CASE ALERT: Constitutionality of Medical Malpractice Non-economic Damages Caps to be reviewed by the Florida Supreme Court

By Eric D. Novak

The Florida Supreme Court is reviewing the constitutionality of non-economic caps, such as pain and suffering damages, in medical malpractice cases. Section 766.118(2)(a), Florida Statutes, provides for a cap on non-economic damages that a medical malpractice plaintiff can be awarded. This statute caps non-economic damages at $500,000 per claimant.[1] This amount is increased to $1 million per claimant if the negligence results in either the injured party being in a permanent vegetative state or in the claimant's death.[2] Furthermore, 766.118(2)(c) caps the total amount of non-economic damages recoverable by all claimants from all defendants to $1 million.

On May 27, 2011, in the Estate of McCall ex. rel. McCall v. United States, 642 F.3d 944 (11th Cir. 2011), the Eleventh Circuit upheld a decision from the Northern District of Florida finding caps on non-economic damages in Medical Malpractice cases constitutional under the U.S. Constitution. However, the 11th Circuit held that there was no controlling precedent from the Florida Supreme Court, under the Florida Constitution, and certified four questions to the Florida Supreme Court.[3] The answer to these certified questions may have wide reaching social and political effects.

The underlying case is a wrongful death case where Michelle McCall died after giving birth to her son.[4] While the facts were somewhat detailed, the general basis of liability was the health care providers' failure to monitor her vital signs, such as blood pressure, leading to her death.[5] After delivery of her son and complications during delivery, McCall's blood pressure dropped rapidly and remained dangerously low for over two and a half hours.[6] When her vitals were eventually checked, a nurse found her unresponsive and that she had gone into shock and cardiac arrest.[7] It was unclear how long she had been in this state because no one had checked on her status for over an hour.[8] McCall never regained consciousness and was removed from life support several days later.[9]

In a bench trial[10], the Northern District of Florida found the negligence of the physicians employed by the United States caused McCall's death. The court awarded economic damages totaling $980,462.40 and non-economic damages totaling $2 million dollars ($500,000 to her son and $750,000 to each of her parents). The District Court applied Florida's cap on non-economic

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[1] Id.
[2] §766.118(2)(b), Fla. Stat.
[3] http://www.ca11.uscourts.gov/opinions/ops/200916375cert.pdf, pg. 2 and 18.
[4] A full factual summary of the case can be found at, Estate of McCall, 642 F.3d at 946-47.
[5] Id.
[6] Id. at 947.
[7] Id.
[8] Id.
[9] Id.
[10] McCall's survivors included her newly born son and her parents. They filed suit against the United States under the Federal Tort Claims Act. Id. at 947.

damages and limited the Plaintiffs' cumulative recovery for non-economic damages to $1 million dollars, which was proportionally divided among the three survivors.

The four issues certified by the Eleventh Circuit to the Florida Supreme Court are whether a statutory cap on non economic damages violates the following rights/provisions under the Florida Constitution: (1) equal protection, (2) a person's right to access the courts; (3) a person's right to trial by jury, and (4) separation of powers. Both the parties have submitted briefs and numerous amicus briefs have been submitted, including, but, not limited to, briefs by the American Bar Association, the American Medical Association, the Florida Justice Association, and the Florida Medical Association.

One of the most interesting issues presented to the court is whether the statute improperly bars parties' access to the courts. The parties agree that the rule from Kluger v. White, 281 So.2d 1 (Fla. 1973) applies and is dispositive to this issue. [11] Kluger holds that the legislature cannot abolish a pre-existing common law right without providing a reasonable alternative (such as an alternate forum to have their right addressed), unless the legislature can show an overpowering public necessity for the abolishment of such right, and that no alternative method for meeting the public necessity can be shown.[12] The Defendants-Appellee claims that the statute meets the second prong of the test and that it need not show that a reasonable alternative access to the courts has been made available.[13]

When the statute was adopted, the overwhelming public necessity cited by the Legislature was that Florida was in a medical malpractice crisis and that the crisis would lead to increased healthcare costs.[14] The caps on damages were supposed to stem that crisis by controlling insurance premiums for physicians and ensuring citizen access to physicians in Florida.[15] It was claimed that without caps on medical malpractice damage awards, no legislative reform plan could be successful in achieving a goal of controlling increases in healthcare costs and, thus, promoting improved access to healthcare.[16]

In passing 766.118, Florida Statutes, the Legislature relied on a report generated by the Governor's Select Task Force on Healthcare Professional Liability Insurance.[17] Plaintiffs-Appellants claim that this report was not supported by fact and contained imagined justifications.[18] Plaintiffs-Appellants note that in the decade before the statute was passed the number of doctors practicing in Florida had steadily increased.[19] Plaintiffs-Appellants also argue that the Task Force's report failed to consider that in California, the case study that the Task Force's report relies on, malpractice insurers levied a 400% premium increase only a few months

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[11] http://www.floridasupremecourt.org/clerk/briefs/2011/1001-1200/11-1148_Ans.pdf, pg. 27; http://www.ca11.uscourts.gov/opinions/ops/200916375cert.pdf, pg. 32; and http://www.doh.state.fl.us/myflorida/DOH-LARGE-final%20Book.pdf.
[12] Kluger v. White, 281 So.2d 1, 4 (Fla. 1973).
[13] http://www.floridasupremecourt.org/clerk/briefs/2011/1001-1200/11-1148_Ans.pdf, pg. 30
[14] Id. at pg. 28
[15] Id.
[16] Id.
[17] http://www.ca11.uscourts.gov/opinions/ops/200916375cert.pdf, pg. 21, 35.
[18] Id. at 13.
[19] Id. at 36.

after caps were implemented and that premiums continued to rise during the next decade after the caps were implemented.[20] Additionally, Plaintiffs-Appellants argue that there were alternative methods to accomplishing the Legislature's goals and that the Legislature could have either regulated insurance premiums or provided a tax incentive to offset premium increases.[21]

Defendant-Appellee argues that the goal of making health care accessible to Florida residents was an overwhelming public necessity.[22] The Defendant-Appellee cites to the Governor's Task Force Report which found that "'a cap on non-economic damages must be part of a package of reforms,' and that a per incident cap in particular 'is the only available remedy that can produce a necessary level of predictability.'"[23] The Defendant-Appellee also argues that Florida Supreme Court precedent has held that "limiting claims that may be advanced by some claimants would proportionally limit claims made overall and would directly affect the cost of providing health care by making it less expensive and more accessible."[24] Defendant-Appellee argues that the Legislature's findings of fact are presumed correct and entitled to deference unless clearly erroneous.[25]

These issues, and the others presented to the Court, have the potential to significantly alter health care providers' exposure for acts of malpractice, insurance premiums for medical malpractice coverage, and the Legislature's ability to limit a Plaintiff's damages for an injury. Oral argument before the Florida Supreme Court has been set for February 9, 2012, so resolutions to these issues, and others, are soon to come.

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[20] Id. at 21.
[21] Id. at 37.
[22] http://www.floridasupremecourt.org/clerk/briefs/2011/1001-1200/11-1148_Ans.pdf, pg.29.
[23] Id. at 17 (citing the Governor's Select Task Force on Healthcare Professional Liability Insurance Report, http://www.doh.state.fl.us/myflorida/DOH-LARGE-final%20Book.pdf).
[24] Mizrahi v. North Miami Med. Ctr. Ltd., 761 So.2d 1040, 1042 (Fla. 2000).
[25] http://www.floridasupremecourt.org/clerk/briefs/2011/1001-1200/11-1148_Ans.pdf, pg. 31.