



## HEALTH CARE BLOG

### Non-Economic Damage Limitation Upheld by the Wisconsin Supreme Court

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The Wisconsin Supreme Court has issued a ruling in the case of Mayo v. Wisconsin Injured Patients and Families Compensation Fund. The Supreme Court's decision, which was handed down on June 27, 2018, overturned a lower court decision that found the non-economic damage cap to be unconstitutional. The 5-2 decision of the Wisconsin Supreme Court will be touted by health care providers as necessary to uphold the Wisconsin legislature's balanced approach to health care damage awards. This approach recognizes the legitimacy of non-economic damages while recognizing that unlimited potential damages can have a deleterious impact on the ability to attract medical talent to the state.

The Wisconsin non-economic damage cap was enacted by the state legislature in 2006 and imposes a limitation of \$750,000 on the award of the non-economic damages that can be awarded in a case involving medical liability (i.e. physician malpractice, etc.). The legislative action followed a previous decision of the Wisconsin Supreme Court that found a previous legislative damages cap of \$350,000 unconstitutional. The 2005 Supreme Court decision was heavily relied upon by the lower court as justifying its holding that the 2006 cap was unconstitutional. The recent Supreme Court decision failed to declare the \$750,000 cap to be unconstitutional.

The decision arises from a 2012 emergency room visit that apparently failed to identify an untreated infection and resulting sepsis in a patient who presented to the ER with a fever and stomach pain. The patient was sent home from the ER with instructions to follow up with other physicians. After a second emergency room identified the infection, the patient was required to undergo amputation of four limbs. The patient sued and the trial court found that the first ER failed to provide the patient with sufficient information about various options. The trial court did not find the ER negligent in the treatment that was provided. The jury returned a verdict awarding \$15 million in non-economic damages to the patient. The patient appealed the application of the cap on non-economic damages the limited recovery to \$750,000 for that damage component.

The Wisconsin health care provider community came out strongly in favor of a cap on non-economic damages. For example, the Wisconsin Hospital Association filed an amicus brief supporting the cap with the Supreme Court. Providers argued that failure to uphold the cap would have significant negative impacts on access to care in Wisconsin. For example, the provider community pointed out that failing to uphold the cap would negatively impact the ability to recruit and retain medical talent into the state. The impact was argued to fall heavily on the ability of small and rural hospitals to provide quality health care.

It should be stressed that nothing in the law of the court's decision denies patients harmed by provider malpractice the ability to recover economic damages such as expenses associated with their care and remedying any resulting damage, as well as other provable economic damages such as lost wages and other losses. The cap only applies to non-economic damages such as punitive damage awards.

Although there can be legitimate reasons for these types of damages, awards in this area are much less quantifiable and can often be based on emotional factors that can artificially inflate damage awards.

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