

WISCONSIN SUPREME COURT UPHOLDS CONSTITUTIONALITY OF MEDICAL MALPRACTICE NONECONOMIC DAMAGES CAP

On June 27, 2018, the Wisconsin Supreme Court (the “Court”) upheld the constitutionality of a state statute that establishes a \$750,000 cap on medical malpractice noneconomic damages as part of Wisconsin’s unique medical liability system that also guarantees payment of all of a proper claimant’s economic damages. In *Mayo v. Wis. Injured Patients and Families Comp. Fund*, 2018 WI 78, the Court acknowledged the legislature’s objective for establishing the cap—“to ensure affordable and accessible health care for all of the citizens of Wisconsin while providing adequate compensation to the victims of medical malpractice”—and, applying a “rational basis” standard of review, found the statute constitutional. The full decision may be viewed [here](#).

HISTORY OF THE CAP

In 1975, in response to what was recognized as a medical malpractice crisis, the Wisconsin legislature established a comprehensive medical liability system. In addition to other features, the system requires physicians, hospitals and certain other health care providers to maintain at least a specified level of medical liability coverage (\$1 million per claim, \$3 million for all claims per policy year) and pay annual assessments to the Injured Patients and Families Compensation Fund (“Fund”). The Fund guarantees payment to those who are injured by medical malpractice by paying medical malpractice settlements and judgments that are in excess of a provider’s insurance coverage amount. In 1986, while maintaining the guaranteed payment for all economic damages, the legislature capped noneconomic damages at \$1 million. The \$1 million cap expired in 1991. Again, working to address issues related to the medical liability environment, in 1995, the legislature enacted a \$350,000 cap on noneconomic damages, which was indexed to inflation. The cap stood until 2005, when the Court found the cap unconstitutional in *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125. Thereafter, the legislature revised the statute to establish the current \$750,000 cap on noneconomic damages. In the introductory text to Wis. Stat. § 893.55, the legislature articulated the cap’s objective and further wrote that establishing a limitation on noneconomic damage awards accomplishes that objective by doing all of the following:

1. Protecting access to health care services across the state and across medical specialties by limiting the disincentives for physicians to practice medicine in Wisconsin;
2. Helping contain health care costs by limiting the incentive to practice defensive medicine, which increases the cost of patient care;
3. Helping contain health care costs by providing more predictability in noneconomic damage awards, allowing insurers to set insurance premiums that better reflect such insurers’ financial risk; and
4. Helping contain health care costs by providing more predictability in noneconomic damage awards in order to protect the financial integrity of the Fund.

The legislature concluded that a \$750,000 cap “is neither too high nor too low to accomplish the goals of affordable and accessible health care, is a reasonable and rational response to the current medical liability situation and is reasonably and rationally supported by the legislative record.”

FACTUAL BACKGROUND

In May 2011, Ascaris Mayo presented to a hospital emergency room with abdominal pain and a high fever. She was seen by a physician and a physician assistant, who included infection in their differential diagnosis but did not diagnose her underlying Strep A infection and did not inform Mayo of the differential diagnosis or offer antibiotics to treat an infection. She was discharged and instructed to contact her personal gynecologist because of her history of uterine fibroids. Mayo visited a different hospital’s emergency room the following day and there she was diagnosed with sepsis that was caused by her untreated infection. The sepsis ultimately caused Mayo’s organs to fail and led to gangrene in and amputation of all four of her extremities. Mayo and her husband brought a suit for medical malpractice and failure to provide proper informed consent.

PROCEDURAL HISTORY

At the circuit court, a jury found that while neither of the original treating providers were negligent, they had failed to provide proper informed consent regarding her diagnosis and treatment options. The jury awarded Mayo almost \$9 million in economic damages and \$15 million in noneconomic damages, and her husband was awarded \$1.5 million for his loss of society and companionship. Post-verdict, the Fund moved to reduce noneconomic damages to \$750,000 as required by the cap. The Mayos moved for entry of the judgment, arguing that application of the cap was unconstitutional facially and as applied to Mayo. The circuit court held that the statutory cap on noneconomic damages was not facially unconstitutional but was unconstitutional as applied to the Mayos because it violated their right to equal protection and due process.

The Wisconsin Court of Appeals affirmed the jury's noneconomic damages award but on different grounds. It held the statutory cap on noneconomic damages in medical malpractice cases was unconstitutional on its face, citing *Ferdon*, "by imposing an unfair and illogical burden only on catastrophically injured patients, thus denying them the equal protection of the laws."

SUMMARY OF WISCONSIN SUPREME COURT DECISION

The Court reversed the decision of the Court of Appeals, holding that the \$750,000 statutory cap on noneconomic damages is constitutional both facially and as applied to the Mayos. The Court also overruled its prior decision in *Ferdon*, finding that the *Ferdon* Court had "erroneously invaded the province of the legislature and applied an erroneous standard of review" when assessing the constitutionality of the prior \$350,000 cap.

The Court, in its opinion, discussed the legislature's establishment of a "comprehensive system of guaranteed payments and controlled liability." The Court indicated that when the legislature established, as part of that comprehensive system, the current \$750,000 cap on noneconomic damages, it had ample testimony before it to support its policy choices. The Court said it would not reweigh the legislative choices. The Court concluded that "the legislature's comprehensive plan that guarantees payment while controlling liability for medical malpractice through the use of insurance, contributions to the Fund and a cap on noneconomic damages has a rational basis."

Applying a rational basis level of scrutiny, the Court held the cap on noneconomic damages is constitutional on its face.

With respect to the Mayos' challenge to the cap's constitutionality as applied, the Court found that the cap on noneconomic damages "has been applied in rational relation to a legitimate legislative objective" and is not unconstitutional as applied to the Mayos.

PRACTICAL TAKEAWAYS

Hall Render was privileged to work with Wisconsin Hospital Association ("WHA") on this case, filing an amicus brief on WHA's behalf. In that brief, discussing the legislature's efforts to create and maintain Wisconsin's unique statutorily created comprehensive medical liability system, WHA emphasized: "The 'Legislature's efforts have borne fruit. Wisconsin leads the nation in healthcare quality. Furthermore, for more than a decade since *Ferdon*, Wisconsin's statutorily enacted comprehensive medical liability system has guaranteed injured patients full compensation for economic damages and allowed recovery for noneconomic damages up to \$750,000, something both unique from other states and to other plaintiffs in Wisconsin. The Legislature's actions have continued the viability of a medical liability system that helps protect all Wisconsin communities' needs for accessible health care.'" The Court's decision upholds that system.

If you have any questions or would like additional information about this topic, please contact:

- **Stephane Fabus** at (414) 721-0904 or sfabus@hallrender.com;
- **Sara MacCarthy** at (414) 721-0478 or smacCarthy@hallrender.com;
- **Kiel Zillmer** at (414) 721-0918 or kzillmer@hallrender.com; or
- Your regular Hall Render attorney.