IADC COMMITTEE NEWSLETTER

# MEDICAL DEFENSE AND HEALTH LAW

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*Bernard S. Vallejos and Erik W. Legg review a new decision of the Supreme Court of Florida striking down as unconstitutional that state's statutory caps on non-economic damages in personal injury medical negligence cases.*

# Supreme Court of Florida Rules Medical Malpractice Noneconomic Damages Caps Unconstitutional . . . Again

## ABOUT THE AUTHORS

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Medical malpractice defendants in personal injury cases in Florida may no longer rely on the noneconomic damages caps set forth in in section 766.118, Florida Statutes (2011) after the Florida Supreme Court recently found them unconstitutional, consistent with its 2014 decision in Estate of *McCall v. United States* regarding medical malpractice wrongful death actions. *See North Broward Hospital District, et al. v. Kalitan*, ___ So.3d ___, 2017 WL 2481225 (Fla. June 8, 2017)[1] ("*North Broward*"). In a 4-3 decision, Chief Justice Labarga authored the *per curiam* opinion for the majority.

In *North Broward*, plaintiff Susan Kalitan suffered from carpal tunnel syndrome and went to defendant North Broward Hospital District for outpatient surgery, requiring general anesthesia. *Id.*, at *1. Aside from her carpal tunnel, plaintiff had no other medical complaints at the time. *Id.* During the intubation procedure for administration of anesthesia, plaintiff's esophagus was perforated. *Id.* This unknown complication did not prevent the completion of the surgery. *Id.* Plaintiff began complaining of severe pain in her chest and back after the procedure. The anesthesiologist was notified and, unaware of the perforated esophagus, he ordered the administration of pain medication. *Id.* Plaintiff was discharged that same day. *Id.*

The next day, plaintiff was discovered unresponsive at home and was taken to an emergency room at another hospital. *Id.* at *2. The providers there diagnosed her perforated esophagus and performed surgery to repair it. *Id.* Plaintiff was placed into a drug induced coma for several weeks and, after being brought out of the coma, underwent additional surgeries and therapy to begin eating again and regain mobility. *Id.* Plaintiff testified at trial that she continued to experience pain throughout the upper half of her body and sustained serious mental disorders as a result of the traumatic incident. *Id.* She also testified of having lost independence because of her physical limitations. *Id.*

Plaintiff asserted direct and vicarious liability claims against the defendants. *Id.* At the conclusion of plaintiff's case, all parties moved for directed verdict on various grounds with the defendants contending primarily that plaintiff failed to meet the threshold for a determination of catastrophic injury. *Id.* The trial court submitted this issue to the jury, asking it to determine if plaintiff suffered a "'permanent impairment constituted by either . . . [s]pinal cord injury involving severe paralysis of an arm, a leg, or the trunk . . . [or] [s]evere brain or closed-head injury evidenced by a severe episodic neurological disorder.'" *Id.* The jury determined that plaintiff experienced the latter and awarded plaintiff $4,718,011 in total damages, with $2 million for past pain and suffering and $2 million for future pain and suffering. *Id.*

All parties filed post-trial motions. The trial court denied the defendants' motion that plaintiff failed to meet the definition of

[1] This opinion is not yet final and citation to it may be premature.

"catastrophic injury", as well as plaintiff's motion that the noneconomic damages caps in medical negligence actions were unconstitutional. *Id.* In issuing a final written judgment as to damages, the trial court applied the caps set forth in section 766.118, Florida Statutes (2011), and reduced the total jury award by nearly $3.3 million. *Id.*

On intermediate appeal, the Fourth District relied upon the Supreme Court of Florida's prior opinion in *McCall v. United States*, 134 So.3d 894 (Fla. 2014) ("*McCall*"), which determined that the cap on wrongful death noneconomic damages under section 766.118 violates the right to equal protection guaranteed by article I, section 2, of the Florida Constitution. *Id.* In so doing, the District Court noted the language in the *McCall* decision regarding the arbitrariness of the cap and the lack of a legitimate governmental interest justifying the cap. *Id.* The District Court reasoned that as section 766.118 applied to both wrongful death actions and personal injury actions, *McCall* mandated a finding that the caps on noneconomic damages for personal injury cases likewise are unconstitutional. *Id.* The District Court instructed the trial court to reinstate the jury's original damages award and defendants appealed. *Id.*

In analyzing the constitutionality of the noneconomic damages caps in a personal injury context, the Supreme Court of Florida undertook a detailed review of the *McCall* decision. *See North Broward* at *3-*5. In that case, the Estate of Michelle McCall asserted a medical negligence claim following the death of Ms. McCall after the birth of her son. *Id.* at *3. The Court in *McCall* concluded that the noneconomic damages caps bore no rational relationship to a legitimate state objective and thereby failed the rational basis test, because the Florida Legislature's purpose in enacting the statute was to address the medical malpractice insurance crisis, which the Court determined no longer existed. *Id.* at *3, *citing McCall*, 134 So.3d at 901. The Court also determined that the caps arbitrarily discriminate between slightly and severely injured plaintiffs while benefitting the tortfeasor, because persons most seriously injured likely would not be fully compensated consequent to the caps. *Id.* at *3, *citing McCall*, 134 So.3d at 901-02.

The Court in *North Broward* set forth the Equal Protection clause of the Florida Constitution: "[A]ll natural persons, female and male alike, are equal before the law." *Id.* at *5, *citing* Art. I, § 2, Fla. Const. The rational basis test applies to evaluate an equal protection challenge unless it involves "a suspect class or fundamental right protected by the challenged provision." *Id.*, *citing McCall*, 134 So.3d at 901. The rational basis test requires that "a statute must bear a rational and reasonable relationship to a legitimate state objective, and it cannot be arbitrary or capriciously imposed." *Id.* (internal citations omitted). The entity challenging the statute has the burden of proof and where the burden is not met, the statute must be upheld. *Id.*, *referencing Fla. High Sch. Activities Ass'n, Inc. v. Thomas*, 434 So.3d 306, 308 (Fla. 1983).

The Court found that Kalitan was not a member of a suspect class and so concluded that the rational basis test applied. *Id.* at *6. The Court determined that the rational basis test was not satisfied for two reasons: (1) the caps discriminated between claimants and so were arbitrary; and (2) there was no evidence that the caps alleviated the predicate for the caps—a medical malpractice insurance crisis—or that any alleged crisis continued to exist, and therefore the arbitrary caps were not rationally related to a legitimate government interest. *Id.* at *6-*8. The Court engaged in a comparison of scenarios similar to *McCall* to demonstrate that the caps "created arbitrary and invidious discrimination between claimants." *Id.* at *6. In so doing, the Court set forth a hypothetical scenario in which plaintiff A suffered a moderate injury, plaintiff B suffered a loss of a hand (a "catastrophic injury"), and plaintiff C suffered a drastic injury resulting in a permanent vegetative state. *Id.* at *6. Under the statutory scheme, "plaintiff C has utterly no chance of being fully compensated" and so his/her damages award would be "arbitrarily diminished, even though plaintiff C has suffered the most grievous injury." *Id.* at *7. Therefore, the Court concluded that the rational basis test was not met because "'[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 *7, *citing McCall*, 134 So.3d at 912 (internal citations omitted). The Court also noted that it "'fail[s] to see how singling out the most seriously injured medical malpractice victims for less than full recovery bears any rational relationship to the Legislature's stated goal of alleviating the financial crisis in the medical liability insurance industry.'" *Id.*, *citing Univ. of Miami v. Echarte*, 618 So.2d, 189, 198 (Fla. 1993).

In enacting the caps in 2003, the Florida Legislature found that "'Florida [was] in the midst of a medical malpractice insurance crisis of unprecedented magnitude.'" *Id.* at *7, citing Ch. 2003-416, § 1, Laws of Fla., at 4035. However, as the Court explained in *McCall*, there is a lack of evidence demonstrating how the caps alleviated that alleged crisis. *Id.* at *7. The Court, relying on *McCall*, noted that reports have failed to establish a direct correlation between damage caps and reduced medical malpractice premiums, and there was no mechanism in place to assure that savings are passed from insurance companies to doctors. *Id.* at *7. Additionally, the Court indicated that current data lead to the conclusion that any alleged medical malpractice crisis had ended. *Id.* at *8. "'A statute may be constitutionally valid when enacted but may become constitutionally invalid because of changes in the conditions to which the statute applies.'" *Id.* at *8, *citing McCall*, 134 So.3d at 913 (internal citations omitted). Therefore, "[b]ecause addressing the medical malpractice crisis was the Legislature's stated objective when passing section 766.118, if the objective no longer exists, then there is no longer a 'legitimate state objective' to which the caps could 'rationally and reasonably relate.'" *Id.* at *8 (internal citations omitted).

The dissent agreed that the rational basis test applied but concluded that it had been met, and also raised the concern that in analyzing the impact of the caps vis-à-vis the statutory goals, the judiciary improperly had interjected itself into a legislative function. *Id.* at *8-*10. The dissent pointed out that the party challenging the statute is required "'to show that there is no conceivable factual predicate which would rationally support the classification under attack.'" *Id.* at *8, *citing Fla. High Sch. Activities Ass'n v. Thomas*, 434 So.2d 306, 308 (Fla. 1983). Moreover, "'[i]t is not the court's function to determine whether the legislation achieves its intended goal in the best manner possible, but only whether the goal is legitimate and the means to achieve it are rationally related to the goal.'" *Id.*, *citing Loxahatchee River Envtl. Control. Dist. v. Sch. Bd. of Palm Beach Cty.*, 496 So.2d 930, 938 (Fla. 1986). While the majority concluded that the medical malpractice insurance crisis, if any, was not alleviated by the statutory cap and that any alleged crisis had subsided, "'a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.'" *Id.* at *9, *citing F.C.C. v. Beach Commcn's, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). There also is "'no obligation for the production of evidence to sustain the rationality of a statutory classification.'" *Id.*, *citing Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). Therefore, the dissent concluded that the cap was rationally related to the legitimate state interest of increasing the affordability, availability and quality of health care in Florida, pointing out that

> "the Florida Legislature could have rationally believed that the cap on noneconomic damages . . . would reduce malpractice damage awards, which would thereby increase predictability in the medical malpractice insurance market and lead to reduced insurance premiums. Then, as a result of decreased insurance premiums, physicians would be more willing to stay in Florida and perform high-risk procedures at a lower cost to Floridians."

*Id.*, *citing McCall*, 134 So.3d at 930 (Polston, J., dissenting) (footnote omitted).

It is anticipated that plaintiffs in other jurisdictions with noneconomic damages caps similar to those in section 766.118 will tout arguments similar to those advanced by Kalitan, as well as arguments sounding in due process and the right to trial by jury and access to the courts, to attack the constitutionality of such caps. Plaintiffs will contend that the most seriously injured plaintiffs are not "made whole" because of the caps and so they arbitrarily discriminate against such individuals, that the caps do not lower the medical malpractice premiums that allegedly caused many physicians to stop practicing medicine or leave a state, and that any alleged "medical malpractice crisis" is over. Defense practitioners should emphasize the legislature's, not judiciary's, responsibility to determine socially and economically

desirable policy and the rational relationship between the caps and legislative goals of improving the affordability, availability and quality of medical care in a state. *See, e.g.*, *McDonald v. City Hosp., Inc.*, 227 W. Va. 707, 720, 715 S.E.2d 405, 418 (2011) (noting that courts are not to question the wisdom or desirability of legislative policy and finding that rational basis test was satisfied because "the Legislature could have rationally believed that decreasing the cap on noneconomic damages would reduce rising malpractice premiums and, in turn, prevent physicians from leaving the state thereby increasing the quality of, and access to, healthcare for West Virginia residents"); *Stinnett v. Tam*, 198 Cal. App. 4th 1412, 1429 (Cal. App. 2011) (holding that MICRA's noneconomic damages cap is supported by a rational basis and finding that it is the Legislature's role to make policy determinations); *M.D. v. United States*, 745 F.Supp.2d 1274, 1277-78, 1280 (M.D. Fla. 2010) (noting that the Legislature is tasked with declaring public policy and finding the rational basis test was met because "[a] limitation on non-economic damages in medical malpractice cases . . . is reasonably related to the permissive legislative objective of ensuring the availability of quality healthcare by controlling the cost of medical malpractice insurance."); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 520 (6th Cir. 2005) (internal citations omitted) ("The purpose of the damages limitation was to control increases in health care costs . . . a legitimate governmental purpose. By limiting at least one component of health care costs, the noneconomic damages limitation is rationally related to its intended purpose."); *Boyd v. Bulala*, 877 F.2d 1191, 1197 (4th Cir. 1989) ("[T]he cap on liability bears a reasonable relation to a valid legislative purpose—the maintenance of adequate health care services in the Commonwealth of Virginia."); *Davis v. Omitowoju*, 883 F.2d 1155, 1158 (3d Cir. 1989) ("Clearly the Virgin Island's decision to curb, through legislation, the high costs of malpractice insurance and thereby promote quality medical care to the residents of the islands, provides a rational basis for capping the amount of damages that can be awarded a plaintiff."); *Lucas v. United States*, 807 F.2d 414, 420, 422 (5th Cir. 1986) (internal citations omitted) ("[W]e find that there is a rational basis for § 11.02 and that the legislature enacted the statute in an attempt to accomplish a legitimate purpose", i.e., to "'assure that awards are rationally related to actual damages' and to 'make affordable medical and health care more accessible and available to the citizens of Texas.'"); *Hoffman v. United States*, 767 F.2d 1431, 1437 (9th Cir. 1985) (holding that the rational basis test was satisfied because "[i]t was reasonable for the lawmakers to believe that placing a ceiling on noneconomic damages would help reduce malpractice insurance premiums"). Additionally, arguments regarding the inherently arbitrary nature of damages for pain and suffering, a subjective award not based on objective facts and evidence, should be considered.

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