



NO RATIONAL BASIS FOR FLORIDA HIGH COURT'S NULLIFICATION OF STATUTORY NONECONOMIC DAMAGES CAP

by William W. Large

In a 5-2 plurality decision on March 13, 2014, 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 civil justice reform. When this occurs, courts usually invalidate laws based on unique state constitutional provisions, such as the "right of access to courts" or a "single subject" rule. 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*, 134 So.3d 894 (Fla. 2014), may be the first of its kind: a state high court striking down a law under a 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 protected classification of citizens, such as minorities, 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, courts must uphold laws 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). "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).

The Florida legislature enacted a noneconomic damage limit after substantial deliberation over the course of one regular legislative session and three special sessions. 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 Florida faced a crisis in the affordability of medical malpractice insurance that was causing a critical reduction in the availability of health care. Testimony included scores of examples. 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. Eighty percent of Miami obstetricians carried no insurance. Hospitals discontinued maternity and trauma services because of the high cost of malpractice coverage for the needed specialists.

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To address the crisis, the legislature mandated regulatory changes for healthcare providers and numerous insurance reforms. The legislature found that the rising cost of malpractice insurance was driven largely by limitless awards of noneconomic damages, making a statutory limit the most direct means of alleviating the problem. The legislature found that without a cap, no reform plan could succeed in controlling costs and thereby improving access to health care. After the reforms were put in place, the medical malpractice crisis abated.

Eleven years later, the Florida Supreme Court set aside its prior equal protection precedent law and simply concluded that the statutory caps on noneconomic damages were unfair and purely arbitrary. Justice Lewis's plurality opinion initially focused on whether a limit could constitutionally apply on a "per incident" or "per claimant" basis in wrongful death cases, but then 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 legislative record and found it did not prove that a 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* 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 exceeded in only three other states; and (2) medical malpractice filings fell 60 percent, and noneconomic damage payouts dropped roughly 30 percent, since the law took effect. Justice Polston's dissent observed that "[t]his information could just as 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 reasoning empowers judges to decide which statutes still serve their original purpose and which do not and are therefore no longer applicable. We entrust to the legislature the responsibility to amend or repeal unneeded laws. Absent some limiting 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 "answered the equal protection challenge to Florida's law under the Federal Constitution," Justice Pariente observed, "we have consistently applied the State Constitution equal protection in a similar way." She then asked, "Do you know any decision of this Court that's interpreted the equal protection clause of our Constitution differently than the Federal Constitution? I don't know one." Justice Lewis appeared to agree. Once Justice Pariente unequivocally redirected the equal protection argument, both plaintiffs' counsel and defense counsel addressed other grounds. Yet, two years later, the decision relied on the Equal Protection Clause.

Why did the Court depart from both federal and Florida constitutional precedent to strike down the noneconomic damage limit? Under the Florida Constitution, the rights of access to courts and to jury trial protects only rights that existed at common law before adoption of the Florida Constitution. These bases for relief were unavailable because the *McCall* case was a wrongful death claim, which was not recognized at common law. In fact, Florida law did not permit survivors to recover noneconomic damages until 1972. Consequently, five members of the Court decided to use rational basis review as providing sufficient flexibility to invalidate the cap.

The Florida Supreme Court's application of rational basis review improperly suggests that courts can strike down a duly-enacted statute if a majority of a court's members disagree with the original need for a law or believes that a law is no longer necessary. Judges in other states looking at *McCall* should view the decision for what it is: an anomaly in the application of rational basis review aimed at reaching a particular result—and a sad day for the Rule of Law.