Florida Society for Healthcare Risk Management & Patient Safety

A Final Goodbye to Statutory Caps in Medical Malpractice Cases?

By: Paula J. Lozano and Saray Noda

On June 8, 2017, in an unsurprising decision, the Florida Supreme Court held statutory caps on non-economic damages in medical malpractice cases resulting in personal injury are unconstitutional. In North Broward Hospital District v. Kalitan, Case No. SC15-1858 (June 8, 2017), the Florida Supreme Court extended the 2014 decision in Estate of McCall v. United States, 134 So. 3d 894 (Fla. 2014). The court's monumental decision in McCall dealt solely with the constitutionality of caps on non-economic damages in wrongful death medical malpractice cases. As a result of Kalitan, we have final confirmation that Florida's statutory caps on damages are a thing of the past-for now anyway.

In Kalitan, the plaintiff suffered from a perforated esophagus following carpal tunnel surgery. A jury awarded $4 million to the plaintiff for past and future non-economic damages. Post-verdict, the trial court capped the plaintiff's non-economic damages at $2 million pursuant to § 766.118, Florida Statutes. The Fourth District Court of Appeal relied on the Florida Supreme Court's decision in McCall and held caps on personal injury non-economic damages as unconstitutional. Being the first and only appellate court in Florida to rule on the issue, the Fourth District Court's decision in Kalitan became binding precedent in 2015. The defendant challenged the appellate court's decision and petitioned the Florida Supreme Court for relief.

As expected, McCall played a major role in our Supreme Court's analysis in Kalitan. The Court considered whether caps on damages violate equal protection under the Florida Constitution. Equal protection allows all citizens to enjoy the same rights and bear the same burdens imposed by the law to others in a similar situation. The Court explained laws challenged on an equal protection basis must pass the following "rational basis test": 1) bear a rational and reasonable relationship to a legitimate state

objective; and, 2) cannot be arbitrary or capriciously imposed. The court concluded "the caps under section 766.118 do not pass the rational basis test because in 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." Kalitan, 2017 WL 2481225 at *7 (internal citations omitted).

The Florida Supreme Court, once again, shared its skepticism of the "medical malpractice crisis" and how the non-economic damages caps alleviated the crisis. The Florida legislature had justified the caps as a mechanism to reduce doctors leaving Florida, retiring early, or refusing to perform high risk procedures. However, "[t]here is no mechanism in place to assure that savings are passed on from the insurance companies to the doctors in accordance with the stated purpose of alleviating the rising premiums." Kalitan, 2017 WL 2481225 at *5 (internal citations omitted).

While four justices joined the majority in Kalitan, Justice Polston dissented with two other justices, Canady and Lawson. The dissent, authored by Justice Polston, criticized the majority for improperly interjecting the judiciary into a legislative function. "It is the Legislature's task to decide whether a medical malpractice crisis exists, whether a medical malpractice crisis has abated, and whether the Florida Statutes should be amended accordingly." Kalitan, 2017 WL 2481225 at *10.

Moving forward, medical malpractice cases must be evaluated without consideration of any caps on damages. It is important to also consider the increased verdicts throughout the State of Florida over the last five years or so. Catastrophic cases have the potential to return multi-million dollar verdicts, which places a considerable burden on healthcare providers, Risk Management, and insurance companies. Noteworthy, in December 2016, the American Tort Reform Association ranked Florida as 4th on their list of "Judicial Hellholes." Additionally, several watchdog groups have noted a substantial increase in political contributions to state political campaigns and super PACs by Florida personal injury lawyers. Thus, it is not surprising Florida does not yet have a proposed bill re-introducing medical malpractice non-economic damages caps.

The only indication of new legislation affecting non-economic damages in malpractice cases is the Protecting Access to Care Act. This federal bill, passed by the House in late June, 2017, would limit non-economic damages to $250,000.00 for cases involving a federal program-Medicare, Medicaid, or coverage that is partly paid for by a government subsidy or tax benefit. The bill would also limit attorney's fees for plaintiffs' lawyers. Since the bill is not yet law, the implications, applicability, and state law preemption issues remain unclear and pure conjecture at best.

We had a good run with the statutory caps, Florida. Although we no longer have that cushion, we should anticipate a modified version in the future. With states like California, New Jersey, North Carolina, and Texas, that have successfully protected its healthcare providers with statutory caps for a number of years, it is probable Florida

will have its day in the Tort-Reform-sun again.

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