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FLORIDA SUPREME COURT OPINION FINDING “CAP” UNCONSTITUTIONAL

KEY FINDINGS

On March 13, 2014, in a 5-2 decision, the Supreme Court of Florida struck down the state’s cap on non-economic damages in a case involving the wrongful death of Michelle McCall during childbirth.¹ The Court said the cap was a violation of the Equal Protection Clause under Florida’s constitution. It found untrue *all* of the arguments used by medical malpractice insurance lobbyists and organized medicine to push for caps and other “tort reforms.” Here are some highlights from *McCall vs. United States of America*:

“[T]he statutory cap on wrongful death noneconomic damages does not bear a rational relationship to the stated purpose that the cap is purported to address, the alleged medical malpractice insurance crisis in Florida.”

- “[I]t has never been demonstrated that there was a proper predicate for imposing the burden of supporting the Florida legislative scheme upon the shoulders of the persons and families who have been most severely injured and died as a result of medical negligence. Health care policy that relies upon discrimination against Florida families is not rational or reasonable when it [caps damages]...”

“[T]he Legislature’s determination that ‘the increase in medical malpractice liability insurance rates is forcing physicians to practice medicine without professional liability insurance, to leave Florida, to not perform high risk procedures, or to retire early from the practice of medicine’ is unsupported.”

- “[T]he alleged interest of health care being unavailable is completely undermined by authoritative government reports.... Those government reports have indicated that the numbers of physicians in both metropolitan and non-metropolitan areas have increased.”

¹ *McCall vs. United States of America*, <http://www.floridasupremecourt.org/decisions/2014/sc11-1148.pdf>

- “Moreover, for those doctors who are leaving or have left Florida, there was no concrete evidence to demonstrate that high malpractice premiums were the cause of that departure,” a fact borne out by sworn testimony before the Senate Judiciary Committee by the CEO of the Florida Medical Association.
- “Thus, the finding by the Legislature and the [Governor’s] Task Force that Florida was in the midst of a bona fide medical malpractice crisis, threatening the access of Floridians to health care, is dubious and questionable at the very best.”

The argument that “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” is unsupported.

[T]here are other explanations for the dramatic rise in medical malpractice insurance premiums."

- For example ... in the opinion of Joanne Doroshow, Executive Director of the Center for Justice and Democracy, “[T]his so-called ‘crisis’ is nothing more than the underwriting cycle of the insurance industry, and driven by the same factors that caused the ‘crises’ in the 1970s and 1980s. According to ... Doroshow, with each crisis, there has been a severe drop in the investment income for insurers, which has been compounded by severe under pricing of insurance premiums in the prior years.... Then ... when investment income drops ... or due to low income resulting from unbearably low premiums, the insurance industry responds by sharply increasing premiums and reducing coverage.....”
- According to Tom Baker in his book, *The Medical Malpractice Myth*, premium hikes are also due to “dramatic increases in the amount of money that the insurance industry put in reserve for claims. Those reserve increases were so big because the insurance industry systematically underserved in the years leading up to the crisis.”

“[T]he deputy director of the Florida Office of Insurance Regulation testified he had found no evidence to suggest that there had been a large increase in the number of frivolous lawsuits filed in Florida, nor was there any evidence of excessive jury verdicts in the prior three years.”

“[T]he record and available data fail to establish a legitimate relationship between” the cap and lower medical malpractice insurance premiums because insurers do not pass savings onto doctors.

- “Robert White, the President of First Professionals Insurance Company (FPIC), testified during a Senate Judiciary Committee meeting that a \$500,000 cap on noneconomic

damages would achieve ‘virtually nothing’ with regard to stabilizing medical malpractice insurance rates. ...”

- “[D]uring floor debate in the House of Representatives, one representative expressed concern that if the Florida Legislature implements a cap on noneconomic damages, there is no requirement in the bill that insurers pass any savings onto physicians. ... (‘[A]t the end of the day, actually, [the insurance companies] don’t have to pay anything back to the doctors. It’s just a windfall, and there’s no provision in the bill that says otherwise.’).”
- “A number of state courts have expressed concern that without a statutory mandate that insurance companies lower their insurance premiums in response to tort reform, the savings resulting from reforms such as damages caps may simply increase insurance company profits.”

Savings from caps have led to huge insurance industry profits, which “the insurance industry should pass ... onto Florida physicians in the form of reduced malpractice insurance premiums, and it should no longer be necessary to continue punishing those most seriously injured by medical negligence by limiting their noneconomic recovery to a fixed, arbitrary amount.”

- “The most recent records and reports of the Florida Office of Insurance Regulation, and the annual reports of medical malpractice insurers, confirm that not only has the number of insurers providing medical malpractice insurance coverage increased, ... the profits would probably shock most concerned.”
- “Indeed, between the years of 2003 and 2010, four insurance companies [The Doctors Company, Mag Mutual Insurance Company, ProAssurance Corporation, and First Professionals Insurance Company] that offered medical malpractice insurance in Florida cumulatively reported an increase in their net income of more than 4300 percent....”

[E]ven if there had been a medical malpractice crisis in Florida at the turn of the century, the current data reflects that it has subsided.... At the present time, the cap on noneconomic damages serves no purpose other than to arbitrarily punish the most grievously injured or their surviving family members.”