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The Future of Statutory Caps on Noneconomic Damages in Florida Medical Malpractice Actions: Constitutional or Not?

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THE FUTURE OF STATUTORY CAPS ON NONECONOMIC DAMAGES IN FLORIDA MEDICAL MALPRACTICE ACTIONS: CONSTITUTIONAL OR NOT?

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Abstract

Florida courts rely on the same legislative findings to both uphold noneconomic damage caps in medical malpractice actions in some scenarios and strike down the same caps in others. However, Florida's position does not mirror the nationwide stance on this issue. After offering an overview of the national trend regarding the caps—an analysis of the Florida caps and corresponding cases—this Note will explain some inconsistencies in Florida case law. It will further discuss the future of Florida's medical malpractice caps in the wake of a newly constructed conservative Supreme Court.

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I. INTRODUCTION

A. *Nationwide Caps on Noneconomic Damages in Medical Malpractice Actions*

Across America, states disagree regarding the constitutionality of applying caps to noneconomic damages in medical malpractice actions.[1] The debate surrounding capping of damages has "good policy reasons" and "good arguments on both sides [as to] whether the caps can withstand constitutional scrutiny."[2] This issue is a relevant and interesting area of study because persuasive case law exists on both sides of the argument. For context, medical malpractice cases can result in verdicts awarding three potential types of damages: economic, noneconomic, and punitive damages.[3] While states vary in the exact definitions of each particular type of damage,[4] the essence of each damage category is similar throughout the country.[5] Economic damages are damages relating to a patient's actual economic loss, which can include medical expenses, future care, and lost earnings.[6] Noneconomic damages are for seemingly intangible losses, for example, amount of pain and suffering associated, loss of consortium, or a decline in life quality.[7] Punitive damages are awards, usually high in value, that attempt to punish the conduct of the defendants involved, as well as to encourage others to avoid acting in the same manner as the defendant in the case.[8]

Many states began discussing caps on noneconomic damages as a result of a national "medical malpractice crisis."[9] Caps on noneconomic damages, specifically, are discussed as a solution for a variety of reasons. Those in the medical profession—including medical professionals, hospital personnel, and other providers of health care—advocate for damage caps because such caps help to combat the high cost of administering care to patients, the high insurance premiums for doctors and hospitals, and "help with risk management due to the certainty of the

1. CTR. FOR JUST. & DEMOCRACY, CAPS ON COMPENSATORY DAMAGES: A SUMMARY, https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary [https://perma.cc/D3L9-TL54] (August 22, 2020).

2. Sue Ganske, *Noneconomic Damage Caps in Wrongful Death Medical Malpractice Cases – Are They Constitutional?*, 14 FLA. ST. U. BUS. REV. 31, 50 (2015).

3. Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damage Caps Constitutional – An Overview of State Litigation*, 33 J. L. MED. & ETHICS 515, 516 (2005).

4. Ganske, *supra* note 2, at 31 n.6 (citing for example Fla. Stat. § 766.202(3) (2014)).

5. *See* Kelly & Mello, *supra* note 3, at tbl.1.

6. Ganske, *supra* note 2, at 31.

7. *Id.*; JUSTIA, *Noneconomic Damages*, https://www.justia.com/injury/negligence-theory/non-economic-damages/ [https://perma.cc/4LTJ-DVP5] (last updated Apr. 2018).

8. Ganske, *supra* note 2, at 31–32.

9. Kelly & Mello, *supra* note 3, at 515.

maximum owed for these damages."[10] Such costs are a concern for many states that explore and pass caps on noneconomic damages.[11] Conversely, those seeking unlimited noneconomic damages argue that their nonphysical losses should be compensated, regardless of the difficulty in quantifying such damages.[12]

There is no uniformity between states as to whether to cap noneconomic damages.[13] In fact, state caps on damages "have been upheld under some state constitutions, while at the same time being struck down in other states with almost identical constitutional provisions."[14] The question of constitutionality in many states turns specifically on whether the statute or constitutional amendment violates equal protection.[15] In states where equal protection violations are advanced, plaintiffs argue that the existence of caps on noneconomic damages separates them into two distinct groups: "those whose injuries are valued below the cap . . . " who are allowed to collect their full damages, and "those with damages in excess of the cap (typically the most severely injured)," who are barred from recovering a portion of their losses.[16] States respond to these arguments with support or opposition through different mechanisms, including statutory provisions authorizing caps, constitutional amendments authorizing caps, or the state courts' striking down of such provisions.[17]

The constitutionality of statutory provisions or constitutional amendments regarding caps on medical malpractice noneconomic damages can also turn on the argument that such caps violate the constitutional right to access of courts.[18] A typical state provision for access to courts is that the courts of the state are available to every person, guaranteeing remedy for injury without undue delays.[19] It is important to note that state courts have interpreted this right of access to courts in varying manners—so it is necessary to look at state court opinions in each state to see exactly what its particular right of access to courts means.[20] Many state courts rule that "the rights protected by open-courts provisions [are] relatively narro[w] and hold that they are not

10. Ganske, *supra* note 2, at 33.

11. W. Kip Viscusi, *Medical Malpractice Reform: What Works and What Doesn't*, 96 DENV. L. REV. 775, 777 (2019).

12. Jared R. Love, *The "Soft Cap" Approach: An Alternative for Controlling Noneconomic Damages Awards*, 52 WASHBURN L.J. 119, 120 (2012).

13. CTR. FOR JUST. & DEMOCRACY, *supra* note 1.

14. Kelly & Mello, *supra* note 3, at 518.

15. Ganske, *supra* note 2, at 35 nn.42 & 48–49, 36 n.57.

16. Kelly & Mello, *supra* note 3, at 522.

17. Ganske, *supra* note 2, at 33.

18. Kelly & Mello, *supra* note 3, at 518.

19. *Id.*

20. *Id.*

significantly impinged by damage caps."[21] States that rule in this manner typically uphold the caps.[22] Other states have ruled that the caps on noneconomic damages violate the state right to open courts because "[the caps] denied catastrophically injured patients the right to collect their full damages award without creating any remedy."[23] Both arguments, as will be discussed below, hold merit.

B. *Florida's Approach to Capping Noneconomic Damages in Medical Malpractice Actions*

In Florida, specifically, statutory authority determines the amount of noneconomic damages in a medical malpractice action.[24] The Florida Legislature codified Florida Statute Section 766.118 in 2003 to purportedly combat "a medical malpractice insurance crisis of unprecedented magnitude."[25] The Florida Statutes define noneconomic damages as including "nonfinancial losses that would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses."[26] Florida Statutes Section 766.118 also includes six different categories of noneconomic damages that are to be capped in litigation.[27] The categories to be capped include noneconomic damages relating to: negligence of practitioners and nonpractitioner defendants in medical malpractice and wrongful death actions; practitioners and nonpractitioner defendants providing emergency services and care in medical malpractice actions; and practitioners providing services and care to a Medicaid recipient.[28] Florida Statutes Section 766.207(7)(b) also caps noneconomic damages at $250,000 per incident if the parties agree to arbitration of the medical malpractice claim.[29] In tandem with this section, Florida Statutes Section 766.209(4)(a) caps damages for parties who decline arbitration to $350,000.[30] This statute is triggered when the plaintiff who brings the action rejects the defendant's offer to engage in

21. *Id.* at 519.

22. *See, e.g.*, Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 905 (Mo. 1992) (en banc), *overruled by* Watts v. Lester E. Cox Medical Centers, 376 S.W.3d 633, 636 (Mo. 2012) (en banc) (reversing the lower court's judgment "to the extent that it caps non-economic damages").

23. Kelly & Mello, *supra* note 3, at 519.

24. FLA. STAT. § 766.118 (2019).

25. 2003 Fla. Laws 416.

26. FLA. STAT. § 766.202(8) (2019).

27. *Id.* § 766.118.

28. *Id.* § 766.118(6).

29. *Id.* § 766.207(7)(b).

30. *Id.* § 766.209(4)(a).

a binding arbitration to determine damages.[31] Section II of this Note will delve further into these statutes and the rationale behind passing each.[32]

The Florida Supreme Court has invalidated two of the caps listed in section 766.118.[33] In *Estate of McCall v. United States*,[34] the court held that the statutory cap on wrongful death noneconomic damages in medical malpractice actions is a violation of equal protection under the Florida Constitution.[35] Further, in *North Broward Hospital District v. Kalitan*,[36] the Florida Supreme Court also held that statutory caps on noneconomic damages for personal injury in medical malpractice actions violate the equal protection clause of Florida's Constitution.[37] Sections III and IV of this Note, respectively, will describe these two cases and explore the reasoning behind the two invalidations.[38]

In contrast, in *University of Miami v. Echarte*,[39] the Florida Supreme Court upheld caps for noneconomic damages when parties agree to arbitrate the claim despite constitutional challenges.[40] The *Echarte* court found the caps regarding arbitration in Florida Statutes Sections 766.207 and 766.209 constitutional.[41] Because of the nature of benefits a plaintiff receives when a claim goes to arbitration, the Florida Supreme Court deemed the state constitutional right of access to courts was met.[42] Other constitutional challenges, including equal protection, were not discussed at length in the majority opinion.[43] Section VI will describe the reasons that the arbitration cap has been deemed constitutional and arguments for and against this policy.[44]

The Florida Supreme Court also continues to uphold statutory caps in other scenarios. For example, section 766.118(4) codifies a statutory cap of $150,000 per claimant and $300,000 total for all claimants in an action arising out of the negligence of a practitioner providing emergency services and care.[45] There is no case law overturning these particular

31. *Id.*
32. *See infra* Section II.
33. Estate of McCall v. U.S., 134 So. 3d 894, 916 (Fla. 2014); N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 59 (Fla. 2017).
34. *Estate of McCall*, 134 So. 3d 894.
35. *Id.* at 916.
36. 219 So. 3d 49 (Fla. 2017).
37. *Id*. at 59.
38. *See infra* Sections III, IV.
39. Univ. of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993).
40. *Id.* at 197–98.
41. *Id.* at 190–91.
42. *Id.* at 194.
43. *Id.* at 191.
44. *See infra* Section VI.
45. FLA. STAT. § 766.118(4) (2019).

caps.[46] Additionally, the Florida Supreme Court upholds caps for noneconomic damages awarded to Medicaid recipients.[47] The ability of the Florida Supreme Court to support some caps while striking down others calls for an analysis of each cap to determine what makes the court take stances on different sides of the Florida Constitution for the respective caps. With the makeup of Florida's Supreme Court shifting to a more conservative bench,[48] the upholding of statutory caps on noneconomic damages is likely. Section VII will delve into the potential future of statutory caps in Florida.[49]

II. FLORIDA'S STATUTORY CAPS

A. *Florida Statutes Section 766.118*

The Florida Legislature passed Florida Statute Section 766.118 as part of a response to the spike of medical malpractice insurance costs and a supposed crisis in the medical malpractice liability industry.[50] A regarded crisis is "often the impetus for policy action."[51] In reaction to the impetus caused by such a crisis, the Legislature passed this statute and claimed that the high insurance rates in Florida were "forcing physicians to practice medicine without professional liability insurance, to leave Florida, [and] to not perform high-risk procedures, or to retire early from the practice of medicine."[52] After reviewing findings from a task force put together by the governor, the Legislature found that the creation of statutory caps on noneconomic damages would potentially reduce the high cost of medical malpractice insurance.[53] Further, the Legislature, in enacting this statute, reasoned that no possible "alternative measure" besides the caps would result in a similar combating of the purported crisis.[54]

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46. Besides *Estate of McCall v. United* States and *North Broward Hospital District v. Kalitan*, the only other case law that Westlaw shows overturning a provision of 766.118, which follows the holding in *North Broward Hospital District*, is *Port Charlotte HMA, LLC v. Suarez*, 210 So. 3d 187, 190 (Fla. 2d DCA 2016).

47. FLA. STAT. § 766.118(6) (2019).

48. Editorial, *The Most Conservative Florida Supreme Court in Decades*, SUN SENTINEL (Jan. 22, 2019, 1:50 PM), https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-florida-supreme-court-20190122-story.html [https://perma.cc/TMT8-DFYK].

49. *See infra* Section VII.

50. 2003 Fla. Laws 416.

51. Viscusi, *supra* note 11, at 777.

52. Estate of McCall v. United States, 134 So. 3d 894, 909 (Fla. 2014).

53. *Id.* at 930 & n.12.

54. *Id.* at 926 (quoting 2003 Fla. Laws 416: "The Legislature further finds that there is no alternative measure of accomplishing such result without imposing even greater limits upon the ability of persons to recover damages for medical malpractice.").

The statute lays out the following limitations on noneconomic damages.[55] Subsection 2(a) of section 766.118 caps noneconomic damages "for personal injury or wrongful death arising from medical negligence of practitioners, regardless of the number of such practitioner defendants" to $500,000 per claimant.[56] Subsection 2(b) of section 766.118 states, "if the negligence resulted in a permanent vegetative state or death, the total noneconomic damages recoverable from all practitioners, regardless of the number of claimants . . . shall not exceed $1 million."[57] If the injury does not result in permanent vegetative state or death, the total noneconomic damages are capped at $1 million if there is a determination of "manifest injustice" or "special circumstances" that occur, and the "trier of fact determines that the defendant's negligence caused a catastrophic injury to the patient."[58] Catastrophic injury is defined in the statute to include spinal cord injuries, certain amputations, severe brain or head injuries, severe motor or sensory injuries, severe neurological injuries, and certain burns.[59] The statute "provides no guidance on how one would determine that death or an injury placing one in a 'permanent vegetative state' could not be considered catastrophic or particularly severe."[60]

The statute continues to further differentiate rewards based on what person causes the medical negligence.[61] If a nonpractitioner defendant causes a medical injury, the cap for noneconomic damages is $750,000, instead of $500,000.[62] Again, if the injury results in a permanent vegetative state or death, or a "catastrophic injury" caused by the nonpractitioner defendant, the damage award is capped at $1,500,000.[63]

The statute additionally mandates a cap for noneconomic damages for negligence of practitioners providing emergency services and care at $150,000 per claimant, and the total noneconomic damages for all claimants to be a maximum of $300,000.[64] Lastly, the statute prescribes a cap of $300,000 for noneconomic damages per claimant for actions arising out of medical malpractice "committed in the course of providing medical services and medical care to a Medicaid recipient."[65] Similar to the other provisions of this statute, the defendant's identity in the action

55. FLA. STAT. § 766.118 (2019).
56. *Id.*§ 766.118(2)(a).
57. *Id.* § 766.118(2)(b).
58. *Id.*
59. *Id.* § 766.118(1).
60. William E. Adams Jr., *Tort Law: 2001-2003 Survey of Florida Law*, 28 NOVA L. REV. 317, 319 (2004).
61. *See* FLA. STAT. § 766.118.
62. *Id.* § 766.118(3)(a).
63. *Id.* § 766.118(3)(b).
64. *Id.* § 766.118(4)(a)–(b).
65. *Id.* § 766.118(6).

is also dispositive the maximum award.[66] For a nonpractitioner defendant, the noneconomic damages cap is at $750,000 per claimant.[67]

It is key to note, however, the report relied on by the Legislature in passing these statutory caps did not seem to be as factually sound as the Legislature took it to be.[68] The report, authored by the Academic Task Force for Review of the Insurance and Tort Systems (Task Force), detailed the current state of medical malpractice insurance, litigation costs, and premiums.[69] The Task Force reported, "the size and increasing frequency of the very large [medical malpractice] claims were found to be a problem."[70] This problem, the Task Force found, was creating an alleged medical malpractice crisis, causing an exodus of physicians, drastically high insurance rates, and problems for the Florida medical community.[71] The *McCall* court, however, found the Task Force's findings to be "dubious and questionable at the very best."[72] The *McCall* court noted that, according to a 2003 report, the number of physicians in Florida grew from 1991 to 2001.[73] This seems to suggest that some of the reasons for passing the statute were unfounded, self-conclusive, and not indicative of evidence that there was in fact a crisis in the Florida medical malpractice liability industry.[74] Additionally, the growing cost of medical malpractice insurance was not necessarily due to the high noneconomic damage rewards but included an ebb and flow in the market and a reduction in the number of available insurers.[75] The lack of evidentiary support in this report[76] ultimately led to the court's decision to render certain portions of the statute unconstitutional.[77] This will be discussed later in Sections IV and V of this Note.[78]

B. *Florida Statutes Section 766.207*

Similarly, Florida Statutes Section 766.207 aimed to fight the high cost of medical malpractice insurance.[79] In addition to the reasons

66. *See id.* § 766.118.
67. FLA. STAT. § 766.118(5)(a).
68. *See* Estate of McCall v. United States, 134 So. 3d 894, 906 (Fla. 2014).
69. *See* Univ. of Miami v. Echarte, 618 So. 2d 189, 191 (1993).
70. *Id.*
71. *Estate of McCall*, 134 So. 3d at 906.
72. *Id.* at 909.
73. *Id.* at 906.
74. R. Jason Richards, *Capping Non-Economic Medical Malpractice Damages: How the Florida Supreme Court Should Decide the Issue*, 42 STETSON L. REV. 113, 133 (2012).
75. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-836, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE, 9–10 (2003).
76. *Id.*
77. *Estate of McCall*, 134 So. 3d at 909.
78. *See infra* Sections IV, V.
79. 2003 Fla. Laws 416.

mentioned above regarding a purported medical malpractice crisis, the Legislature added reasons for targeting noneconomic damages specifically.[80] The Legislature stated that targeting "arbitrary" noneconomic damages would result in cheaper medical malpractice insurance, as a part of its effort to balance the interest of the harmed individual with society's overarching interest in reducing the cost of medical liability insurance.[81] Florida's reasoning echoes that of other state legislatures that have discussed targeting noneconomic damages.[82] Such reasoning supports capping noneconomic damages, as opposed to other types of damages, because "[i]t is politically unpopular to suggest that injured persons should not be fully compensated for their economic losses."[83] Further, the fact that many juries return very different awards of noneconomic damages when a similar injury results can raise questions of "horizontal equity."[84]

Florida Statutes Section 766.207 allows for either party to request that a medical arbitration panel determine the amount of damages in the case if the plaintiff's reasonable grounds for medical malpractice are intact after a pre-suit investigation is complete.[85] The statute continues on and places the cap on noneconomic damages at $250,000 per incident.[86] It is important to note, however, that when a claim under this statute goes to arbitration, a defendant "who submits to arbitration under this section shall be jointly and severally liable for all damages assessed pursuant to this section."[87] This means that the defendant is admitting liability—something that dramatically reduces a plaintiff's costs, time, and effort in litigating and proving its case.[88] The statute also provides, in subsection (7), that the defendant must promptly pay the arbitration award, attorney's fees and costs (up to fifteen percent of the award), and the cost of arbitration.[89] Because medical malpractice cases can take years to litigate, resolve, and ultimately produce payment,[90] this provision, too, provides a substantial benefit to a medical malpractice plaintiff that agrees to arbitration.

80. *Id.*
81. *Id.*
82. *E.g.*, 2012 Mich. Pub. Acts 608.
83. Kelly & Mello, *supra* note 3, at 516.
84. *Id.* at 517.
85. Univ. of Miami v. Echarte, 618 So. 2d 189, 193 (1993).
86. FLA. STAT. § 766.207(7)(b) (2019).
87. *Id.* § 766.207(7)(h).
88. Viscusi, *supra* note 11, at 789.
89. *Echarte*, 618 So. 2d at 193.
90. Viscusi, *supra* note 11, at 781.

C. *Florida Statutes Section 766.209*

Florida Statutes Section 766.209 governs the effects of a plaintiff's failure to accept the defendant's offer to arbitrate.[91] As discussed above, in Florida Statutes Section 766.207, arbitration offers a claimant in a medical malpractice action a slew of benefits.[92] This corresponding section details the consequences of not accepting voluntary binding arbitration.[93] First, the statute allows for a jury trial if neither party agrees or requests to arbitrate the claim.[94] If the defendant refuses an offer to arbitrate, the damages in the jury trial will be awarded pursuant to Florida Statutes Section 766.118—which as discussed above, would result in *no* cap on economic damages.[95] If, however, the plaintiff fails to agree to arbitration requested by the defendant, then caps enter into play.[96] Since the case will obviously then proceed to trial, "[t]he damages awardable at trial shall be limited to net economic damages, plus noneconomic damages not to exceed $350,000 per incident."[97] The statute then specifically discusses the Florida Legislature's intent with respect to passing such a cap.[98] It sets out a rationale based on the balancing of both litigants' interests: "such [a] conditional limit on noneconomic damages is warranted by the claimant's refusal to accept arbitration and represents an appropriate balance between the interests of all patients who ultimately pay for medical negligence losses and the interests of those patients who are injured as a result . . . ."[99] This statute and its reasoning have been upheld despite constitutional challenges before the Florida Supreme Court.[100]

III. THE *MCCALL* CASE

In *Estate of McCall v. United States*, the Florida Supreme Court, in a plurality decision, declared the statutory cap on wrongful death noneconomic damages recoverable in an action for medical malpractice to be unconstitutional under the equal protection clause of the Florida Constitution.[101] *McCall* is the first case from the Florida Supreme Court

91. FLA. STAT. § 766.209 (2019).
92. *Id.* § 766.207.
93. *Id.* § 766.209.
94. *Id.* § 766.209(2).
95. *Id.* § 766.209(3).
96. *Id.* § 766.209(4)(a).
97. FLA. STAT. § 766.209(4)(a).
98. *Id.*
99. *Id.*
100. *See, e.g.*, Univ. of Miami v. Echarte, 618 So. 2d 190 (1993).
101. Estate of McCall v. United States, 134 So. 3d 894, 916 (2014).

to declare a portion of section 766.118 unconstitutional.[102] The court answered a certified question of state constitutional law: "Does the statutory cap on wrongful death noneconomic damages, Fla. Stat. § 766.118, violate the right to equal protection under article I, section 2 of the Florida Constitution?"[103]

In *McCall*, the decedent's parents and surviving son filed an action against the United States on behalf of the decedent's estate, as the medical negligence occurred at a clinic of the United States Air Force.[104] The deceased in *McCall* died as a result of medical negligence relating to the delivery of her child.[105] After the estate prevailed on its claim for wrongful death, the United States District Court for the Northern District of Florida "concluded that the Petitioners' noneconomic damages, or nonfinancial losses, totaled $2 million, including $500,000 for [the deceased]'s son and $750,000 for each of her parents."[106] The court, however, limited those damages pursuant to section 766.118.[107] On appeal, the Eleventh Circuit certified the question above regarding the constitutionality of caps for the Florida Supreme Court.[108]

Article I, section 2 of the Florida Constitution, which is Florida's equal protection clause, states, "[a]ll natural persons, female and male alike, are equal before the law."[109] The court conducted an equal protection analysis to determine whether the statute was constitutional using the rational basis test, as no suspect class or fundamental right existed.[110] The court applied the rational basis test as follows: "(1) whether the challenged statute serves a legitimate governmental purpose, *and* (2) whether it was reasonable for the Legislature to believe that the challenged classification would promote that purpose."[111] In carrying out this test, the court investigated the Legislature's factual findings.[112] To conduct an investigation "to invalidate an entire enactment is relatively rare."[113]

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102. *Florida Supreme Court Finds $1 Million Noneconomic Damages Cap Unconstitutional*, 9 WESTLAW J. MED. MALPRACTICE 1, 1 (2014) [hereinafter *Florida Supreme Court*].

103. *Estate of McCall*, 134 So. 3d at 897 (all caps in original).

104. *Id.* at 897, 917.

105. *Id.* at 898–99 (citing Estate of McCall v. United States, 642 F.3d 944, 946–47 (11th Cir. 2011)); *see also Florida Supreme Court*, *supra* note 102, at 1.

106. *Estate of McCall*, 134 So. 3d at 899.

107. *Id.*

108. *Id.*

109. FLA. CONST. art. I, § 2.

110. *Estate of McCall*, 134 So. 3d at 901.

111. *Id.* at 905 (quoting Warren v. State Farm Mut. Auto. Ins. Co., 899 So. 2d 1090, 1095 (Fla. 2005)).

112. *Id.* at 901; *see also* James Bush & James Edgar, *Florida Medical Malpractice Claims: Elimination of Noneconomic Damages Caps*, 15 HEALTH L. LITIG. 3 (2017).

113. Bush & Edgar, *supra* note 112, at 3.

The first prong of the rational basis test was not satisfied.[114] The court reasoned, "aggregate caps or limitations on noneconomic damages violate equal protection guarantees under the Florida Constitution when applied without regard to the number of claimants entitled to recovery."[115] After the application of a cap to noneconomic damages, regardless of the number of claimants in this case, the court found that multiple claimants would be in a worse position than an individual claimant.[116] The "modest amount" saved by this statute in light of the unfair treatment to multiple claimants caused the court to rule the statute failed to meet the first prong of the analysis.[117] Further, the court found no relationship to a legitimate state objective.[118] The Florida Legislature relied on reports that that the jury awards of noneconomic damages were a significant factor in the medical liability insurance rates.[119] The court determined, however, that these findings were "not fully supported by available data."[120]

The second prong also failed, according to the court.[121] In passing the statute, the Senate Judiciary Committee listened to testimony regarding the "purported health care crisis."[122] Transcripts of debates in the Florida Senate prove that the Legislature heard that the number of doctors and medical school applicants had increased, and there was no closing of emergency rooms due to medical malpractice.[123] The Florida Senate also heard testimony that the caps would not affect the rates of medical liability insurance.[124] The court reasoned that because of this testimony, as well as other materials made available to the Legislature, there was an unfounded belief that this statute was necessary.[125] Based on this reasoning, the court found no rational basis and held that the wrongful death noneconomic damages cap was unconstitutional under the equal protection clause of the Florida Constitution.[126]

Conservative Chief Justice Polston, joined by Justice Canady, another conservative justice, wrote the dissenting opinion in *McCall*.[127] In regards to the plurality opinion's analysis of the statute's equal protection

114. *Estate of McCall*, 134 So. 3d at 900–01.
115. *Id.* at 901.
116. *Id.* at 901–02.
117. *Id.* at 903.
118. *Florida Supreme Court*, *supra* note 102, at 1.
119. *Estate of McCall*, 134 So. 3d at 906.
120. *Id.*
121. *Id.* at 908.
122. *Id.*
123. *Id.*
124. *Id.* at 910.
125. *Florida Supreme Court*, *supra* note 102, at 2.
126. *Estate of McCall*, 134 So. 3d at 916.
127. *Id.* at 922; *see also* SUN SENTINEL, *supra* note 48.

violation, Chief Justice Polston focused in on three key areas: the legislative findings, the rational basis test standard, and the Florida Supreme Court's precedent in deciding similar issues.[128] First, the dissent suggested that there were in fact legitimate "legislative findings that indicated the state was in the midst of a medical-malpractice-insurance 'crisis' in 2003 that threatened the quality and availability of health care," and that the court should not ignore those findings.[129] Polston argued, in opposition to the plurality's opinion that the legislative findings were unfounded, that the Legislature's efforts in investigating this crisis included "issu[ing] a report on the issue, h[o]ld[ing] public hearings, hear[ing] expert testimony, and review[ing] another report prepared by the Governor's Task Force that recommended a per incident cap to remedy the problem."[130] The Legislature also undertook other steps, besides the caps, to solve this problem: tighter regulation of the industry and license requirements, which were not found unconstitutional.[131]

Second, the dissent argued that the rational basis test was clearly satisfied with regard to the statute.[132] Calling the rational basis analysis a relatively easy standard to meet, Chief Justice Polston's main argument was that the judicial branch, in rendering this statute unconstitutional, overstepped its constitutional boundaries.[133] He argued that the judiciary, under a rational basis analysis, must not decide if the statute at issue provides the *best* solution, only that it takes aim at a legitimate goal and is related rationally to that goal.[134] Chief Justice Polston also stated that the plurality did not take into account the fact that the noneconomic damage caps were rationally related to the crisis.[135] Scholars agree with this argument, that under rational basis review, "[l]aws subject to this level of review are almost always upheld, even if the classification is not the best method for accomplishing the law's stated goal."[136]

The dissent also pointed out inconsistences in the court's equal protection analysis in relation to its own precedent.[137] Chief Justice Polston pointed out that the court in *Pinillos v. Cedars of Lebanon Hospital Corp.*,[138] deemed the capping of damages to be rationally related

128. *Estate of McCall*, at 924, 932.

129. News Service of Florida, *Florida Supreme Court Throws Out Malpractice Caps*, ORLANDO SENTINEL, Mar. 13, 2014, https://www.orlandosentinel.com/news/os-xpm-2014-03-13-os-medical-malpractice-damages-20140313-story.html [https://perma.cc/BU3J-EJ5H].

130. *Estate of McCall*, 134 So. 3d at 923 (Polston, C.J., dissenting).

131. 2003 Fla. Laws 416.

132. *Estate of McCall*, 134 So. 3d at 927 (Polston, C.J., dissenting).

133. *Id.* at 932.

134. *Id.* at 927.

135. *Id.* at 930–31.

136. Kelly & Mello, *supra* note 3, at 522.

137. *Estate of McCall*, 134 So. 3d at 927 (Polston, C.J., dissenting).

138. 403 So. 2d 365 (Fla. 1981).

to attempts to solve the perceived medical malpractice crisis,[139] arguing that "[t]his Court has employed the rational basis test in its prior decisions involving equal protection challenges to limitations on damages in medical malpractice cases," and such caps have been upheld.[140]

IV. THE *KALITAN* CASE

North Broward Hospital District v. Kalitan[141] expanded the Florida Supreme Court's reasoning in *McCall,* rendering the statute regarding noneconomic damages in personal injury cases unconstitutional.[142] The court affirmed the Fourth District's decision to hold statutory caps on personal injury medical malpractice actions unconstitutional.[143] In *Kalitan*, the plaintiff suffered severe injuries as a result of carpal tunnel surgery.[144] The plaintiff went in for this relatively routine surgery, which required her to be placed under anesthesia.[145] During this surgery, an anesthesia tube perforated her esophagus.[146] The plaintiff eventually needed additional lifesaving surgery to correct the perforation, was entered into a drug-induced coma for an extended period of time, and continued to need therapy and suffered continual pain, mental anxieties, and mental disorders as a result.[147]

After hearing the case, the jury awarded the plaintiff $4,718,011 in total damages, $4,000,000 of which were attributed to noneconomic, pain and suffering damages.[148] As a result of post-trial motions, and pursuant to the statutory caps on noneconomic damages in section 766.118, the trial court reduced the jury award while also applying the increased cap for the finding of a substantially serious or "catastrophic" injury.[149] On appeal, the Fourth District ruled that the trial court erred, and following *McCall*, the trial court should have awarded the full amount of damages.[150]

The Florida Supreme Court, using an equal protection analysis, upheld the Fourth District's decision and rendered the subsections unconstitutional.[151] To begin its analysis, the court looked at whether the

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139. *Id.* at 367.

140. *Estate of McCall*, 134 So. 3d at 927 (Polston, C.J., dissenting); *Pinillos*, 403 So. 2d at 367.

141. 219 So. 3d 49 (Fla. 2017).

142. *Id.* at 59.

143. *Id.* at 51, 59.

144. *Id.* at 51; Bush & Edgar, *supra* note 112, at 3–4.

145. *Kalitan*, 219 So. 3d at 51.

146. *Id.*

147. *Id.*

148. *Id.* at 52.

149. *Id.*

150. Bush & Edgar, *supra* note 112, at 4.

151. *Id.*

statutory caps were rationally related to the alleged medical malpractice crisis.[152] The court created a hypothetical to illustrate that a less severely injured claimant, entitled to up to $500,000 in recovery, may end up recovering more of his or her full compensation than a severely injured person who will max out at a recovery of $1,500,000.[153] The court could not rationalize why the Legislature would limit recovery between claimants and category of injury; therefore, the court concluded there was no rational basis for such recovery.[154]

The court reasoned through its decision by looking at the classifications that the statute created regarding "classes of medical malpractice victims."[155] Subsection (2) of section 766.118 create these classifications: "Section 766.118(2) provides a cap of $500,000 in noneconomic damages to a plaintiff who suffers from a practitioner's negligence and increases the cap to $1 million in the event of death, permanent vegetative state, or 'catastrophic injury' where a manifest injustice would occur unless increased damages were awarded."[156]

The court noted that the statute defined catastrophic injury to include "instances that range from amputation of a hand to severe brain or closed-head injury."[157] The court felt that this distinction would create arbitrary awards for plaintiffs with injuries that differ significantly in true damage.[158] The court found that this portion of the statute discriminated unequally between claimants.[159]

The court then considered if there was a legitimate state objective the Legislature was attempting to achieve.[160] Looking to its rationale in *McCall*, the court again stated that the reports relied upon by the Legislature were largely unfounded.[161] Further, the court explained that no evidence supported the continuation of a medical malpractice crisis.[162] In fact, the court argued, the evidence actually pointed to a decline in the perceived emergency situation.[163] After the caps on noneconomic damages failed the rational basis test, the court declared the caps on noneconomic damages to be unconstitutional and in violation of Florida's equal protection clause.[164] This decision, together with the Florida

152. *Kalitan*, 219 So. 3d at 58.
153. *Id.*
154. *Id.*
155. *Id.* at 57.
156. *Id.*; *see* FLA. STAT. § 766.118(2) (2019).
157. *Kalitan*, 219 So. 3d at 57.
158. *Id.* at 57–58.
159. *Id.*
160. *Id.* at 58.
161. *Kalitan*, 219 So. 3d at 59; *see Florida Supreme Court*, *supra* note 102, at 2.
162. *Kalitan*, 219 So. 3d at 59.
163. *Id.*
164. *Id.* at 56; Bush & Edgar, *supra* note 112, at 4.

Supreme Court's decision in *McCall*, effectively overturned caps for noneconomic damages in medical malpractice cases in the state of Florida.[165]

Again, Justice Polston met the plurality and concurring opinions with opposition in his "impassioned dissent."[166] Two other conservative justices joined Polston's dissent.[167] The opinion reiterated that the statute in question "easily passes constitutional muster" under the rational basis test.[168] The dissent, similar to the *McCall* dissent, spoke about the Legislature's efforts to combat an ongoing crisis and why capping noneconomic damages could potentially offer a solution.[169] Arguing that the judiciary overstepped its boundaries, Justice Polston stated, "it is immaterial that the majority of this Court disagrees with the Legislature's evidence regarding whether there was (or currently is) a medical malpractice crisis in Florida."[170] The Florida Supreme Court rarely reweighs legislative findings.[171] Instead, Justice Polston argued, the judiciary should have applied the "proper" rational basis analysis and found that enacting caps is rationally related to a legitimate government interest, even if the judiciary could identify a "better" method.[172] By questioning the Legislature's findings, the majority inserted itself into a purely legislative function.[173]

V. THE *ECHARTE* CASE

In the case of *University of Miami v. Echarte*,[174] the Florida Supreme Court upheld two statutory caps, Florida Statutes Sections 766.207(7)(b) and 766.209(4)(a), that limited noneconomic damages in the context of arbitration.[175] The court reversed the Third District Court of Appeal's decision holding these two statutes unconstitutional.[176] In this case, doctors at the University of Miami treated a minor child for a brain tumor, and issues during the operation resulted in the amputation of the minor child's right hand and forearm.[177] The minor child and her parents

165. Bush & Edgar, *supra* note 112, at 4.

166. Jill F. Bechtold & Alison H. Sausaman, *State of Emergency? A Flurry of New Case Law Creates Uphill Battles for Defending Medical Malpractice Claims in Florida*, 36 No. 3 Trial Advoc. Q. 33, 35 (2017).

167. *Kalitan*, 219 So. 3d at 60 (Polston, J., dissenting).

168. *Id.*

169. *Id.* at 61.

170. *Id.*

171. Bush & Edgar, *supra* note 112, at 4.

172. *Kalitan*, 219 So. 3d at 61 (Polston, J., dissenting).

173. *Id.* at 63.

174. 618 So. 2d 189 (Fla. 1993).

175. *Id.* at 190.

176. *Id.* at 198.

177. *Id.*

brought suit and alleged negligence on the part of the university, and the university subsequently requested arbitration between the two parties to determine damages.[178] In response, the plaintiffs filed a motion for declaratory judgment to render the portions of the Florida Statutes regarding arbitration caps unconstitutional.[179]

The trial court held the statutes unconstitutional on various grounds, and the Third District affirmed the grounds, but only discussed the right of access to courts.[180] Here, the Florida Supreme Court did the same, but explicitly stated that "the statutes do not violate the right to trial by jury, equal protection guarantees, substantive or procedural due process rights, the single subject requirement, the taking clause, or the non-delegation doctrine."[181] The court discussed the duties and completion of pre-suit requirements from both claimants and defendants and the applicability of Florida Statutes Sections 766.207 and 766.209.[182] The court then applied a right of access to courts test in analyzing these statutes.[183]

Kluger v. White[184] is the seminal case in Florida regarding the right of access to courts.[185] In *Kluger*, the Florida Supreme Court discussed the right of access to courts and developed a test to determine whether a statute infringed this right.[186] The test is as follows:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law…, the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[187]

Thus, according to this test, either the two statutes at issue need to establish a reasonable alternative to the right that is being taken away, or the Legislature must prove that there is an overwhelming public need for

178. *Id.*

179. *Id.*

180. *Echarte*, 618 So. 2d at 191; *see* Carol A. Crocca, Annotation, *Validity, Construction, and Application of State Statutory Provisions Limiting Amount of Recovery in Medical Malpractice Claims*, 26 A.L.R. 5th 245 § 7 (originally published 1995).

181. *Echarte*, 618 So. 2d at 191.

182. *Id.* at 193.

183. *Id.* at 194.

184. 281 So. 2d 1 (Fla. 1973).

185. *Echarte*, 618 So. 2d at 193 (stating that *Kluger* is the seminal case on constitutional challenges to right of access).

186. *Kluger*, 281 So. 2d at 4.

187. *Id.*

the right to be abolished, and no other measure is available to combat the issue.[188]

First, the court determined whether sections 766.207 and 766.209 gave plaintiffs a corresponding gain in order to recover the noneconomic damages they seek.[189] The court stated that the plaintiff receives "prompt recovery without the risk and uncertainty of litigation or having to prove fault in a civil trial."[190] In addition to admission of liability by the defendants (and fees and costs saved in proving liability), the plaintiffs also benefited from a relaxed standard of evidence in arbitration proceedings.[191]

Second, the court found that even though the first prong of the *Kluger* test was satisfied, the second portion of the test would also be met.[192] This prong "requires a legislative finding that an 'overpowering public necessity' exists, and further that 'no alternative method of meeting such public necessity can be shown.'"[193] Here, the court recognized the legitimacy of a medical malpractice crisis.[194] The *Echarte* court detailed factual findings, as discussed above, in the legislative report: an increase in medical malpractice insurance premiums, an increase in specialty premiums, and the burden upon current physicians to survive in such a climate.[195] In discussing the second prong, the court deferred to the Legislature's findings and the existence of a "crisis," during which there is an overwhelming public necessity for these caps to exist.[196] The court explicitly stated that the caps are necessary and can help to abate the present medical malpractice crisis.[197]

There are two dissenting opinions in *Echarte*. Justice Shaw, in his dissent, argued that the statutes fail the *Kluger* test, and thus, violate the constitutional right of access to courts.[198] First, Justice Shaw found that the first prong of the *Kluger* test was not satisfied, as arbitration did not offer the plaintiff a remedy that fully redressed the injuries suffered.[199] He then discussed the second prong of the *Kluger* test.[200] Agreeing with Justice Barkett's analysis, discussed below, Justice Shaw found no

188. *Echarte*, 618 So. 2d at 194.
189. *Id.*
190. *Id.*
191. Crocca, *supra* note 180.
192. *Echarte*, 618 So. 2d at 195.
193. *Id.*; see Crocca, *supra* note 180.
194. *Echarte*, 618 So. 2d at 196.
195. *Id.*
196. *Id.* at 197.
197. *Id.* at 196.
198. *Id.* at 199 (Shaw, J., dissenting).
199. Tracy Carlin, *Medical Malpractice Caps Move From the Legislature to the Courts: Will They Survive?*, 78 FLA. B.J. 10, 12 (2004).
200. *Echarte*, 618 So. 2d at 199 (Shaw, J., dissenting).

overwhelming public necessity or inability to implement an alternative method.[201] In making this argument, Shaw discussed "that even the task force pointed to other methods of meeting the alleged public necessity, e.g., vigilant management of medical malpractice."[202]

Chief Justice Barkett's dissent discussed her belief that the caps violate not only access to courts, but also equal protection.[203] Her dissent vigorously opposed the finding that the Task Force's report outlines a public necessity that warrants a limited access to courts.[204] Further, she stated that there is no finding that a reasonable alternative method could not similarly aid in remedying the crisis.[205] In regards to her equal protection analysis, Justice Barkett offered comments that the Legislature creates two categories of victims—ones who will be fully compensated by this statute, and ones who will not.[206] She, therefore, would have found the statutes unconstitutional under both the equal protection and access to courts clauses of the Florida Constitution.

VI. THE INCONSISTENCES IN CASE LAW REGARDING NONECONOMIC DAMAGE CAPS

After close analysis of these cases, it is clear that there are inconsistencies in the Florida Supreme Court's judicial opinions as to the constitutionality of caps on noneconomic damages. The three cases discussed above, *McCall*, *Kalitan*, and *Echarte*, all continue to be regarded as good law. The reasoning in each of these opinions, however, is at odds with each other in a few crucial areas.

The first, and perhaps most obvious, inconsistency in the opinions is the way in which the Governor's Task Force Report was treated. In both *McCall* and *Kalitan*, this report, relied on by the Legislature in carrying out its findings, was harshly criticized.[207] Language such as, "dubious,"[208] "questionable,"[209] and unsound,[210] represent how the majority of the court in these two cases felt about the report.[211] In fact, the court went as far as to conduct its own investigation into the report's findings because it garners so much suspicion towards the results.[212] In

201. Carlin, *supra* note 199.
202. *Id.*
203. *Id.*
204. *Echarte*, 618 So. 2d at 198 (Barkett, C.J., dissenting).
205. *Id.*
206. *Id.*
207. *See* Estate of McCall v. United States, 134 So. 3d 894, 906 (Fla. 2014); N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 59 (Fla. 2017).
208. *Estate of McCall*, 134 So. 3d at 909.
209. *Id.*
210. *Id.*
211. *See id.* at 906; *Kalitan*, 219 So. 3d at 59.
212. Bush & Edgar, *supra* note 112, at 3.

Echarte, however, the court used the report to advance its own argument.[213] The *Echarte* Court specifically stated, "[t]he Legislature's factual and policy findings are supported by the Task Force's findings in its report."[214] Now, it is important to remember that in *McCall* and *Kalitan*, the ideological makeup of the court was different from the makeup of the court in *Echarte*. That is clear from looking at the dissents in the three cases. The dissents in *McCall* and *Kalitan*, written by a conservative justice, advocated for a return to the principals detailed in *Echarte*.[215] It seems that the majority of the court praised the report when the report's findings coincided with its position regarding the noneconomic damage caps. A solution to this inconsistency could be for future courts to take an active, bipartisan look at the "findings of fact and history" of Task Force findings and Legislative reports and find a way to reconcile the differing case law on this issue.[216] While the constitutionality of such economic provisions are obviously dealt with at a state level, the Florida Supreme Court seems to be applying a test more stringent than the traditional rational basis test to the argument that such caps violate equal protection according to the Florida Constitution.

Another blatant inconsistency that has yet to be resolved by Florida law is the fact that Florida has caps in certain situations and not in others.[217] One way to reconcile this potential problem is to look at the situations where caps are applied and where they are not. In wrongful death and medical malpractice actions, the plaintiff does not receive a benefit if caps are applied.[218] In arbitration, it is more readily apparent that a plaintiff receives some sort of benefit in return for arbitration: a relaxed evidentiary standard, admission of liability by the defendant, and fees and costs paid for by the defendant.[219] One can at least partially rationalize a cap in this scenario because the plaintiff incurs substantial benefits if the case is arbitrated.[220]

An argument can also be made, however, that despite these benefits, an arbitration plaintiff may not be fully compensated to the amount that a full jury trial would have given the plaintiff. It is easy to imagine a situation in which a plaintiff has a particularly egregious claim, where both punitive and noneconomic damages would potentially be very high, where the "commensurate benefits" of arbitration would not begin to even scrape the surface of a jury trial verdict. This is a clear hole in the

213. *See* Univ. of Miami v. Echarte, 618 So. 2d 189, 196 (Fla. 1993).
214. *Id.*
215. *Estate of McCall*, 134 So. 3d at 922; *Kalitan*, 219 So. 3d at 60.
216. Carlin, *supra* note 199, at 14–15.
217. *See id.*
218. *Estate of McCall*, 134 So. 3d at 919–20.
219. *Echarte*, 618 So. 2d at 194.
220. *See id.*

body of case law that the Florida Supreme Court has put out in the last thirty years. Consistency in case law regarding a supposed medical malpractice crisis, rational basis precedent, and outlook on legislative findings can remedy some of these variances in the caps on noneconomic damages.

The Florida Supreme Court's position to overturn the caps, and the manner in which it did so (by conducting an equal protection analysis), deviates from the "normal" outcomes nationwide.[221] As previously discussed, much of the reasoning cited by the court dealt with a distrust of the legislative findings.[222] The national trend of questioning legislative findings is that "most state courts have been hesitant to overturn damages caps, even in the face of judicial doubt about their efficacy."[223] Most state courts are unmotivated to question "the important responsibility that state legislators have to thoroughly evaluate the evidence supporting damages caps before adopting legislation."[224] Nationwide, the case law suggests that if no heightened scrutiny is applied to the damages cap, the cap will survive such a rational basis analysis.[225] This is because the caps may have a stabilizing effect on insurance premiums that a court must take into account.[226] However, as far as a constitutional challenge in terms of access to courts, Florida's *Echarte* decision echoes most case law across the country "in states in which courts have interpreted open-courts provisions to impose substantive restrictions on legislatures' ability" to impose caps or other remedies-limiting legislation.[227] However, the overarching approach for access to courts "continues to view open-courts guarantees as procedural guarantees only, leaving legislatures free to admit or abolish remedies and causes of action."[228]

VII. THE FUTURE OF NONECONOMIC DAMAGE CAPS IN FLORIDA

It will be interesting to see how the current Florida Supreme Court deals with the previously discussed inconsistencies in upcoming decisions. The makeup of the Florida Supreme Court has recently changed as a result of newly elected Florida Governor Ron DeSantis's appointments.[229] The new justices are Barbara Lagoa, Robert Luck, and

221. Bryston C. Gallegos, *Tort Reform Under Constitutional Fire*, 96 DENVER U. L. REV. 17, 17–18 (2018).

222. *Estate of McCall*, 134 So. 3d at 909.

223. Kelly & Mello, *supra* note 3, at 516.

224. *Id.*

225. *Id.* at 523.

226. David M. Studdert et al., *Medical Malpractice*, 350 NEW ENG. J. MED. 283 (2004).

227. Kelly & Mello, *supra* note 3, at 520.

228. *Id.*

229. Sun Sentinel Editorial Board, *The Most Conservative Florida Supreme Court in Decades*, SUN SENTINEL (Jan. 22, 2019, 1:50 PM), https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-florida-supreme-court-20190122-story.html [https://perma.cc/TMT8-DFYK].

Carlos Muñiz.[230] The three newly appointed conservative justices are considered to be younger and likely "could shape the direction of the court for years to come."[231] Because of these three new additions, conservative justices, including Chief Justice Canady, Justice Polston, and Justice Lawson, now dominate the court.[232]

Because the dissents in both *McCall* and *Kalitan* were written by a conservative justice, joined by other conservative justices, there is reason to suspect that these decisions may be reversed. Upon appointment, "[DeSantis has] made it clear . . . that he expects [the new justices] to reverse a half-century of what he and some conservatives consider 'activist' decisions of the Florida Supreme Court."[233] Both *McCall* and *Kalitan* could fall into this category.

It is important to remember that Justice Polston, in his *Kalitan* dissent, specifically called out the majority for overstepping the bounds of the judiciary branch.[234] Justice Polston argued, as he did in *McCall*, "[f]or a majority of this Court to decide that a [medical malpractice] crisis no longer exists, if it ever existed, so it can essentially change a statute and policy it dislikes, improperly interjects the judiciary into a legislative function."[235] This largely echoes a sentiment that the judicial branch promoted, while taking an activist stance, its own interests when not overturning the statutory caps on noneconomic damages.

Further, the more liberal Justice Barkett took the position in her dissenting opinion in *Echarte* that the cap violated equal protection.[236] This stance has been characterized as "liberal judicial activism."[237] While this was only a dissenting opinion, the majority opinions in *McCall* and *Kalitan* echoed many of the sentiments that Justice Barkett advocated.[238] Therefore, if the issues presented in *McCall* and *Kalitan* come up to the Florida Supreme Court, some of the reasoning used to overturn the caps

230. *Id.*

231. John Kennedy, *DeSantis Appoints Third Florida Supreme Court Justice, Completing Conservative Makeover*, HERALD-TRIB. (Jan. 22, 2019, 10:21 AM), https://www.heraldtribune.com/news/20190122/desantis-appoints-third-florida-supreme-court-justice-completing-conservative-makeover [https://perma.cc/VB4K-6GJY].

232. Sun Sentinel Editorial Board, *supra* note 229.

233. *Id.*

234. *See* N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 60 (Fla. 2017) (Polston, J., dissenting).

235. *Id.* at 63; *see also* Estate of McCall v. United States, 134 So.3d 894, 922 (Fla. 2014) (Polston, J., dissenting) ("I respectfully dissent because the plurality disregards the rational basis standard prescribed by our precedent as well as the Legislature's policy role under Florida's constitution.").

236. Carlin, *supra* note 199, at 14.

237. Ed Whelan, *This Day in Liberal Judicial Activism–May 13*, NAT'L REV. (May 13, 2015, 12:00 PM), https://www.nationalreview.com/bench-memos/day-liberal-judicial-activism-may-13-ed-whelan-5/.

238. *See Estate of McCall*, 134 So. 3d at 916; *Kalitan*, 219 So. 3d at 56.

may be construed as activism by the judicial branch and used to reverse the invalidation of the caps.[239]

However, if the current Florida Supreme Court wants to overturn the decisions in both *McCall* and *Kalitan*, it faces an additional challenge. Both of these cases suggest that the medical malpractice crisis has ended.[240] In *Kalitan*, the Florida Supreme Court suggested the crisis had ended by stating, "in *McCall*," the court opined that "there [was] no evidence of a continuing medical malpractice crisis justifying the arbitrary application of the statutory cap, [so] we reach the same conclusion with regard to the unconstitutionality of the caps in the present case."[241] This statement, now included in precedent, may hinder the court from attempting to reinstate such caps. If the court wishes to overturn these decisions and uphold the caps, there will likely need to be evidence that the medical malpractice crisis is indeed ongoing. This could potentially require more legislative findings regarding the existence of such a crisis, and, as previously discussed, legislative findings are often debated by the makeup of the court. Or, will the court decide to implement an investigation of its own? If this topic reaches the new makeup of the Florida Supreme Court, it will be interesting to see how the existence of a perceived medical malpractice crisis is dealt with. Additionally, because *Echarte* has not been overturned by the court, it is possible that the new conservative majority may use *Echarte* as precedent if the issues in *McCall* or *Kalitan* were brought before the court.[242]

VIII. CONCLUSION

The issue of capping noneconomic damage awards is one on which many states disagree.[243] In Florida, specifically, there have been landmark decisions both allowing and disallowing caps in varying situations.[244] This can likely be attributed to an ever-changing ideological makeup of the Florida Supreme Court, as well as available findings, information, and reports.

In 1993, in *Echarte*, the Florida Supreme Court upheld Florida Statutes Sections 766.207(7)(b) and 766.209(4)(a), which limit noneconomic damages when the parties either agree to arbitrate or the plaintiff denies the defendant's request to arbitrate.[245] The majority found that the statute, and the commensurate benefits it gave plaintiffs, passed

239. *See Estate of McCall*, 134 So. 3d at 916; *see also Kalitan*, 219 So. 3d at 56.

240. *Kalitan*, 219 So. 3d at 57.

241. *Id.*

242. *See Estate of McCall*, 134 So. 3d at 897; *Kalitan*, 219 So. 3d at 58.

243. CTR. FOR JUSTICE & DEMOCRACY, *supra* note 1.

244. *See, e.g.*, *Estate of McCall*, 134 So. 3d at 916; *Kalitan*, 219 So. 3d at 59; Univ. of Miami v. Echarte, 618 So. 2d 189, 191 (Fla. 1993).

245. *Echarte*, 618 So. 2d at 191.

constitutional challenge in terms of the right to equal protection and access to courts.[246] It largely relied on the existence of a medical malpractice crisis.[247]

In 2014, in *McCall*, the Florida Supreme Court struck down Florida Statutes Section 766.188 as unconstitutional and in violation of the equal protection clause of the Florida Constitution.[248] The previous existence of a medical malpractice crisis was discredited, and the arbitrary way section 766.118 classified plaintiffs did not pass the rational basis analysis conducted by the court.[249] As a result, in a wrongful death case, noneconomic damages could not be capped.[250]

In 2017, the Florida Supreme Court further extended its reasoning in *McCall* by holding that in medical malpractice actions the noneconomic damages cap was unconstitutional.[251] Again finding no evidence of a medical malpractice crisis, the court argued that separating medical malpractice victims into certain categories of recovery violated equal protection.[252]

Echarte has not yet been overturned, and the existence of caps on noneconomic damages still exists.[253] The Florida Supreme Court has yet to reconcile its treatment of a Task Force report in *Echarte* with its treatment of the same report in *McCall* and *Kalitan*. The inconsistences in Florida case law may have impacts in the coming years on medical malpractice litigation and plaintiffs' recoveries. The makeup of the Florida Supreme Court in 2019 has shifted to largely conservative justices.[254] These justices may take the opportunity to build on the vigorous dissents in *McCall* and *Kalitan* to overturn the unconstitutionality of the wrongful death and medical malpractice action caps. National rulings also point to a potential overturn of such damage caps.[255] Florida's highest court has taken a heightened approach to traditional rational basis, potentially to the point of overstepping into the Legislature's duties. Regardless, it would aid Florida's potential claimants to have a clear body of case law, or a clear, bipartisan analysis of this perceived "medical malpractice crisis."[256]

246. *Id.*
247. *Id.* at 196.
248. *Estate of McCall*, 134 So. 3d at 916.
249. *Id.* at 912.
250. *Id.* at 916.
251. N. Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 59 (Fla. 2017).
252. *Id.* at 58.
253. *See* Univ. of Miami v. Echarte, 618 So. 2d 189, 191 (Fla. 1993).
254. Kennedy, *supra* note 231.
255. Kelly & Mello, *supra* note 3, at 516.
256. *Id.* at 515.