

## MEDICAL DEFENSE AND HEALTH LAW

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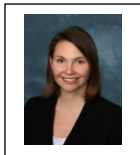
*The Florida Supreme Court held the state's cap on non-economic damages in medical malpractice cases involving wrongful death is unconstitutional. Florida's legislature enacted the non-economic damages cap in 2003 in response to an identified health care crisis within the state. This article was originally published in the Florida Defense Lawyers Association's Trial Advocate Quarterly.*

## The Florida Supreme Court Rejects Caps on Noneconomic Damages in Wrongful Death Medical Malpractice Cases

### ABOUT THE AUTHORS



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### ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee recently added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

In a highly anticipated decision, the Florida Supreme Court in *McCall v. United States*<sup>1</sup> held Florida's caps on noneconomic damages in wrongful death medical malpractice cases are unconstitutional. Healthcare leaders and attorneys have waited for over two years for the decision by Florida's highest court, causing speculation that the caps would be struck down by a narrow majority. While the 5–2 decision was issued by a larger majority than anticipated, the opinion's long-term impact remains unclear.

Medical malpractice cases in Florida are governed by Chapter 766, Florida Statutes. Section 766.118 outlines the damages available to a plaintiff, including a cap on noneconomic damages.<sup>2</sup> Section 766.118(2) limits wrongful death noneconomic damages to \$1 million in cases against practitioners,<sup>3</sup> and \$1.5 million in cases against hospitals or

facilities. The caps apply regardless of the number of claimants.

The noneconomic caps were added to Chapter 766 by the Florida Legislature in 2003, after the Governor's Task Force investigated the status of medical malpractice insurance in Florida and found "a medical malpractice insurance crisis of unprecedented magnitude."<sup>4</sup> The Task Force concluded "actual and potential jury awards of noneconomic damages (such as pain and suffering) are a key factor (perhaps the most important factor) behind the unavailability and un-affordability of medical malpractice insurance in Florida."<sup>5</sup>

Unlike most Florida medical malpractice cases, *McCall* began in the federal courts. The estate of Michelle McCall filed suit under the Federal Tort Claims Act for alleged negligence by a United States Air Force clinic, resulting in Ms. McCall's death.<sup>6</sup> The estate was awarded \$2 million in noneconomic damages, but the district court later limited the award to \$1 million pursuant to section 766.118(2).<sup>7</sup> On appeal, the Eleventh Circuit held Florida's caps on noneconomic damages did not violate the Equal Protection Clause or Takings Clause of the U.S. Constitution, but certified the question of whether the caps violated the Florida Constitution to the Florida Supreme Court.<sup>8</sup>

The Florida Supreme Court held the caps on wrongful death noneconomic damages under section 766.118 violate the Equal Protection

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<sup>1</sup> 2014 WL 959180 (Fla. March 13, 2014).

<sup>2</sup> § 766.202(8), Fla. Stat. (2013). "Noneconomic damages" are nonfinancial losses that would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses to the extent the claimant is entitled to recover such damages under general law, including the Wrongful Death Act.

<sup>3</sup> § 766.118, Fla. Stat.:

"Practitioner" means any person licensed under chapter 458, chapter 459, chapter 460, chapter 461, chapter 462, chapter 463, chapter 466, chapter 467, or chapter 486 or certified under s. [464.012](#). "Practitioner" also means any association, corporation, firm, partnership, or other business entity under which such practitioner practices or any employee of such practitioner or entity acting in the scope of his or her employment. For the purpose of determining the limitations on noneconomic damages set forth in this section, the term "practitioner" includes any person or entity for whom a practitioner is vicariously liable and any person or entity whose liability is based solely on such person or entity being vicariously liable for the actions of a practitioner.

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<sup>4</sup> *Id.* at 9 (citing Ch. 2003-416, § 1, Laws of Fla., at 4035).

<sup>5</sup> *Id.* (citing Report of Governor's Select Task Force on Healthcare Professional Liability Insurance (Task Force Report), Jan. 29, 2003, at xvii).

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.*

Clause of the Florida Constitution because the aggregate structure significantly reduces awards for injured parties in multi-claimant cases without regard to the tortfeasor's actions.<sup>9</sup> Citing to its prior holding in *St. Mary's Hospital v. Phillipe*, 769 So. 2d 961 (Fla. 2000), the court held that aggregate caps on noneconomic damages are "inherently discriminatory."<sup>10</sup>

In an unusual move, the court further conducted an equal protection analysis of the stated purpose behind the caps (Florida's medical malpractice crisis) to determine constitutionality. The court attacked the findings of the Governor's Task Force and Legislature, holding that the wrongful death caps in section 766.118(2) do not bear a rational relationship to the stated purpose of alleviating Florida's health care crisis.<sup>11</sup>

Under the heading "The Alleged Medical Malpractice Crisis," the court undertook a vigorous attack of the legislature and Task Force's conclusions that increasing medical malpractice insurance premiums were causing physicians to leave the state, retire or decline high-risk practices, thereby causing a medical malpractice crisis.<sup>12</sup> The court relied on its own research, arguing that contrasting data and reports showed sufficient availability of statewide healthcare. The court contended that even if there was a legitimate crisis, the caps did not alleviate it.<sup>13</sup> It found no correlation between the caps and reduced insurance rates, pointing to studies showing insurance premiums rose less for high risk medical practices in states without caps than those with caps.<sup>14</sup>

Finally, regardless of any past crisis, the court determined there was no current crisis justifying the caps.<sup>15</sup> The court argued that within the past several years, there have been sufficient numbers of available doctors in Florida, the number of malpractice claims filed has decreased, and malpractice insurance companies have paid less in noneconomic damages.<sup>16</sup> In all, the court concluded the "insurance industry should pass savings onto Florida physicians in the form of reduced malpractice insurance premiums," but could not look to limit recovery for injured parties based on arbitrary factors.<sup>17</sup>

In defense of its reasoning, and to counter accusations of judicial activism, the court noted it was not bound to accept the Legislature and Task Force's findings without inquiry, but instead was authorized under the rational basis test to review the purpose of a statute being challenged for constitutionality.<sup>18</sup>

Right now it appears *McCall* is limited to wrongful death cases.<sup>19</sup> The Florida Supreme Court specifically narrowed the original certified question from whether all noneconomic caps under section 766.118 were constitutional to whether the *wrongful death* noneconomic caps under section 766.118 were constitutional.<sup>20</sup>

The future impact of *McCall* is less certain. Speculation continues that the plurality might accept a revised cap if an aggregate structure is eliminated; however, the court's reasoning regarding the intended purpose of the caps

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<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.* at 5.

<sup>11</sup> *Id.* at 9.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 13.

<sup>14</sup> *Id.*

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<sup>15</sup> *Id.* at 16.

<sup>16</sup> *Id.* at 17.

<sup>17</sup> *Id.* at 18.

<sup>18</sup> *Id.* at 9, 10.

<sup>19</sup> *Id.* at 3 n.2 ("[t]he present case is exclusively related to wrongful death, and our analysis is limited accordingly.").

<sup>20</sup> *Id.* at 1.

calls into question whether any cap system could pass constitutional muster. Opponents of caps will argue the majority's reasoning in *McCall* will extend to all remaining personal injury caps under section 766.118, if challenged, since they share the same aggregate structure and purpose. Conversely, it is possible the court may have set the stage for preserving personal injury caps when it acknowledged that "the legal analysis for personal injury damages and wrongful death damages are not the same,"<sup>21</sup> and in its further discussion of the difference in origin between common law personal injury claims versus statutorily-created wrongful death actions. The answer could come soon: the first case challenging the remaining medical malpractice caps is set for oral argument before the Florida Supreme Court on June 4, 2014.<sup>22</sup>

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<sup>21</sup> Id. at 3 n.2.

<sup>22</sup> *Miles v. Weingrad*, 123 So. 3d 558 (Fla. 2013).

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