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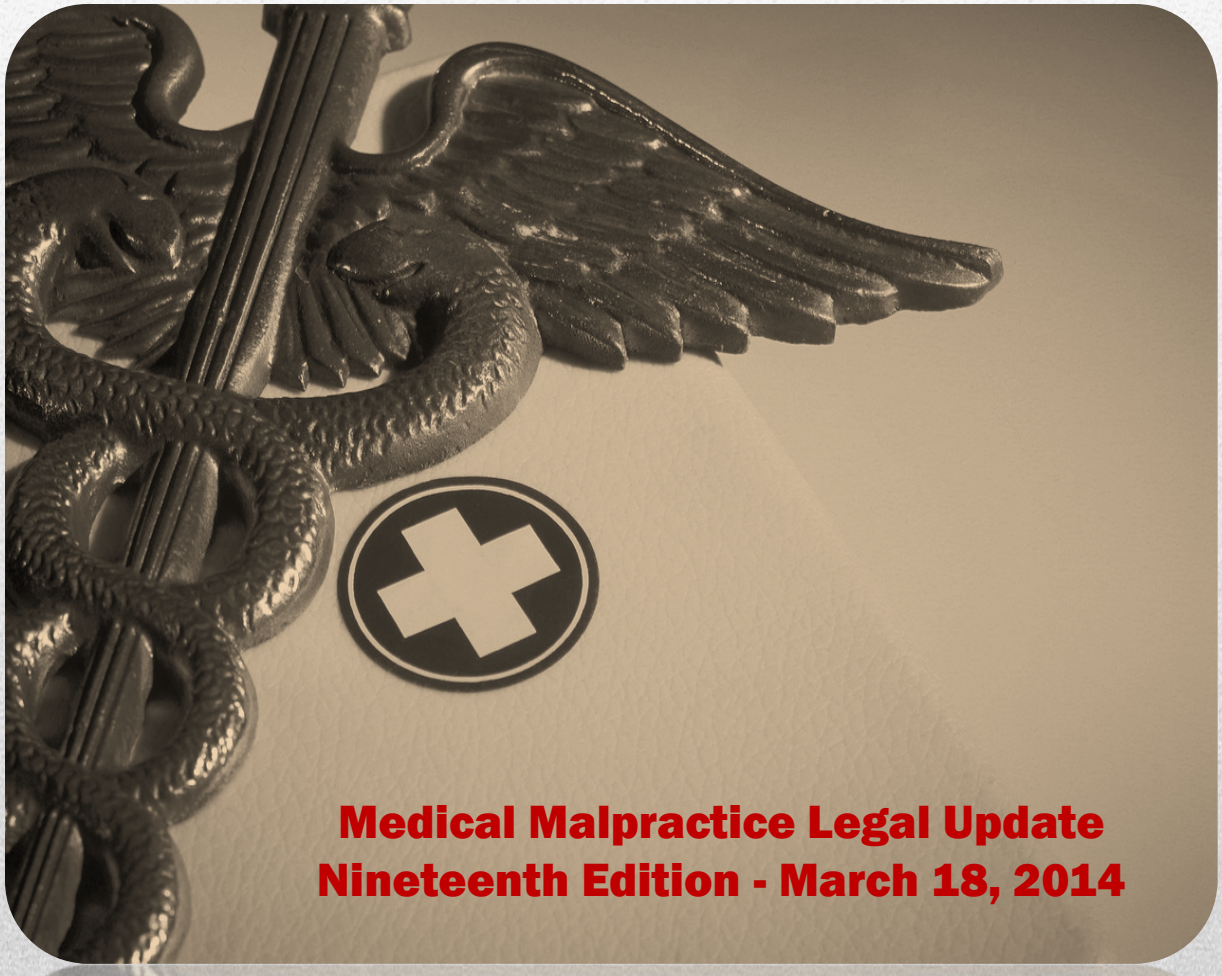

Medical Malpractice Legal Update
Nineteenth Edition - March 18, 2014

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ALL GOOD THINGS COME TO AN END: *MCCALL* DECISION DISCUSSED IN DETAIL

On March 13, 2014, the Florida Supreme Court released its much anticipated decision in *McCall v. United States*, No. SC11-1148. **The Court held (5-2) that caps on noneconomic damages in medical malpractice wrongful death suits are unconstitutional under Florida law; however, preserved caps for medical malpractice resulting in personal injury**. The Court's lengthy 96 page decision focuses on Florida Statute § 766.118's discrimination amongst plaintiffs by limiting recovery regardless of the number of survivors/claimants. The Florida Supreme Court rejected the legislature's findings regarding the "medical malpractice crisis" rationale and concluded that availability of health care and high insurance premiums are no longer a problem in the state. *McCall* demonstrates the Florida Supreme Court's disagreement as to the amount of deference due to the legislature when addressing state interests and the passage of legislation. This decision profoundly affects the valuation and potential verdict ranges for current and future wrongful death cases.

In *McCall*, the estate of Michelle McCall brought a wrongful death claim against practitioners at a U.S. Air Force clinic.[1] Ms. McCall died as a result of severe blood loss sustained during labor. [2] A jury in the Northern District of Florida awarded Plaintiff $2 million in noneconomic damages. [3] The Federal District Court limited the Plaintiff's recovery to $1 million pursuant to Florida Statute § 766.118 (2).[4] Florida Statute § 766.118 (2) provides noneconomic damages in a personal injury or wrongful death case are limited to $500,000 for practitioners and $1 million for cases resulting in death and permanent vegetative death. The Plaintiff challenged the constitutionality of this provision, and the Federal Court denied the motion.[5] The Eleventh Circuit Court of Appeals affirmed the application of the noneconomic damages cap and certified several questions to the Florida Supreme Court, including whether the noneconomic damages cap violated Equal Protection under the Florida Constitution. [6]

Although asked to determine whether all noneconomic damages caps were unconstitutional, the Florida Supreme Court could only rule on wrongful death caps, as a blanket ruling on noneconomic damages would be prohibited as an advisory opinion. Since the medical malpractice statute did not involve fundamental rights (those delineated in the Florida Constitution) or a suspect class (e.g. race, national origin, religion or alienage), the Court applied the lowest constitutional standard—rational basis review.[7] A statute will pass rational basis so long as it "bears a rational and reasonable relationship to a legitimate state objective."[8] Most statutes pass rational basis; however, the Florida Supreme Court held § 766.118 (2) did not pass constitutional muster.

First, the Court concluded wrongful death caps are purely arbitrary and "irrationally impact" plaintiffs based on the number of survivors or claimants.[9] For example, in *McCall*,

each survivor's award was proportionally reduced to avoid exceeding the cap; however, the Court noted recovery would be much greater per person with a lower number of claimants.[10] "[U]nder section 766.118, the greater the number of survivors and the more devastating their losses are, the less likely they are to be fully compensated for those loses."[11] The Court found Florida Statute § 766.118 discriminated against wrongful death plaintiffs by treating survivors differently based on how many are entitled to recovery.[12] "Survivors receive absolutely no benefit whatsoever from the cap on noneconomic damages, but only arbitrary reductions based on the number of survivors."[13]

Next, the Court discussed the legislative motive behind wrongful death caps, dismissing the justification for § 766.118.[14] Rational basis review determines whether the statute actually bears a relationship to the expressed legislative motive.[15] In passing § 766.118, the legislature believed the State was "in the midst of a medical insurance crisis of unprecedented magnitude" where large jury verdicts were affecting the affordability of insurance premiums. [16] The Court rejected the legislature's reliance on reports prepared by the Governor's Taskforce as they "are not fully supported by available data."[17] Instead, the Court used other government reports indicating the number of physicians in Florida has grown from 1991 to 2001.[18] Testimony by the Florida Office of Insurance Regulation presented to the legislature prior to passing Statute § 766.118 showed no evidence of a large increase in frivolous lawsuits and excessive jury verdicts in the prior three years.[19] The Court concluded the legislature's finding of a medical malpractice crisis was "dubious and questionable."[20]

Furthermore, noneconomic damages caps have not actually reduced insurance premiums.[21] "While the cap on noneconomic damages limits the amount of money that insurance companies must pay for injured victims of medical malpractice, section 766.118 does not require insurance companies to use the acquired savings to lower malpractice insurance premiums for physicians . . . ."[22] Thus, the legislative record and data fail to justify the relationship between § 766.118 and lower malpractice insurance premiums.[23]

Finally, the Supreme Court noted that even if Florida experienced a medical malpractice crisis when the statute was implemented, "conditions can change . . . transforming what may have once been reasonable into arbitrary and irrational legislation."[24] Data shows Florida is no longer in a bind to lower medical malpractice premiums: 1) there are 254.8 active physicians for every 100,000 people, a figure higher than 28 other states; 2) medical malpractice suits are down more than 60 percent and compromise 0.76 percent of all civil actions; and, 3) insurance companies offering medical malpractice coverage continue to report an increase of income of more than 4300 percent.[25] As a result, "[h]ealth care policy that relies upon discrimination against Florida families is not rational or reasonable when it attempts to utilize aggregate caps to create unreasonable classifications."[26]

Not all Florida Supreme Court Justices agreed with the decision written by Justice Lewis. Justice Pariente, joining the plurality and writing a concurring opinion, agreed the statute discriminated unfairly against plaintiffs based on the number of survivors; however, disagreed with the plurality's questioning of legislative intent while using their own research and data. Justice Pariente believed the rational basis standard presumes legislative findings

are correct unless "there has been a showing made that the findings are 'clearly erroneous.'"[27]

Justice Polston wrote the dissenting opinion, in which he summarized the legislature's extensive research prior to passing § 766.118: 1) a series of hearings in Tallahassee; 2) four hearings outside the capital; 3) an 82-page report; 4) testimony from experts; and, 5) records from previous attempts to address the medical malpractice crisis.[28] Justice Polston noted six Federal Courts of Appeals and eight state courts have upheld limitations on noneconomic damages caps under Equal Protection analysis.[29] The majority's focus on discrimination against the most injured means "no caps could survive equal protection review because all caps have that effect."[30] Prior legislative data and statistics (cited by the plurality) support use of the cap because there has been a decrease in medical malpractice cases.

PRACTICAL IMPLICATIONS

McCall does not state whether this decision should be applied retroactively. The Florida Supreme Court addressed a similar issue in *Clausell v. Hobart Corporation.[31] Clausell* dealt with the retroactive application of the elimination of the statutory repose for products liability suits.[32] Retroactive application would only be unconstitutional if it affected a substantive, vested right. "To be vested a right *must be more than a mere expectation based on an anticipation of the continuation of an existing law;* it must have become a title, legal or equitable, to the present or future enforcement of a demand."[33] Florida courts have applied *Clausell* to determine whether to retroactively apply statutory caps. For example, Florida's Third District Court of Appeals in *Weingrad v. Miles* [34] noted a key factor is whether the case is already filed or a judgment rendered.[35] Until a judgment is rendered, the right to a specific amount of damages continues to be "indeterminate" and speculative.[36] As a result, the Supreme Court's decision in *McCall* will likely be applied to all existing suits where judgment has not been entered. We should expect a flurry of activity in the appellate districts on this issue.

Some sources, including the American Tort Reform Association, believe § 766.118 could be revised this legislative session[37]; however, until that occurs, the Supreme Court's decision in *McCall* means the "sky is the limit" for noneconomic damages in wrongful death cases. Case valuations and verdict ranges for certain wrongful death cases may now be significantly higher than before *McCall*.

Noneconomic damages caps for medical malpractice resulting in personal injury are safe for now; however, *McCall* provides legal precedent for plaintiffs to also challenge the remaining caps. The arguments accepted by the Supreme Court in *McCall* can easily be applied to personal injury caps within § 766.118. For example, some plaintiffs in medical malpractice cases have sustained more pain and suffering than others; yet, they are subjected to the same cap of $500,000 for practitioners and $750,000 for nonpractitioners under § 766.118. This type of discrimination was the backbone of the court's decision in *McCall*. It is only a matter of time before the remaining medical malpractice caps are also challenged by plaintiffs.

And so the saying goes—"All Good Things Come to an End."

[1] *Id.* at 3.
[2] *Id.* at 4.
[3] *Id.* at 5.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 6, 8.
[7] *Id.* at 9.
[8] *Id.* (citing to *Dep't of Corr. v. Fla. Nurses Association*, 897 So. 2d 317, 319 (Fla. 1987)).
[9] *Id*. at 11.
[10] *Id.*
[11] *Id.*
[12] *Id.* at 16.
[13] *Id.* at 17.
[14] *Id.* at 18.
[15] *Id.* at 19.
[16] *Id.* at 20.
[17] *Id*. at 21.
[18] *Id.* at 22.
[19] *Id*. at 25.
[20] *Id*. at 28.
[21] *Id.* at 28.
[22] *Id.* at 32.
[23] *Id.* at 35.
[24] *Id.*
[25] *Id.* at 35-40.
[26] *Id.* at 39-40.
[27] *Id.* at 53.
[28] *Id.* at 61-62.
[29] *Id.* at 70-71.
[30] *Id.* at 75.
[31] 515 So. 2d 1275 (Fla. 1987).
[32] *See*, *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874 (Fla. 1980).
[33] Id. at 1276 (emphasis added).
[34] 29 So. 3d 406 (Fla. 3d DCA 2010)
[35] *Id.* at 416.
[36] *Id.*
[37] *See*, Mary Ellen Klas, *Florida Supreme Court Throws Out 2003 Damage Caps, Centerpiece of Bush Reforms*, Miami Herald, March 13, 2014, *available at* http://miamiherald.typepad.com/nakedpolitics/2014/03/florida-supreme-court-throws-2003-damage-caps-centerpiece-of-bush-reforms.html.

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