

## **Florida's Second District Court of Appeal Declares Florida's Non-Economic Damages Caps Unconstitutional in Medical Malpractice Personal Injury Actions**

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In another unfortunate blow to Florida's statutory caps on non-economic damages awards in medical malpractice cases, the state's Second District Court of Appeal recently became the second of Florida's five intermediate appellate courts to declare the state's statutory caps on non-economic damages unconstitutional in medical malpractice personal injury actions. In *Suarez v. Port Charlotte HMA, LLC*, 41 Fla. L. Weekly D2393a (Fla. 2d DCA Nov. 4, 2016), a case involving alleged medical negligence in the delivery of a premature baby, the jury awarded total damages of \$13,550,000 to the infant and her mother against the hospital at which the infant was delivered, including \$4,000,000 in non-economic damages to the infant. Based on the \$1,500,000 cap on non-economic damages in medical malpractice personal injury actions set forth in Section 766.118(3), Florida Statutes, the hospital moved for a reduction in the non-economic damages awarded to the infant to \$1,500,000. The trial court denied the motion, relying on *Kalitan v. North Broward Hospital District*, 174 So.3d 403 (Fla. 4th DCA 2015), a case which previously declared those caps unconstitutional, as the only District Court of Appeal case on the issue and therefore constituting binding precedent on the issue. The Second District upheld this denial and further agreed with the Fourth District's conclusion in *Kalitan* that the damages caps in Section 766.118(3) are unconstitutional.

In *Kalitan*, Florida's Fourth District Court of Appeal declared the same caps in Section 766.118(3) to be unconstitutional in medical malpractice personal injury actions. The hospital district appealed to the Florida Supreme Court and oral argument was held in June 2016 with a written decision yet to be issued. Nonetheless, considering the Florida Supreme Court's decision in *McCall v. United States* declaring the caps on non-economic damages in medical malpractice wrongful death cases unconstitutional, 134 So.3d 894 (Fla. 2014), it is likely Florida's highest court will agree with the Fourth and Second District Courts of Appeal and strike down the caps on non-economic damages in medical malpractice personal injury actions.

Considering the *Kalitan* case is currently pending before the Florida Supreme Court and a written decision could be issued at any time now, it seems only a matter of time before *Kalitan* is affirmed and Florida's cap on non-economic damages in medical malpractice personal injury cases is struck down as unconstitutional by Florida's highest court. Considering the *McCall* decision on the unconstitutionality of the damages caps in medical malpractice wrongful death actions, the chances were already very high that Florida's Supreme Court would take a similar view on the non-economic damages cap in medical malpractice personal injury actions. However, with the addition of a second intermediate appellate court having decided that the caps are unconstitutional in *Suarez*, the already-high chances of an adverse decision for healthcare practitioner and medical malpractice insurers in Florida have only increased. This will make life less predictable both for physicians and other healthcare providers in Florida in terms of what they will pay for future medical malpractice premiums and will also negatively affect insurers' ability to set reserves on medical malpractice claims with any reasonable certainty in a post damages cap environment.