S
ALL WE'RE ASKING FOR AND WE
THINK IT IS CLEAR THAT THE
STATEMENT THAT THEIR PRIOR
DECISION IS CONSISTENT CANNOT BE
SUPPORTED.
>> NOW, YOU MENTIONED THE ISSUE
OF THE CONSTITUTIONALITY OF THE
CAPS.
WOULD YOU AGREE THAT THIS CASE,
IF WE APPLY RAFAEL AND SAY
THAT'S THE CORRECT STATEMENT OF 6
THE LAW IN ACCORDANCE WITH
SPIEWAK AND OTHER
PRONOUNCEMENTS, THERE IS NO
REASON TO REACH THE ISSUE OF THE
CONSTITUTIONALITY OF CAPS IN
GENERAL.
>> CORRECT.

YOU WOULD NOT HAVE TO.
BOTH ARE CONSTITUTIONAL ARGUMENTS, SO THERE'S NO -- PREFERENCE.
BUT THE ONE CAVEAT IS IF YOU DO IT AS A SIMPLE RAFAEL IS THE CORRECT LAW AND QUASH THE MILES DECISION, THERE IS GOING TO BE AN IMPLICATION IN THE MIND OF SOME THAT THERE MUST BE SOME VIABILITY LEFT TO THE MED MAL CAPS.
>> WELL, THERE MIGHT BE.
BUT IT'S NOT -- AT THIS POINT -- I MEAN, FOR THIS TO BE RESOLVED IN THIS CASE WITHOUT GOING WAY BEYOND WHAT WE NEED TO GO, WHICH IS THAT, AS YOU SAID, THERE IS THIS VERY IMPORTANT CONFLICT ABOUT--
>> CORRECT.
>>-- SUBSTANTIVE CAUSES OF ACTION.
>> YOU COULD DEFINITELY DO IT LIMITED TO THAT.
BUT IN THE INTEREST OF GIVING GUIDANCE TO TRIAL COURT, WE'VE SEEN A VERY RIGOROUS SUPPLEMENTAL BRIEF IN THIS CASE CHALLENGING THE VALUE OF MCKAW.
THERE ARE TIMES TO GIVE GUIDANCE TO THE LOWER COURTS AND PARTIES WHEN IT IS NOT A PART OF JUMPING OUT INTO A WHOLE NEW AREA OF THE LAW.
WHILE THEY HAVE A SUPPLEMENTAL BRIEF CHALLENGING MCCALL, THERE'S NO SUGGESTION THAT THE EQUAL PROTECTION ANALYSIS APPLIES EQUALLY.
AND I WOULD ALSO SUBMIT THAT IT'S VERY EASY TO APPLY SMITH VERSUS DEPARTMENT OF INSURANCE, WHICH IS INDISTINGUISHABLE, WHERE THIS COURT SET ASIDE A CAP ON NON-ECONOMIC DAMAGES IN GENERAL TORT CASES BASED ON THE ACCESS TO COURTS PROVISION.
THERE IS REALLY NO DISTINGUISHING FACTOR.

SO I WOULD SUBMIT THAT WE KNOW WHAT WILL HAPPEN IF YOU GIVE A PARTICULARLY NARROW RULING.
THE IMPLICATION WILL BE THAT THERE IS STILL SOMETHING VIABLE ABOUT THE MED MALCAPS THAT REQUIRES US TO RESOLVE WHETHER THEY APPLY RETROACTIVELY OR PROSPECTIVELY.
I AGREE, AND IN THE INTEREST OF MY CLIENT, WE WOULD LIKE A RESOLUTION AND THE ONE YOU SUGGEST IS THE NARROWEST AND WOULD GET US A VERDICT -- EXCUSE ME, A JUDGMENT IN ACCORDANCE WITH THE VERDICT.
AND I WANTED TO RESERVE SIGNIFICANT TIME FOR REBUTTAL BECAUSE OF THE VARIOUS ISSUES AND ABSENT FURTHER QUESTIONS, I WILL SIT DOWN.

>> MAY IT PLEASE THE COURT, DINAH STEIN ON BEHALF OF DR. WEINGRAD.
AND TO BEGIN WITH THE JURISDICTIONAL QUESTION, WHICH WE HAVE ASSERTED ALL THIS TIME, THIS DID GO UP IN 2010 AND '11 ON PURPORTED CONFLICT WITH NOT ONLY RAFAEL, BUT THIS COURT ACKNOWLEDGED AMERICAN OPTICAL BACK THEN.
THE LAW HAS NOT CHANGED IN THIS REGARD SINCE THAT TIME.
THERE'S NO DECISION THAT'S CHANGED THE LANDSCAPE AND WE SUBMIT THAT ONCE THIS COURT DENIED JURISDICTION THE FIRST TIME, THAT'S WHAT ITS DECISION WAS--
>> WELL, YOU KNOW, JUST LIKE THE U.S. SUPREME COURT, THAT A DENIAL OF JURISDICTION IS NOT A DECISION ON THE MERITS.
AND I NEED TO GO BACK TO THE FOUR CORNERS RULE.
BUT THERE'S NO QUESTION -- AND I KNOW YOU'RE AN EXCELLENT APPELLANT LAWYER -- THAT THERE

IS A CLEAR CONFLICT BETWEEN JUST RAFAEL AND THE MILES DECISION ON A VERY IMPORTANT QUESTION OF LAW, AND I WILL SAY, JUST CONFESS FOR ME, WE HAVE THESE TAG CASES, BECAUSE WE TAGGED IT. WE EITHER JUST DIDN'T REALIZE THAT THERE WAS THE OTHER CONFLICT WITH RAFAEL WE COULD EXERCISE OUR DISCRETION NOT TO TAKE A TAG CASE.
SAYING WE'RE NOT GOING TO TAKE IT DOESN'T MEAN THERE'S NOT A CONFLICT.
SO I GUESS THE QUESTION IS WHEN THEY REAFFIRMED THAT THERE WAS NO CONFLICT WITH SPIEWAK, AND SPIEWAK CLEARLY SPEAKS OF SUBSTANTIVE CAUSES OF ACTION ACCRUING.
DO YOU HAVE ANYTHING IN OUR JURISPRUDENCE THAT WOULD SAY WE HAVE NO WAY TO EXERCISE OUR DISCRETION IN THIS NARROW CIRCUMSTANCE?
>> UNLESS YOUR HONORS FELT THAT THERE WAS NO CONFLICT BETWEEN MILES ONE AND AMERICAN OPTICAL, NO.
IF THERE'S A CONFLICT, WHICH WE'VE CONTENDED ALL ALONG THERE'S NOT, BECAUSE THESE ARE FUNDAMENTALLY DIFFERENT CASES, THEN POTENTIALLY THERE COULD BE A DISCRETIONARY CONFLICT JURISDICTION.
>> I APPRECIATE THAT.
>> AND WE'VE ASKED THE COURT TO EXERCISE ITS DISCRETION HERE BECAUSE OF THE WAY IT HAS GONE DOWN, ESSENTIALLY.
ON THE MERITS OF RETROACTIVITY, OF COURSE WE'RE ASKING THE COURT TO APPROVE THE 2010 AND 2012 DECISIONS FROM THE THIRD DISTRICT BECAUSE THERE IS NO CONFLICT WITH ANY JURISPRUDENCE OF THIS COURT ON THE ISSUE OF RETROACTIVE APPLICATION OF A STATUTE WHEN THE PLAINTIFF HAS

THE RIGHT TO GO FORWARD WITH A CAUSE OF ACTION.
AND EVEN IF AMERICAN OPTICAL HELD -- AND IT DID -- THAT A PLAINTIFF HAS AT THE VERY LEAST AN EQUITABLE TITLE IN A CAUSE OF ACTION, IN AMERICAN OPTICAL AND MARONDA HOMES THE CAUSES OF ACTION WHICH WERE PENDING AT THAT TIME IN THIS COURT'S WORD WERE, QUOTE, "DESTROYED."
THEY WERE NO LONGER ABLE TO GO FORWARD WITH THEIR CAUSES OF ACTION AND COMPARE NOW THE PLAINTIFFS HERE.
THE CAPS DID NOT STOP THEM FROM FILING THEIR ACTION, FROM PURSUING THEIR ACTION, FROM GOING TO JURY VERDICT, AND IN FACT THE CAP STATUTE DID NOT PREVENT THE PLAINTIFFS FROM GETTING ALL OF THEIR OUT-OF-POCKET EXPENSES.
AND IN FACT THE CAPS ALLOWED THEM TO GET THEIR NON-ECONOMIC DAMAGES.
THE ONLY DAMAGE ELEMENT THAT THE CAPS PREVENTED HERE WAS ANYTHING OVER $500,000.
>> BUT DOES THAT -- HOW DOES THAT MAKE IT NOT SUBSTANTIVE? I GUESS I'M HAVING TROUBLE -- APPRECIATE THAT THERE'S A DISTINCTION BETWEEN DESTROYING A CAUSE OF ACTION OR ESSENTIALLY TAKING AWAY A COMMON LAW RIGHT TO NO CAP ON DAMAGES.
HOW DOES THAT STILL -- AND, AGAIN, YOU KNOW, I GUESS YOU'RE ARGUING FOR -- THAT RAFAEL WAS WRONGLY DECIDED.
>> CORRECT.
>> HOW -- WHY IS THAT A DISTINCTION THAT WHEN WE'RE TALKING ABOUT SUBSTANTIVE CAUSES, THAT IT'S A SUBSTANTIVE VERSUS PROCEDURAL THAT THOSE DO NOT -- CANNOT BE APPLIED RETROACTIVELY?
>> WELL, TWO THINGS, YOUR HONOR.

ONE, WE'VE TAKEN THE POSITION
THAT THIS IS -- IT'S NEITHER,
REMEDIAL MEASURE.
BUT TO ANSWER MORE DIRECTLY,
SUBSTANTIVE VERSUS PROCEDURAL
DOES NOT THE QUESTION OF
RETROACTIVITY, BUT NOT ALWAYS.
WE STILL HAVE THAT COURT FINDING
CLAUSELL--
>> DIDN'T THE COURT FIND THIS
STATUTE WAS SUBSTANTIVE?
>> YES, IT DID.
BOTH RAFAEL AND WEINGRAD DID.
SOMETIMES YOU HAVE A SUBSTANTIVE
CAUSE OF ACTION WHICH MAY NOT
HAVE A VESTED RIGHT AND YOU
STILL HAVE TO DO -- I THINK IT'S
VERY IMPORTANT TO CONTINUE TO DO
THE VESTED RIGHT ANALYSIS.
>> WELL, AGAIN, AT THE POINT
THAT THIS PLAINTIFF WAS INJURED
BY THE NOW DETERMINED MEDICAL
MALPRACTICE OF WINE GUARD, SHE
AND HER LAWYER HAD A -- THE LAW
WAS -- THERE WAS NO LIMITATION
ON NON-ECONOMIC DAMAGES,
CORRECT?

>> CORRECT -- CORRECT.
>> NOW, HOW IS THAT -- THE CASE
THAT IS NOT MENTIONED BUT I'M
NOT SURE EITHER PARTY, BUT IS IN
THE DISSENT, THE MENENDEZ CASE.
DO YOU SEE THERE'S ANY GUIDANCE
IN MENENDEZ FOR THE FACT THAT
IT'S NOT AN ISSUE OF DESTROYING
A CAUSE OF ACTION, BUT WHAT THE
RIGHT IS ON THE DAY THAT THE
INJURY OCCURS?
>> I DON'T KNOW THAT MENENDEZ
GUIDES US TOO MUCH HERE BECAUSE
IN THAT CASE IT HINDERED THE
CAUSE OF ACTION.
IT INVOLVED THINGS LIKE
PENALTIES, SUCH AS ATTORNEYS'
FEES, WHICH WE KNOW ARE A
DIFFERENT ANIMAL THAN COMMON LAW
RIGHTS.
SO I THINK MENENDEZ HAS VERY
LITTLE GUIDANCE HERE WHEN YOU'RE

NOT DEALING WITH SOMETHING THAT HINDERS THE CAUSE OF ACTION OR IN ANY WAY PROHIBITS THE PLAINTIFF FROM GOING FORWARD WITH THEIR CAUSE OF ACTION.
>> I GUESS ALL THE -- WHEN DR. WEINGRAD HAD HIS INSURANCE IN PLACE ON THE DATE OF THIS INCIDENT, THE RELIANCE OF EVERYBODY WAS THERE'S NO CAP. SO IT'S VERY DIFFERENT THAN IF -- SO THIS IS WHY I'M TRYING TO UNDERSTAND WHY WOULD WE CARVE OUT AN EXCEPTION WHERE THE POLICY SEEMS TO NOT FAVOR RETROACTIVELY APPLYING THE CAP? IS THERE ANY POLICY REASON THAT YOU CAN POINT TO WHERE, OH, MY GOODNESS, DR. WEINGRAD DIDN'T GET ENOUGH INSURANCE BECAUSE HE THOUGHT THAT A CAP THAT WAS GOING TO BE -- YOU KNOW, PUT INTO PLACE AFTERWARDS WAS NOT APPLIED?
>> YES.
AND OF COURSE WE'RE ASSUMING THAT DR. WEINGRAD HAS INSURANCE, BUT FOR ANY PHYSICIAN WHO HAS INSURANCE, GENERALLY THESE ARE CLAIMS-MADE POLICIES.
AND SO WHEN A PHYSICIAN PURCHASES A POLICY -- AND I DON'T EVEN KNOW THE SPECIFICS OF THIS CASE OR ANY OTHER CASE, BUT YOU DO IT BASED ON WHAT CLAIMS ARE PENDING AND THAT'S HOW THE MALPRACTICE, THE PROFESSIONAL INSURANCE CARRIERS, ADJUST PREMIUMS AND SET RESERVES AND SO FORTH.
SO ASSUMING -- AND THE LEGISLATURE THOUGHT ABOUT THIS WHEN IT MADE THE ACCRUAL DATE BASED ON THE NOTICE OF INTENT BECAUSE THE NOTICE OF INTENT IN A CLAIMS-MADE POLICY IS REALLY WHAT SETS THE POLICY WHICH INVOKES WHATEVER POLICY IS ALIVE RIGHT THEN.
SO HYPOTHETICALLY DR. WEINGRAD

COULD HAVE HAD MUCH MORE
COVERAGE, LET'S SAY A MONTH
BEFORE THE CAP STATUTE WENT INTO
EFFECT AND DECIDED WHEN THE NEW
POLICY UNDERWRITING CAME ABOUT
THAT HE DIDN'T NEED AS MUCH
BECAUSE NOW WE HAVE A $500,000
LIMIT.
AND SO MADE THE DECISION BASED
ON THAT.
SO THAT WOULD BE THE POLICY
REASON TO APPLY IT
RETROACTIVELY.
AND I'LL SAY ANOTHER ONE, JUST
BACK TO THE VESTED RIGHTS
ANALYSIS AND THE PLAINTIFF'S
PERSPECTIVE, BUT WHAT MAKES THIS
SO MUCH DIFFERENT FROM HAVING A
CAUSE OF ACTION OR GETTING YOUR
OUT-OF-POCKET EXPENSES BACK IS
THIS, AND THE LEGISLATURE
RECOGNIZED IT IN ENACT BE THE
CAP STATUTE, IS THAT
NON-ECONOMIC DAMAGES ARE
TREMENDOUSLY DISCRETIONARY ON
THE PART OF THE JURY, AND SO THE
AVERAGE LITIGANT CAN GO FILE AN
ACTION SEEKING SUCH DAMAGES AND
YOU CAN HAVE AN EXPECTATION TO
GET YOUR OUT-OF-POCKET EXPENSES
BACK, CERTAINLY.
BUT CAN MRS. MILES AND HER
HUSBAND IN THIS CASE HAVE
REASONABLY HAD AN EXPECTATION,
AN EQUITABLE TITLE TO EXPECT TO
GET MORE THAN $501,000 WHEN THEY
COULD HAVE BEEN AWARDED A MUCH,
MUCH LOWER AMOUNT AND CERTAINLY
THEY WOULD NOT HAVE BEEN
ENTITLED TO COMPLAIN ABOUT IT OR
SAY, WELL, I HAD A VESTED RIGHT
TO A HIGHER AMOUNT, BECAUSE IT
HAS TO DO WITH THE ARBITRARINESS
AND THE DISCRETION OF A JURY.
SO THAT'S AGAIN A VERY
FUNDAMENTAL DIFFERENCE BETWEEN
AN AMERICAN OPTICAL CASE, A
MARONDA HOMES CASE, EVEN
MENENDEZ AND THIS.
SO AGAIN THIS IS NOT A

DESTRUCTION OF ANY KIND OF
VESTED RIGHT.
THIS IS JUST A LIMITATION AT THE
END OF THE CASE ON SOMETHING
THAT THE PLAINTIFFS NEVER HAD A
VESTED INTEREST IN BEFORE.
NOW, AS FAR AS THE OTHER ISSUES
-- AND YOUR HONOR'S CORRECT THAT
RETROACTIVITY IS DISPOSITIVE OF
THIS CASE.
IF YOU AGREE WITH US ON
RETROACTIVITY.
NOW, OF COURSE WE HAVE SUBMITTED
THAT THIS IS NOT THE CASE TO
ADDRESS THE OTHER CONSTITUTIONAL
ISSUES BECAUSE OF THE WAY THIS
CASE HAS GONE THROUGH THE
APPELLATE SYSTEM WHEN WE DON'T
EVEN HAVE MUCH OF BRIEFING ON
SOME OF THESE OTHER
CONSTITUTIONAL ISSUES.
IT SUDDENLY BECOME A MCCALL CASE
IN THE LAST TWO AND A HALF
MONTHS.
BUT I FEEL COMPELLED IF YOUR
HONORS WANT TO ADDRESS THAT OR
HAVE QUESTIONS -- AND WE HAVE
ASSERTED A VERY VIGOROUS
OPPOSITION TO MCCALL, MOSTLY
BECAUSE WE HAD TO.
THE PLAINTIFFS FILED A
SUPPLEMENTAL BRIEF ON MCCALL
SAYING IT WAS DISPOSITIVE OF
THIS CASE.
AND SO I WOULD SUBMIT THAT WE'VE
MADE SOME COMPELLING POINTS,
THAT AT THE VERY LEAST IF THIS
COURT WERE TO GO THE STEP
FURTHER AND GET TO THE
CONSTITUTIONAL -- THE FACIAL
CONSTITUTIONAL ISSUES, THAT IT'S
LISTENED TO OUR ARGUMENTS AND
THAT MCCALL AT VERY MOST IS AN
ABROGATION OF THE AGGREGATE CAP
ON NON-ECONOMIC DAMAGES AND
FURTHERMORE THAT IT SHOULD BE
APPLIED PROSPECTIVELY FOR THE
REASONS I STATED EARLIER AND
THAT WE'VE NOW HAD A STATUTE ON
THE BOOKS FOR 11 YEARS THAT THE

ENTIRE -- MANY LAYERS OF INDUSTRY AND PROFESSIONS HAVE RELIED ON, DOCTORS IN PURCHASING INSURANCE, HOSPITALS, CARRIERS DECIDING WHETHER TO COME INTO FLORIDA, UNDERWRITERS, PEOPLE SETTING RESERVES.
AND SO IN THIS CASE IT'S VERY PREJUDICIAL AND A VIOLATION OF FUNDAMENTAL FAIRNESS FOR THOSE WHO HAVE RELIED ON THE CAP TO TAKE IT AWAY AT THIS JUNCTURE.
SO I WOULD SUBMIT AT THE VERY LEAST, AGAIN, IF THE COURT GETS PAST THE RETROACTIVITY AND HOLDS THAT THE CAP CAN BE APPLIED TO THE PLAINTIFFS ON THAT BASIS--
>> WELL, THIS IS A PRETTY DIFFICULT LEGAL THEORY, TO SUGGEST THAT CONSTITUTIONAL VIOLATIONS CAN ONLY BE PROTECTED IN THE FUTURE AND THOSE WHICH HAVE OCCURRED IN THE PAST ARE BASICALLY FORGIVEN.
I'M MISSING THE LEGAL ANALYSIS THAT MAKES THAT JUMP, TO SAY THAT A COURT THAT HOLDS SOMETHING UNCONSTITUTIONAL, AS I UNDERSTAND THE LAW, IT WAS UNCONSTITUTIONAL FROM THE DAY IT WAS PASSED.
NOW, THE FACT THAT SOMEONE HAS NOT CHALLENGED IT OR PRESENTED IT IN SUCH A WAY THAT IT CAME TO FRUITION IS NOT A LEGAL REASONING TO SAY, WELL, WE JUST EXCUSE ALL THE PAST AND WE START ANEW HERE.
>> I APPRECIATE THAT, YOUR HONOR.
AND THE ANSWER IS IN SOME OF THE CASES THERE IS A VERY ROBUST BODY OF LAW THAT HOLDS THAT WHERE THE LEGISLATURE HAD THE POWER TO DO SOMETHING, THE CONSTITUTIONAL POWER TO DO SOMETHING, EVEN IF THAT WAS UNCONSTITUTIONAL, IT CAN BE PROSPECTIVELY APPLIED IF THE ORGANIC RIGHTS OF PERSONS WHO

RELIED ON THE STATUTE WILL BE AFFECTED.
AND SO I THINK IF MCCALL HAD HELD THAT THE LEGISLATURE JUST WENT BEYOND WHAT THE LEGISLATURE COULD HAVE EVEN ENACTED AND IT WAS A VIOLATION OF JUST OTHER PORTIONS OF THE CONSTITUTION, THAT THEY COULDN'T HAVE DONE THAT TO START WITH, THAT WOULD BE ONE THING.
BUT WE--
>> WELL, THAT WAS A STATUTORY CAUSE OF ACTION.
THAT WAS NOT A COMMON LAW ACTION AT ALL.
>> CORRECT.
>> WE HAD NO WRONGFUL DEATH WITHOUT LEGISLATIVE ACTION.
>> THAT'S CORRECT.
BUT I'M GOING BACK TO NOW THE LEGISLATURE'S POWER.
>> I UNDERSTAND.
>> AND SO IF I READ MCCALL CORRECTLY, WE'VE HAD POSSIBLY FIVE JUSTICES AGREE THAT EVEN IF THERE'S NO MEDICAL MALPRACTICE CRISIS NOW, THERE MAY HAVE BEEN THEN.
AND IN THAT CASE IT WOULD HAVE BEEN JUSTIFIED.
SO IN A CASE WHERE THE LEGISLATURE, THE MAJORITY AGREES THEY WERE JUSTIFIED, AT LEAST IN 2003, FOR DOING WHAT THEY DID, THEN I THINK THAT'S A COMPELLING REASON TO THEN CONSIDER WHO'S IN THE PIPELINE.
AND ANYONE WHO'S IN THE PIPELINE AT THE TIME OF MCCALL GETS THE BENEFIT OF THE CAP BECAUSE THESE ARE THE DOCTORS WHO PURCHASED THEIR INSURANCE.
SO--
>> I THINK THE CONCERN MR. BURLINGTON RAISED IS THAT IF WE DECIDE THIS ON A SPECIFIC GROUND THAT'S THE BASIS FOR CONFLICT, THAT SOMEONE DOESN'T TAKE, WELL, WE DON'T DISCUSS

MCCALL, ALL WE HAVE TO SAY IS WE DO NOT ADDRESS THE APPLICABILITY OF MCCALL.
I MEAN, IT'S--
>> RETROACTIVITY IS DISPOSITIVE AND I'M BEING THE ETERNAL OPTIMIST BY THINKING PERHAPS IF FOUR OF YOU ARE TO AGREE, I THINK WE NEED TO ADDRESS THESE IMPORTANT ISSUES.
BUT I DO AGREE THAT RETROACTIVITY IS DISPOSITIVE AND I DO STAY WITH OUR ORIGINAL ARGUMENTS THAT TO THE EXTENT YOUR HONORS -- AND YOUR HONORS MAY AGREE WITH US ON RETROACTIVITY AND AGREE WITH THE THIRD DISTRICT.
I WOULD SUBMIT THAT YOU DON'T GO THE STEP FURTHER BECAUSE THIS HAS NEVER BEEN A CONSTITUTIONAL CASE.
>> WELL, IT WOULD BE A REAL CONSTITUTIONAL ISSUE IF MR. RAFAEL IN THE FOURTH DISTRICT DID NOT HAVE A VERDICT WITH A CAP, BUT IN THIS CASE THEY GOT THE CAP.
SO I THINK THERE'S, AGAIN, GOING BACK TO WHY IT'S IMPORTANT TO ME THAT WE RESOLVE THIS CONFLICT IS BECAUSE THERE IS FUNDAMENTAL FAIRNESS THAT'S AT PLAY HERE, THAT THE RULES OUGHT TO BE THE SAME THROUGHOUT THE STATE OF FLORIDA.
>> THEY SHOULD.
THEY SHOULD.
AND OUR POSITION BEING THIS COULD HAVE GONE EITHER WAY.
WE DON'T KNOW WHY THE COURT DIDN'T TAKE JURISDICTION IN BOTH THIS CASE AND RAFAEL.
AND IT COULD HAVE EASILY BEEN THE DEFENDANT IN RAFAEL WHO GOT THE SHORT STICK BECAUSE THEY SHOULD HAVE HAD JURISDICTION GRANTED AND HAD THIS COURT HOLD THAT THE CAP DID APPLY.
SO I THINK WE STILL HAVE TO MAKE

THESE ARGUMENTS AND HOW UNFAIR
IT IS TO THE RAFAEL LITIGANTS, I
THINK WE'RE BEYOND THAT NOW AND
THE COURT NEEDS TO DECIDE THAT
ISSUE IF IT'S GOING TO GET THAT
FAR ON THE MERITS.
SO I WOULD SUBMIT AGAIN THAT I
WOULD ASK THIS COURT TO IN THIS
CASE APPROVE THE THIRD DISTRICT
BOTH OPINIONS AND FIND THAT THE
APPLICATION OF THE CAP STATUTE
IN THIS CASE IS CONSTITUTIONAL.
THANK YOU, YOUR HONORS.

>> THE PARTIAL REDUCTION OF A
CAUSE OF ACTION HAS CONSISTENTLY
BEEN HELD BY THIS COURT TO
CONSTITUTE A VESTED RIGHT THAT
IS PROTECTED BY THE DUE PROCESS
CLAUSE OF THE FLORIDA
CONSTITUTION.
>> WHAT'S THE BEST CASE ON THAT?
>> THERE'S THREE CASES.
THE BEST CASE IS PROBABLY
KAISNER, AND THAT WAS A CASE
WHERE THERE WAS SOVEREIGN
IMMUNITY AND THERE WAS A STATUTE
PASSED THAT IT WOULD WAIVED TO
THE EXTENT OF INSURANCE
COVERAGE.
THEN THAT STATUTE WAS REPEALED
AND THE QUESTION WAS DID THAT
APPLY RETROACTIVELY.
IT ONLY REDUCED THE AMOUNT OF
DAMAGES THAT A PARTY WOULD BE
ABLE TO COLLECT.
BUT THIS COURT STATED A VESTED
RIGHT IS NOT ANY LESS IMPAIRED
IN THE EYES OF THE LAW MERELY
BECAUSE THE IMPAIRMENT IS
PARTIAL.
THERE IS ALSO THE KNOLLS CASE
OUT OF THIS COURT IN WHICH THERE
WAS ANOTHER CHANGE IN THE
SOVEREIGN IMMUNITY STATUTING
LIMITING THE LIABILITY OF
GOVERNMENT EMPLOYEES.
THERE WAS A CAP.
THE JUDGMENT WAS $70,000.
THIS COURT HELD JUST THAT

$20,000 DIFFERENCE WAS
SUFFICIENT TO IMPLICATE VESTED
RIGHTS PROTECTED BY THE DUE
PROCESS CLAUSE AND THEREFORE THE
STATUTE COULD NOT BE APPLIED
RETROACTIVELY.
ALSO THE L. ROSS CASE WHICH
INVOLVED AN AWARD OF ATTORNEY'
FEES AND THERE HAD BEEN A
PROVISION FOR A 12.5% LIMITATION
ON THE JUDGMENT ON THE AMOUNT OF
ATTORNEYS' FEES THAT COULD BE
AWARDED.
THAT PERCENTAGE WAS REPEALED AND
THE QUESTION WAS DID IT APPLY
RETROACTIVELY.
THE COURT HELD IT COULD NOT BE
APPLIED RETROACTIVELY BECAUSE OF
THE VESTED RIGHTS.
SO THE PARTIAL ARGUMENT HAS
ABSOLUTELY NO MERIT AND IT
SHOULDN'T CHANGE WHAT THE
FUNDAMENTAL PRINCIPLES ARE, THAT
THE CAUSE OF ACTION VESTS WHEN
IT ACCRUES AND IS ENTITLED TO
PROTECTION UNDER THE DUE PROCESS
CLAUSE.
NOW -- AND I REALIZE YOU ALL MAY
NOT WANT TO GO TO THE MCCALL,
BUT I HEARD ABOUT THIS
PROSPECTIVE APPLICATION.
THERE ARE VERY FEW CASES WHERE
THAT IS DONE, BUT EVERY CASE
WHERE IT HAS BEEN DONE THE COURT
HAS DONE IT IN THE DECISION IT
ISSUED.
IT WOULD BE UNFAIR TO -- IN THIS
CASE THE MCCALLS ARE GETTING THE
BENEFIT OF THE ELIMINATION OF
THE CAP.
THERE'S NO QUESTION.
IT WAS SENT BACK TO THE FEDERAL
COURT.
THEY IMPLEMENT THIS COURT'S
DECISION.
THE RAFAEL COURT CASE,
UNFAIRNESS TO RAFAEL, THEY WENT
BACK AND HAD A JUDGMENT OF
APPROXIMATELY $10 MILLION
ENTERED.

THERE'S NO UNFAIRNESS TO THEM.
THEY'RE GETTING THE BENEFIT OF
THE ELIMINATION OF THE CAP.
BUT -- SO TO SAY NOW IN AN
OPINION ISSUED AT SOME TIME IN
THE FUTURE THAT IT IS NOW GOING
TO BE PROSPECTIVE AS A PRACTICAL
MATTER MAKES NO SENSE.
AS A LEGAL MATTER IT MAKES NO
SENSE.
THE CASES THEY RELY ON ARE
PRIMARILY TAXATION CASES WHERE
THERE WAS SOME PROBLEM WITH
EITHER THE FORM OR THE
EXPRESSION OR THE REFERENDUM
INVOLVING THE PASSAGE OF A TAX
CHANGE.
IT HAD A SMALL IMPACT ON THOSE
WHOSE CONSTITUTIONAL RIGHTS WERE
VIOLATED.
IT HAD A HUGE IMPACT ON THE
GOVERNMENTAL ENTITIES THAT HAD
COLLECTED THE MONEY, UTILIZED IT
IN THE BUDGET AND WOULD HAVE TO
PAY IT ALL BACK.
BUT THOSE WERE NOT CASES WHERE
THERE WERE EQUAL PROTECTION
VIOLATIONS IN THE PASSAGE OF THE
ACT AT ITS INCEPTION.
AND IT MAKES NO SENSE TO SAY
THAT WE'RE GOING TO HAVE TO WAIT
UNTIL SOMEBODY BRINGS IT UP.
THE REASON THAT THIS COURT DID
NOT HAVE A CASE CHALLENGING THE
CAPS DIRECTLY, I WOULD SUBMIT,
IS BECAUSE EVERYONE KNEW IT WAS
A QUESTIONABLE CAP TO BEGIN
WITH.
AND IN TEN YEARS YOU DIDN'T HAVE
A SINGLE CASE?
THERE'S NOT EVEN A DISTRICT
COURT CASE DIRECTLY ADDRESSING
THE CONSTITUTIONALITY OF THE
CAPS.
WHY WOULD THAT BE IN WE KNOW
THERE'S VERDICTS IN EXCESS.
BECAUSE THE INDUSTRY KNEW A
BUSINESS DECISION TO MAKE.
THE CASE THIS COURT GETS IS A
FEDERAL TORT CLAIMS ACT WHERE

THE GOVERNMENT IS THE DEFENDANT.
THEY AREN'T INVOLVED IN ALL
THESE DYNAMICS.
THAT'S WHY IT HASN'T COME UP.
>> I'M NOT SURE I UNDERSTAND
ANYTHING ABOUT YOUR -- THE
ARGUMENT YOU JUST MADE.
>> WELL, THE POINT IS IS IF YOU
ARE GOING TO DO PROSPECTIVE
APPLICATION--
>> BUT WHAT WERE YOU SAYING
ABOUT TEN YEARS AND NOBODY
CHALLENGING IT SOMEHOW IS THE
INDUSTRY, THE INSURANCE INDUSTRY
PREVENTING PLAINTIFFS FROM
CHALLENGING THE CAP?
>> NO.
THEY DIDN'T PREVENT IT.
>> WHAT IS THE ARGUMENT?
>> THEY WOULD SETTLE CASES IN
EXCESS AND YOU WOULD REACH A
BALANCE.
IN TEN YEARS NOT A SINGLE CASE
GETS TO A DISTRICT COURT?
>> WELL, I JUST THINK WE'RE
SPECULATING ON SOMETHING.
>> LET ME JUST PUT IT THIS WAY.
THE PROSPECTIVE ISSUE SHOULD NOT
BE DECIDED ON HOW LONG IT TOOK
FOR--
>> DO YOU AGREE FROM A SIMPLE
STATEMENT THAT SAYS WE REACH --
WE DECIDE THIS CASE ON THE
CONFLICT, WHICH IS
RETROACTIVITY.
WE DO NOT ADDRESS MCCALL.
>> THAT IS FINE FOR MY CLIENT
AND I BELIEVE IT WOULD--
>> THERE'S NO SPECULATION AT
THAT POINT ABOUT WHAT MCCALL
MEANS UNDER WHAT CIRCUMSTANCE.
>> CORRECT, YOUR HONOR.
HOWEVER, THESE CONSTITUTIONAL
ARGUMENTS HAD BEEN RAISED
ALTERNATIVELY AND SO THEY WERE
BEFORE THE COURT, SO WE COULD
NOT IGNORE THEM.
WE DID NOT MEAN TO BURDEN THE
COURT WITH UNNECESSARY ARGUMENT.
BUT -- SO, ANYWAY, WE WOULD

REQUEST THAT THIS -- COURT QUASH
THE DECISION, MAKE IT CLEAR
THERE IS NO LACK OF UNIFORMITY
AS TO WHEN A CAUSE OF ACTION
VESTS AND THAT THE RAFAEL CASE
IS THE CORRECT STATEMENT IN THE
CONTEXT OF THESE SPECIFIC
STATUTES AND ISSUES.
AND THAT WOULD RESULT IN A
JUDGMENT ENTERED IN ACCORDANCE
WITH A JURY VERDICT AND
RESPECTFULLY THAT SHOULD BE THE
RESULT IN THIS CASE, CONSISTENT
WITH WHAT MR. RAFAEL HAD THE
OPPORTUNITY TO ENJOY.
THANK YOU.
>> THANK YOU FOR YOUR ARGUMENTS.