

The Florida Supreme Court Overturns the Caps on Noneconomic Damages

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In a 5-2 plurality decision in March, the Florida Supreme Court held that the state's limit on noneconomic damages in medical negligence actions, as applied in wrongful death cases involving multiple claimants, violates the Equal Protection Clause of the Florida Constitution because it lacked a "rational basis." The outcome should trouble anyone who respects the democratic process, regardless of his or her views on

medical malpractice reform.

Judicial nullification, in which judges substitute their policy views for that of elected legislators, is not unheard of, particularly with respect to medical malpractice legislation. When this occurs, however, medical malpractice laws are usually invalidated based on unique state constitutional provisions, such as the "right of access to courts" or a "single subject" rule. See Victor E. Schwartz, Mark A. Behrens & Mark D. Taylor, *Who Should Make America's Tort Law: Courts or Legislators?*, Wash. Legal Found. (Feb. 1997). Occasionally, courts interpret a provision of a state constitution, such as the right to jury trial, differently than the federal equivalent. But the Florida Supreme Court's decision in *McCall v. United States*, 2014 WL 959180 (Fla. 2014), may be the first of its kind: a state high court struck down a law under the state's Equal Protection Clause as lacking a rational basis after a federal appellate court, in the same case, found the law had a rational basis under the U.S. Constitution.

Under the Equal Protection Clause, apart from laws that implicate a suspect classification, such as race, challenged laws are subject to "rational basis review." This standard respects the separation of powers, giving deference to elected officials. Under the rational basis test, laws must be upheld if they have any conceivable legitimate government purpose. See *Heller v. Doe*, 509 U.S. 312, 321 (1993). The legislature has no obligation to articulate its reasoning or prove itself through evidence or empirical data. See *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). "Under a 'rational basis' standard of review a court should inquire

only whether it is conceivable that the regulatory classification bears some rational relationship to a legitimate state purpose: the burden is upon the party challenging the statute or regulation to show that there is no conceivable factual predicate which would rationally support the classification under attack. Where the challenging party fails to meet this difficult burden, the statute or regulation must be sustained." *Fla. High Sch. Activities Ass'n v. Thomas*, 434 So.2d 306, 308 (Fla. 1983). "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 510 (1937).

Florida's noneconomic damage limit was enacted after substantial deliberation and analysis. In fact, the 2003 medical malpractice reforms were based on perhaps the most substantial legislative and evidentiary record ever assembled. The record included more than 1,600 sworn affidavits of medical providers, substantial additional testimony, numerous public hearings, and empirical analysis. After reviewing the history of medical malpractice problems and attempted solutions, the Legislature concluded that the State of Florida was again facing a crisis in the availability and affordability of medical malpractice insurance which was causing a critical reduction in the quality of healthcare available in Florida. Examples of testimony before the Legislature included the following: In Broward County alone, four hundred physicians left the state or retired early in the preceding year; obstetrical centers closed because of the soaring costs of liability insurance; new residency graduates often could not practice in Florida because they were unable to obtain or afford the necessary insurance; fully eighty percent of Miami obstetricians carried no insurance and sheltered their assets as a result of soaring costs; in 2002, Orlando lost twelve OB/GYNs—ten percent of the workforce; and twenty to twenty-five percent of those remaining worked without insurance. The Legislative findings also included scores of additional examples, setting forth summaries of the testimony of Florida physicians who keenly felt the effects of the insurance crisis.

To address the crisis, the Legislature passed wide-ranging legislative regulations. Among other things, it mandated regulatory changes for healthcare providers and numerous other insurance reforms. Most importantly, however, the Legislature found that limits on noneconomic damages were the most important reform and necessary to alleviate the identified problem. The Legislature found that increases in the cost of malpractice insurance, which the Legislature feared would become unaffordable, were driven largely by limitless awards of noneconomic damages. The Legislature found that these unlimited awards were a key factor (perhaps the most important factor) behind the unavailability and un-affordability of medical malpractice insurance in Florida.

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The Legislature found that without the inclusion or a cap on potential awards of non-economic damages in the reform package, no legislative reform plan would be successful in achieving a goal of controlling increases in healthcare costs, and thereby promoting improved access to healthcare. The legislative staff analysis that accompanied the final legislative product explained that some "hospitals are discontinuing services such as maternity services and trauma services because of the high cost of malpractice coverage for the specialists needed to provide these services." After the reforms were put in place, the medical malpractice crisis abated.

Eleven years later, the Florida Supreme Court put its prior equal protection precedent law aside and substituted its own views of what the law should be. Instead of applying prior precedent, the plurality simply concluded that the caps on noneconomic damages were unfair and purely arbitrary. The decision was written in three separate parts. First, Justice Lewis wrote a plurality opinion that was joined by Justice Labarga. Second, Justices Pariente, Quince and Perry concurred in the result of the Lewis plurality, with a separate opinion. Third, Chief Justice Polston dissented with an opinion in which Justice Canady joined.

Justice Lewis' plurality opinion, initially focused on whether a limit could constitutionally apply on a "per incident" or "per claimant" basis in wrongful death cases, and the ruling broadly found that the cap "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." The Court independently reevaluated the evidence relied upon by the legislature and found it did not prove that a medical malpractice crisis existed or that limits on noneconomic damages reduced insurance premiums.

In addition, the Court concluded that no rational basis exists to justify continued (emphasis added) application of the noneconomic damages cap. In order to support its conclusion, the Court noted: (1) physicians who go to medical school in Florida are now staying in Florida to practice at a rate that only three other states exceed; (2) medical malpractice filings have decreased significantly, down 60 percent from 5,829 in 2003-04 to 2,303 in 2011-12; and (3) total payout for non-economic damages dropped from \$195 million in 2004 to \$140 million in 2012, roughly a 30 percent drop. In his dissent, Justice Polston observed that "[t]his information could just have easily (and perhaps more likely) supported the argument that the cap had its intended effect and that, if the cap was eliminated, the medical malpractice crisis would return with full force."

Under the Court's reasoning, even a law that had a rational basis when enacted could be challenged decades later. This reason empowers judges to decide which statutes still serve their purpose and which do not and are therefore no longer applicable. A search of Florida Statutes will surely reveal laws

that today seem outdated or even silly. We entrust to the legislature the responsibility to amend or repeal those laws as needed. Absent some guiding principle, the court's decision would appear to seize this enormous and unbridled power from the legislature.

The equal protection basis of the Court's ruling came as a surprise. At the outset of oral argument, Justice Pariente immediately refocused plaintiffs' counsel when he raised equal protection as a ground for invalidating the law. Noting that the U.S. Court of Appeals for the Eleventh Circuit had already found a rational

basis for the law before certifying state constitutional issues to the Florida Supreme Court, Justice Pariente observed, "we have consistently applied the state Constitution equal protection in a similar way." She noted, "our hands are tied in this case" because of the Eleventh Circuit ruling. "Do you know any that interprets our constitution differently than the Federal Constitution? I don't know one," she said. Justice Lewis appeared to agree. "So there's my problem," Justice Pariente said. "My suggestion is let's look at the right of access to the court argument." Once Justice Pariente so clearly and unequivocally redirected the argument, both plaintiffs' counsel and defense counsel spent their time addressing other grounds. Two years later, the entire decision turned on the Equal Protection Clause.



Following the decision, members of the 2002 Governor's Task Force that studied this issue including current and past presidents and trustees of five Florida universities, wrote a letter to legislative leaders in Tallahassee, finding the court's conclusion "most disconcerting" and that the decision "raises serious questions concerning the separation of powers that should concern the legislative branch." Disheartened, task force members could "only conclude that [the Court] made an egregious mistake."

Why did the Florida Supreme Court totally depart from both federal and Florida constitutional precedent to strike down the noneconomic damage limit on rational basis grounds? Under the Florida Constitution, the right of access to courts and right to jury trial protects only rights that existed at common law before adoption of the Florida Constitution. These bases were unavailable because the McCall case was a wrongful death claim, which was not recognized at common law, and since Florida law did not permit survivors to recover noneconomic damages until 1972. Five members of the Court perceived rational basis review as providing sufficient flexibility to invalidate the cap. The plaintiffs bar is already citing McCall as precedent in other states in an attempt to have other state Supreme Courts throw out caps on noneconomic damages. Courts in other states looking at McCall should view the decision for what it is: an anomaly in the application of rational basis review that demonstrates what occurs when judges allow their policy preferences to trump fundamental principles of constitutional law.

William Large is the President of the Florida Justice Reform Institute, which filed an amicus brief in Estate of McCall v. United States. He served as Governor Jeb Bush's deputy chief of staff and as general counsel for the Florida Department of Health. He is currently President of the Florida Justice Reform Institute.