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Case Law Update

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Medical Malpractice

North Broward Hosp. Dist. v. Kalitan
Nos. 4D11-4806, 4D11-4833, and 4D11-4834, 2015 WL 3973075
(Fla. 4th DCA July 1, 2015)

Following *McCall v. United States*, 134 So. 3d 894 (Fla. 2014), the Fourth DCA holds that caps in medical malpractice cases imposed by §768.118, Fla. Stat. (2005) are unconstitutional in personal injury cases, even when there is only one plaintiff. The caps violate the equal protection provision of Art. I, §2, Fla. Const. regardless of the number of claimants.

McCall was a wrongful death case with multiple claimants in which the Florida Supreme Court ruled the caps were unconstitutional. Carefully analyzing the reasoning of the *McCall* plurality and concurring opinions, the Fourth DCA summarized:

> The two opinions for the five-justice majority conclude that, even assuming there was a legitimate interest when section 766.118 was enacted, "the current data reflects that it has subsided" and no legitimate interest remains. *Id.* at 914 (Lewis, J., plurality opinion); *see also id.* at 920 (Pariente, J., concurring).
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> Per the *McCall* plurality and concurring opinions, we are compelled to conclude that section 766.118 presently lacks a rational and reasonable relation to any state objective, and thus fails both the concurring opinion's "smell test" as well as the rational basis test. *Id.* at 920 (Pariente, J., concurring).
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> Therefore, adhering to *McCall*, the section 766.118 caps are unconstitutional not only in wrongful death actions, but also in personal injury suits as they violate equal protection. It makes no difference that the caps apply horizontally to multiple claimants in a wrongful death case (as in *McCall*) or vertically to a single claimant in a personal injury case who suffers noneconomic damages in excess of the caps (as is the case here). Whereas the caps on noneconomic damages in section 766.118 fully compensate those individuals with noneconomic damages in an amount that falls below the caps, injured parties with noneconomic damages in excess of the caps are not fully compensated.
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> So long as the caps discriminate between classes of medical malpractice victims, as they do in the personal injury context (where the claimants with little noneconomic damage can be awarded all of their damages, in contrast to those claimants whose noneconomic damages are deemed to exceed the level to which the caps apply), they are rendered unconstitutional by McCall, notwithstanding the Legislature's intentions.

The court also rejected the defense argument that *McCall* should not apply retroactively, noting that the Supreme Court did not limit its decision to prospective application.

Miles v. Weingrad
— So.3d —— 2015 WL 2401261 (Fla. May 21, 2015)

The Supreme Court holds that the medical malpractice caps statute does not apply retroactively. A medical malpractice cause of action vests at the time the malpractice occurs and cannot be impaired by a subsequently enacted statute.

The court did not address the constitutionality of the statute, apparently following the well established rule that courts will avoid constitutional issues when the case can be decided on another ground. Therefore, defendants should not be heard to argue that this decision implicitly supports the argument that the statute is constitutional in a personal injury case.

Sovereign Immunity

Plancher v. UCF Athletics Ass'n, Inc.

— So.3d —— 2015 WL 2458015 (Fla. May 28, 2015)

The University of Central Florida Athletics Association is entitled to sovereign immunity because of the extent of control the State exercised over it. The State controlled its board of directors and its day-to-day activities.

The court clarifies that, when a verdict is obtained against a sovereign entity in excess of the limits imposed by §768.28, Fla. Stat., judgment should be entered in the full amount of the verdict. However, the state is only liable to pay up to the statutory cap, unless the plaintiff succeeds with a claims bill.

Citizens Property Ins. Corp. v. Perdido Sun Condominium Ass'n, Inc.

— So.3d —— 2015 WL 2236719 (Fla. May 14, 2015)

The Supreme Court holds that Citizens, which was created by the legislature, is immune from first party bad faith claims under §624.155, Fla. Stat.

Inconsistent Verdict

Coba v. Tricam Industries, Inc.

— So.3d —— 2015 WL 2236905 (Fla. May 14, 2015)

A verdict is inconsistent when two definite findings of fact material to the judgment are mutually exclusive.

The Supreme Court holds that, "to preserve the issue of an inconsistent verdict, the party claiming inconsistency must raise the issue before the jury is discharged and ask the trial court to reinstruct the jury and send it back for further deliberations."

The court reversed a decision of the Third DCA in a products liability case that had ordered a JNOV in favor of the defendants where the jury had found that the product was not defective but that the defendants were negligent. The court rejected a ruling of the Third DCA that allowed the issue to be raised for the first time post trial where the inconsistency is of a "fundamental nature,"

> "[W]e hold that a timely objection is required to an inconsistent verdict in a civil case and disapprove the use of the 'fundamental nature' exception to the general law pertaining to inconsistent verdicts as has been carved out for products liability cases. In circumstances involving an inconsistent verdict, a party is still obligated to object prior to the time that the jury is discharged so the parties and the trial court can consider whether the jury's confusion can be rectified through additional jury instructions or a new verdict form. If a party fails to timely object to an inconsistent verdict, that party waives the objection and unless there is no evidence to support one finding, the trial court may properly enter judgment pursuant to that verdict."

Expert Witnesses - Limiting Number of Experts

Woodson v. Go,

No. 5D13–3311, 2015 WL 3903589 (Fla. 5th DCA June 26, 2015)

Receding from *Lake v. Clark*, 533 So.2d 797 (Fla. 5th DCA 1988), the Fifth DCA has joined the other district courts of appeal in holding that a trial judge has discretion, pursuant to §90.612(b), Fla. Stat., and Fla. R. Civ. P. 1.200(b)(4), to limit the number of expert witnesses each party may call in a medical malpractice case. However, the parties should be notified in advance of the limit, not during trial.