2009
CASE LAW SUMMARY

Medical Malpractice

Agency/Apparent Agency

Ginsberg v. Northwest Medical Center, Inc., 14 So.3d 1250 (Fla. 4th DCA 2009)

The Plaintiff went to the emergency department at Northwest Medical Center for treatment of kidney pain. After he was admitted, a urologist confirmed he needed a kidney stone removed. The physician ultimately ended up removing the man's left kidney. The Plaintiff sued the two urologists, their employer and the hospital for its vicarious liability. The hospital moved for summary judgment and submitted a consent form expressly negating any agency relationship between the hospital and the independent contractor physicians. The form stated that the associates were independent contractors and not employees or agents of the hospital nor did the hospital control the manner or the methods by which the procedures were performed.

Despite the contract, the Plaintiff presented evidence demonstrating that at the time he signed the form, he was in pain, did not have his glasses and had taken pain medication rendering him unable to understand the form. Additionally, the court pointed out Supreme Court precedent which found that it was not uncommon for parties to include conclusionary statements in documents with regard to the independence of the relationship of the parties even where the totality of the circumstances reflect otherwise.

Amendment 7

Lakeland Regional Medical Center v. Neely, 8 So.3d 1268 (Fla. 2d DCA 2009)

Plaintiff sought incident reports regarding the physician who delivered their daughter. The hospital objected asserting that the reports were protected under the Work Product Doctrine having been prepared in anticipation of litigation. The Second District held that the Buster decision did away with this protection adding that because the Work Product Doctrine is a creation of the common law and healthcare providers did not have a vested substantive right to the work product privilege. The Second District certified this issue as a question of great public importance.

Florida Eye Clinic v. Gmach, 14 So.3d 1044 (Fla. 5th DCA 2009)

Plaintiff sought incident reports concerning infections and related investigations at the clinic. The reports were prepared by the Risk Manager so that accurate information will be available to defense counsel in the event that a lawsuit was filed. However, counsel never reviewed these incident reports prior to this lawsuit and the reports did not contain any of the attorney's mental impressions, conclusions, opinions or theories concerning the client's case. The Fifth District held that these reports were fact work product and therefore subject to production under Amendment 7. They noted; however, that there was nothing in the passage of Amendment 7 that indicated an intent to mandate the disclosure of documents containing the mental impressions, conclusions, theories or opinions of an attorney (i.e., opinion work product).

Columbia Hospital Corporation v. Fain, 16 So.3d 236 (Fla. 4th DCA 2009)

The patient fell from a bed while in the hospital and subsequently died. During discovery, the patient's estate requested incident reports for the patient's fall and of all adverse incidents involving falls of patients using fall precautions within the prior five years. The Fourth District ruled that the work product objection was not ripe for review and noted that "it is not clear that a provider or healthcare facility may, after the Amendment, continue to refuse to provide an adverse medical incident report based on a fact work product objection. A distinction may need to be drawn between fact work product and opinion work product."

The Fourth District also found that objections involving relevance, breadth of discovery and burdensomeness of discovery are not proper objections pursuant to Amendment 7. The Fourth District also rejected the argument that the only documents that need be produced are the Code 15 report and the annual report and also found that the Federal Constitution and the HCQIA did not preclude production of these materials.

West Florida Regional Medical Center v. See, 18 So.3d 676 (Fla. 1st DCA 2009)

The hospital sought certiorari review of two discovery orders arguing that the trial court is wrong in granting discovery because it denied its work product objection to the production of documents relating to adverse medical incidents; denied the hospital the right, under Florida Statute 381.028(7)(b)(1) to use the process identified in Florida Statute 395.0197 to decide which documents are

considered records of adverse medical incidents; rejected the hospital's demand for pre-payment of the cost of production pursuant to Florida Statute 381.028(7)(c)(1); rejected the hospital's argument that Amendment 7 was preempted by the HCQIA; rejected the hospital's argument that Amendment 7 violated the contract clause of the United States Constitution; improperly directed the hospital to produce specific evidence of the training of two doctors perform certain surgical procedures; and improperly ordered the hospital to produce a blank copy of its application for medical staff privileges.

The First District ruled that the trial court had not actually decided the work product issue and allowed the hospital an opportunity to file a privilege log following the petition. The District Court rejected the hospital's attempt to limit production to Code 15 reports and annual reports as set forth under Florida Statute 395.0197 finding that Amendment 7 is not limited to incidents that already must be reported under law. The court also rejected any claim that the HCQIA or the contract clause of the Constitution prohibited production of materials. Finding that the scope of Amendment 7 is not limitless, it was found that the trial court improperly ordered production of documents related to the doctor's training because it did not relate to adverse medical incidents. It did, however, find, in contrast to the Fourth District's decision in *Tenet Health System Hospital v. Taitel*, 855 So.2d 1257 (Fla. 4th DCA 2003) that blank credentialing forms can be produced. In so doing, they found that *Kruger v. Love*, 599 So.2d 111 (Fla. 1992) did not protect blank forms but only the information provided on the forms.

Arbitration-Medical Malpractice

Lifemark Hospitals of Florida v. Afonso, 4 So.3d 764 (Fla. 3d DCA 2009)

The Third District reversed the decision of the arbitrators in a wrongful death suit and held that the economic damages awarded in a wrongful death arbitration were to be those awarded under the Wrongful Death Act. The Third District also found that the arbitration statute did not violate the right of access to courts under Article I, Section 21 of the Florida Constitution because the economic damages awarded in wrongful death cases were coextensive with those available in court under the Wrongful Death Act.

Arbitration-Nursing Homes

Curcio v. Sovereign Health Care, 8 So.3d 449 (Fla. 4th DCA 2009)

The trial court granted motion to compel arbitration even though plaintiff argued that the arbitration provision was unconscionable because the decedent had no choice but to sign the arbitration agreement in order to obtain necessary medical care and treatment and because she did not understand the agreement or the rights she was waiving by the signing the agreement. The Fourth District held that the trial court erred in compelling arbitration without conducting an evidentiary hearing pursuant to Florida Statute 682.03(1).

Sovereign Health Care of Tampa v. Estate of Huerta, 14 So.3d 1033 (Fla. 2d DCA 2009)

The Second District held that the durable power of attorney signed by the nursing home Resident was broad enough to allow the Resident's attorney-in-fact to agree to arbitration. In so doing, it distinguished its earlier decision in McKibbin v. Alterra Health Care, 977 So.2d 612 (Fla. 2d DCA) rev. den., 987 So.2d 79 (Fla. 208).

New Port Richey Medical Investors v. Stern, 14 So.3d 1084 (Fla. 2d DCA 2009)

Nursing home Resident entered into an agreement which required arbitration to be administered by the American Arbitration Association. At the time that the agreement was signed, the American Arbitration Association is no longer accepting the administration of cases involving individual patients who did not have a post-dispute agreement to arbitrate. The Second District held that because the American Arbitration Association was no longer available to conduct the arbitration, the Circuit Court must appoint another arbitrator or arbitrators in its place.

Gessa v. Manor Care, 18 So.3d 527 (Fla. 2d DCA 2009)

On admission to the nursing home, the resident (or her attorney-in-fact) signed admission documents which included an arbitration agreement. Additionally, they signed a separate document which was not designated within the admission agreement. The separate document prohibited an award of punitive damages and capped any award of non-economic damages at $250,000. The resident argued that the limitations were contrary to the rights specifically granted under the Nursing Home Residents Act and that this invalidated the entire agreement to arbitrate. The Second District affirmed that the arbitration agreement was valid; however, the separate document was severable even though the contract lacked a specific severability clause.

Carrington Place of St. Petersburg v. Estate of Milo, 19 So.3d 340 (Fla. 2d DCA 2009)

Because the power of attorney signed by the Resident did not grant the attorney-in-fact authority to enter into an arbitration agreement, the trial court properly denied the nursing home's motion to compel arbitration.

Manor Care Health Services v. Stiehl, 22 So.3d 96 (Fla. 2d DCA 2009)

The Second District held that the trial court erred in declining to compel arbitration on grounds that remedial limitations contained within the arbitration agreement were void as against public policy because those limitations were severable from the arbitration agreement.

Jaylene, Inc. v. Steuer, 22 So.3d 711 (Fla. 2d DCA 2009)

The Second District held that a durable power of attorney was sufficiently brought to confer upon the individual who signed the nursing home admissions agreement the authority to bind the decedent to an arbitration provision in the admissions contract. The Second District further held that the trial court erred in declaring the arbitration agreement as against public policy because even though the binding arbitration was to be administered by the National Health Lawyers Association which limited remedies available to nursing home Residents under Chapter 400, the Second District held that whether an arbitration agreement's limitation on statutory remedies renders the agreement unenforceable based on public policy grounds is a question for the arbitrator and not the trial court.

Estate of Perez v. Life Care Centers of America, 23 So.3d 741 (Fla. 5th DCA 2009)

While the trial court properly found that the contract compelling arbitration was procedurally unconscionable, a trial court must find both procedural and substantive unconscionability in order to validate the arbitration agreement. Having found no substantive unconscionability, the arbitration agreement was appropriate. Further, like the case of New Port Ritchey Medical Investors v. Stern, 14 So.3d 1084 (Fla. 2d DCA 2009), this agreement required the parties to use the American Arbitration Association. The Fifth District held that because the American Arbitration Association was no longer arbitrating such disputes, the Circuit Court would have power to appoint a different arbitrator.

Candansk, LLC v. Estate of Hicks, 34 FLW D2326 (Fla. 2d DCA 11/13/09)

The Second District held that a power of attorney agreement which granted the decedent's daughter the power to "act in my name, place and stead in any way which I myself could do, if I were personally present with respect to claims and litigation" conferred on the daughter, as the attorney-in-fact, the authority to submit to arbitration.

Arbitration-Physician Practice Agreement

Sitarik v. JFK Medical Center, 7 So.3d 576 (Fla. 4th DCA 2009)

Dr. Sitarik was an anesthesiologist who performed a surgical procedure at the hospital. During the procedure, a sponge was left inside the patient. He reported the incident and was subsequently terminated. Following his termination, he brought a claim against the hospital and his employer for intentional interference with a business relationship, breach of contract, and Whistle Blower's violations. The hospital and his employer moved to compel arbitration based on an arbitration clause contained in the professional services agreement entered into between the hospital and his employer.

In support of this position, they noted an addendum to the contract between Dr. Sitarik and his employer which stated that the professional services agreement was binding on him" to the extent applicable." The trial court granted the motion to compel arbitration and the Fourth District reversed.

They agreed with Dr. Sitarik that the arbitration clause only bound "the parties" and that Dr. Sitarik was not a party. Specifically, the agreement contained a third-party beneficiary clause which states "Nothing contained herein…shall be construed as conferring any third-party beneficiary status on any person not a party to this agreement including without limitation any contractor's representative." Additionally, the addendum signed by Dr. Sitarik also contained a clause which states "In the event any party brings an action against another party challenging the validity or seeking to enforce or enjoin the enforcement of this agreement, the prevailing party shall be entitled to recover against the other party its legal fees and costs incurred in connection with such action at the trial and appellate levels."

Caps on Damages

Raphael v. Shecter, 18 So.3d 1152 (Fla. 4th DCA 2009)

In April, 2003 the patient suffered a heart attack and was treated in an emergency room. On presentation, he was not administered tPA. More than an hour later, a different doctor administered tPA. It was alleged that this delay resulted in significant damage to the patient's heart. In 2005, the patient filed a medical malpractice action against the first physician, his employer and the hospital. The patient died the following year.

At trial, the jury rendered a verdict for $9,500,000 in non-economic damages. The Defendants then moved to limit the non-economic damages to $150,000 per claimant in accordance with Florida Statute 766.118(4). The trial court granted this motion. The Fourth District reversed and found that the cap on non-economic damages, which was enacted after the date of incident, could not be applied retroactively.

Conferences with Non-Party Physicians

Dannemann v. Shands Teaching Hospital, 14 So.3d 246 (Fla. 1st DCA 2009)

The Plaintiff moved to prohibit pre-deposition conferences between non-party physicians employed by the University of Florida (also a non-party) and the attorney hired by the Defendant Shands' insurer to represent the physicians at their depositions. The First District determined that the trial court improperly denied the motion and found that Florida Statute §456.057(8) prohibits any non-party physician from disclosing the patient's medical condition and history to counsel hired by the Defendant's insurer to represent the physician at deposition. While there are situations under which such discussions would be allowed, the First District found that this is not such a case and therefore granted certiorari.

Credentialing

Herndon v. Shands Teaching Hospital, 23 So.3d 802 (Fla. 1st DCA 2009)

The Plaintiff alleged that a surgical nurse employed by the hospital murdered the decedent with an injection of controlled substances. The Plaintiff alleged that the hospital had a legal duty to the decedent, and breached it by its

negligent hiring and supervision of this nurse based upon a history of the nurse having stolen controlled substances which the hospital would have learned about had they done a complete background check. The Plaintiff also alleged that the hospital should have been mindful that controlled substances had been taken from it in the past while the nurse worked there.

Even though the nurse had taken the Fifth Amendment when questioned, based upon the alleged facts, the court found that the death was a foreseeable consequence of the hospital's failure to use reasonable care in hiring and 12supervision as alleged. As such, the First District concluded that the facts and allegations were sufficient to establish a duty on behalf of the hospital and, therefore, it was error to dismiss the complaint.

EMTALA

St. Joseph's Hospital v. Cintron, 998 So.2d 1192 (Fla. 2d DCA 2009)

Plaintiff filed a claim against the hospital for patient dumping under F.S. §395.1041. The trial court found that the complaint, as filed, was not for medical malpractice and refused to dismiss the case for failure to presuit the claim. The Second District upheld the lower court's decision and noted that the hospital could later raise appropriate objections should the case develop into a medical malpractice claim.

Expert Testimony

St. Joseph's Hospital v. Cox, 14 So.3d 1124 (Fla. 2d DCA 2009)

A claim was brought for failure to treat a stroke with tPA. The patient suffered a stroke and a person who witnessed it was able to narrow its onset to a 15-20 minute window. The Plaintiff arrived at the hospital within the window for administering the tPA but the ER physician did not treat the Plaintiff's stroke with thrombolytics because he did not know the time of the onset. Further, the Plaintiff had suffered a subdural hematoma 2½ years earlier.

The Second District determined that a directed verdict should have been entered because the Plaintiff failed to prove that he would have more likely than not benefited from tPA. The Plaintiff's causation expert suggested the need for tPA, but admitted that she had never given it to a patient with a prior intracranial hemorrhage. Further, the expert acknowledged that the NINDS study was the

seminal study on the use of tPA in treatment of ischemic strokes. According to this study, 20% of stroke patients recover without any tPA and the rate of successful outcomes increases to 31% when tPA is given. The Plaintiff's expert could not testify that her rate of success with tPA therapy exceeded that reported in the NINDS study and, therefore, the Plaintiff did not satisfy the *Gooding* requirement that the Defendant more likely than not caused the Plaintiff's injuries.

Good Samaritan

Harris v. Soha, 15 So.3d 767 (Fla. 1st DCA 2009)

The Plaintiff's husband suffered an allergic reaction and was rushed to the emergency department. The testimony established that the anesthesiologist did not provide services to the ER, although occasionally an anesthesiologist was on call for other reasons who would voluntarily provide assistance in the ER upon request if they were available. The day the decedent was admitted, an anesthesiologist responded to an ER physician's request for assistance even though he was in the hospital providing on call services for an obstetrical patient.

The Plaintiff argued that the anesthesiologist was not entitled to the *Good Samaritan* defense because the anesthesiologist was not at the hospital attending to a patient of "his or her practice" when he responded to the emergency room and further argued that the anesthesiologist was not treating a patient of his "practice" when he went to the obstetrical suite because anesthesiologists do not really have their own patients. The court rejected this reading of the statute an found that the claim was barred by the Good Samaritan Act.

Hospital Liens

Copeland v. Buswell, 20 So.3d 867 (Fla. 2d DCA 2009)

A wrongful death action was brought. During the pendency of the lawsuit, the hospital where the decedent was treated following the accident filed a statutory lien. Thereafter, without informing the estate and without approval from the probate court, the Defendants reached a settlement with the hospital on the lien paying $300,000 on a claim of $492,224. Although troubled by the Defendants' action, the trial court eventually entered a final judgment awarding only the funeral expenses.

The Second District reversed finding that the Defendants had improperly circumvented the priority of payment of claims set forth in Florida Statute §733.707 (1). Under this statute, the costs and expenses of administration, compensation of personal representatives and their attorney's fees, funeral expenses, debts and taxes all had a priority for payment over the medical expenses incurred during the last 60 days of the decedent's life.

Medicare/Medicaid Liens

Smith v. Agency for Health Care Administration, 24 So.3d 590 (Fla. 5th DCA 2009)

The Plaintiff settled a claim for $2,225,000. Thereafter, the Plaintiff sought to reduce the State of Florida's Medicaid lien from $122,784 to $40,928. The trial court denied the motion and the Fifth District affirmed.

In doing so, they note that under Florida Statute §409.910 AHCA could have recovered up to $707,778. Because the state's lien was far less than the statutory cap, the statute allowed the state to recover the full amount of the lien. In doing so, the Fifth District considered the United States Supreme Court decision in *Arkansas Department of Health v. Ahlborn*, 547 U.S. 268 (2006) which mandates a percentage reduction of a Medicaid lien in the same ratio as the settlement bears to actual damages. In this case, the Plaintiff claimed that the settlement represented only 1/3rd the value of the damages. The Fifth District determined that the *Ahlborn* decision was based upon a stipulation between the parties regarding the total amount recovered and the total value of the claim, and because they did not occur in this case, the trial court was affirmed.

NICA

Macri v. Clements, 15 So.3d 762 (Fla. 2d DCA 2009)

Parents filed a wrongful death action following the death of their child. An action was filed against the obstetrician and the nurse-midwife and the hospital where the child was born. The hospital subsequently settled its portion of the claim and the remainder of the action was abated so as to compel the plaintiffs to pursue relief under NICA. The administration law judge determined that the child sustained a qualified birth-related neurological injury, but noted that the settlement of the medical negligence claim against the hospital precluded an award of benefits under the plan pursuant to Florida Statute 766.304.

Once the matter was remanded to the circuit court, the obstetrician and the nurse midwife moved for summary judgment asserting that the civil action was barred by the exclusivity of remedy provision under Florida Statute 766.303(2). The defendants did not properly raise exclusivity as an affirmative defense and subsequently submitted a supplemental answer raising the affirmative defense along with their summary judgment. The plaintiffs responded by noting that exclusivity does not pertain in situations of willful and wanton disregard and filed an affidavit stating that their action was based upon such conduct. The trial court entered summary judgment finding that the plaintiff failed to plead the willful and wanton exception to Florida Statute 766.303(2) exclusivity. The First District reversed finding that because exclusivity is an affirmative defense to be raised by the defendants, the plaintiff does not have to anticipate that defense being raised in their complaint.

The plaintiff also contends that the nurse midwife should not have been able to invoke the exclusivity statute because she did not pay a NICA assessment. Because the nurse midwife performed services with the delivery obstetrician and was employed by his professional association, she was covered under the umbrella of the doctor's statuses participating physician in contrast to a case where a supervising doctor was not actually present and directly involved at the birth. See Fluet v. NICA, 788 So.2d 1010 (Fla. 2d DCA 2001).
Rodriguez v. NICA, 19 So.3d 386 (Fla. 2d DCA 2009)

In a consolidated appeal, parents of children covered under the NICA plan appealed a 2007 order clarifying final orders entered in 1995 and 1999. After those final orders were entered, the parents, along with others, filed a class action lawsuit against NICA arguing that NICA was not complying with its payment obligations. NICA sought clarification of the previous final order and an administrative law judge (ALJ) entered orders clarifying the prior final orders. The parents contended that the clarification of the orders is merely an attempt to circumvent their class action lawsuit. The Second District reversed and held that the ALJ had no jurisdiction to clarify the previously entered final orders.

St. Vincent's Medical Center v. Bennett, 34 FLW D1716 (Fla. 1st DCA 8/21/09)

An infant was born following her mother's involvement in a motor vehicle accident. The condition of the infant at the time of delivery was a matter of controversy with her requiring manual resuscitation at birth; however, within minutes her APGAR scores were within the normal range. Thereafter, the infant experienced renal distress and liver damage. A week after her birth she

experienced pulmonary bleeding and then pulmonary arrest leading to multi-organ failure and seizure activity. She was later diagnosed with a neurological injury and cerebral palsy, although the timing of the neurological injury was a matter of controversy.

The administrative law judge found that the infant suffered multi-system failure as a consequence of oxygen deprivation suffered some time before delivery and it likely continued during the immediate post-delivery resuscitative period. The ALJ also found that she did not suffer brain injury or substantial neurological impairment until she experienced profound episodes of oxygen deprivation a week after her birth. The ALJ thus found that this was not compensable under NICA. The healthcare providers appealed finding that the ALJ erred in not applying presumption provided for under Florida Statute 766.309(1)(a) which provides that if a claimant has demonstrated that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and the infant was thereby rendered permanently and substantially mentally and physically impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury. In a 2-1 decision, the First District reversed the ALJ finding that the presumption can be employed in favor of medical providers and that dispensing with the presumption of the request of a claimant would undermine the intent of NICA.

Tarpon Springs Hospital v. Anderson, 35 FLW D40 (Fla. 2d DCA 12/30/09)

During delivery, the mother was attended to by an obstetrician and nurse midwife. Both were employees of the hospital. The obstetrician was a participating physician under NICA and the nurse midwife assistant had paid for NICA during the relevant time period and she had a certificate signifying her participation with NICA. The physicians who provided the mother's prenatal care provided her with appropriate notice under NICA. While pre-registering at the hospital, the hospital failed to give appropriate notice. On the day before delivery, the patient was diagnosed with false labor and the hospital gave notice of NICA. The patient returned in labor the following day and signed a similar acknowledgment form. On arrival, she was evaluated by the nurse midwife who contacted the obstetrician who authorized her to augment labor. Thereafter, the patient required an emergency cesarean section.

A hearing was held at which time the administrative law judge found that the nurse midwife was not a participating physician under NICA because she could not produce a written protocol to establish the existence of a prearranged plan of

treatment. The Second District reversed and found that a prearranged plan of treatment is not required to be a written document, rather it only requires that the doctor supervising the midwife had a prearranged plan of treatment in place for specified patient problems.

Nursing Homes

In Re: Estate of Trollinger, 9 So.3d 667 (Fla. 2d DCA 2009)

The Plaintiff brought a survival and wrongful death action against the nursing home. The trial court granted the Defendant's Motions to Dismiss pursuant to Florida Statute §400.023(1) which provides that if an action alleges a claim for a violation of a resident's rights or for negligence that caused the death of the resident, the claimant is required to elect either survival damages pursuant to Florida Statute §46.021 or wrongful death damages pursuant to Florida Statute §768.21. The trial court then dismissed the Complaint and ordered Plaintiff to amend the Complaint demonstrating her election of remedies.

The Plaintiff argued that forcing the election of remedies at the pleading stage departed from the essential requirements of law. The Second District did not rule on the actual issue but held that because the Plaintiff could not demonstrate she would be irreparably harmed by electing her remedy at the pleading stage, certiorari was not available.

Paternity

Daniels v. Greenfield, 15 So.3d 908 (Fla. 4th DCA 2009)

In this wrongful death case, the child's alleged biological father was not married to the child's mother at the time of death. In fact, at the time the child was conceived and born, the mother was married to someone else. Florida Statute §382.013 provides that when a child is born to a mother who is married at the time of the child's birth, the husband is listed on the birth certificate as the father unless paternity has been determined otherwise by a court.

In this case, the mother previously filed a petition to determine paternity and child support. The decedent had answered by demanding a DNA test which was ordered but never conducted because he failed to appear. No judgment establishing paternity was ever entered.

Thereafter, the decedent committed suicide and the mother brought a wrongful death action on behalf of the son. The trial court granted summary judgment in favor of the healthcare providers finding that the child's paternity could not be determined or questioned in the context of a wrongful death case. The Fourth District reversed the entry of summary judgment finding that the trial court erred in determining the child was not a survivor of the decedent. The court remanded for further proceedings to resolve the issue either by summary judgment or in front of a jury as had occurred in the Third District's decision in *Coral Gables Hospital v. Veliz*, 847 So.2d 1027 (Fla. 3d DCA 2003). The Florida Supreme Court has now accepted jurisdiction of this case.

Pharmacist Liability/Drug Liability

Hoffman-La Roche, Inc. v. Mason, 34 FLW D2200 (Fla. 1st DCA 10/27/09)

The drug manufacturing Defendants appealed a final judgment in favor of the Plaintiff following a verdict awarding Plaintiff damages against the Defendants for placing Accutane on the marker with inadequate warnings to physicians about the risk of developing inflammatory bowel disease. The Plaintiff asserted that the failure to provide an adequate warning was a substantial contributing cause of the Plaintiff's development of that condition. The Plaintiff presented no evidence from either his treating physicians that a differently worded warning would have resulted in either physician not prescribing the medication for his extreme acne. Therefore, the Plaintiff failed to establish that the allegedly deficient warning was the proximate cause of the injury and the First District reversed with instructions to enter judgment in favor of Defendant.

Valdes v. Optimist Club of Suniland, Inc., 35 FLW D51 (Fla. 3d DCA 12/30/09)

A boy playing roller hockey suffered a heat stroke and cardiorespiratory arrest which resulted in him being completed disabled. In the morning of his collapse, he had taken Tylenol Cold. The Plaintiffs contended that Tylenol Cold increased the risk of heat related illness and heart-related risk when ingested with caffeinated products coupled with strenuous athletic events. The Plaintiffs alleged that the manufacturer's failure to warn of these risks on the label breached Florida State law requirements. The Defendants argued that Federal law governed the labeling of medication and, therefore, preempted State law requirements; however, an exemption contained in the Federal law states that nothing shall be construed to modify or otherwise affect any action, or the liability of any person based upon the product liability of any state. Finding that State law offered an additional

important layer of consumer protection complimenting the FDA regulations, the Third District found that it was error to grant summary judgment based upon Federal preemption.

Pre-Suit Screening

Shaffer v. Icely, 16 So.3d 282 (Fla. 2d DCA 2009)

In this action against multiple Defendants, the Plaintiff sued an ultrasound technician for ordinary negligence after she mistakenly represented that the Plaintiff's sonogram showed that their fetus had 10 fingers and 10 toes. The Plaintiff's daughter was later born missing a forearm and a hand. On Motion to Dismiss, the trial court agreed that an action for wrongful birth is a subset of medical malpractice and must be brought pursuant to Chapter 766. However, because the act does not include ultrasound technician in its definition of healthcare providers the Second District reversed finding that the Plaintiff's Complaint was properly a claim for ordinary negligence.

Derespina v. North Broward Hospital District, 19 So.3d 1128 (Fla. 4th DCA 2009)

The Plaintiff's Notice of Intent was accompanied by the affidavit of her sister; a nurse with 46 years of experience who also happened to be the mother of the Plaintiff's attorney. The affidavit stated that she had reviewed the subject records and concluded that the medical malpractice claim had merit. The hospital argued that the Plaintiff failed to conduct a reasonable investigation because a biased affiant could not be used to support a Notice of Intent.

An evidentiary hearing was conducted and the trial court determined that the expert was not unbiased, noting that she had not billed for her time in reviewing the file and had no special expertise in the subject matter. The court also concluded that the Plaintiff could have easily obtained a nurse without family ties to give an expert opinion but none was ever sought. The Fourth District affirmed the trial court's dismissal of the Complaint even though the statute of limitations had run finding that the Plaintiff failed to conduct a reasonable investigation as contemplated by the statute.

Dr. Navarro's Vein Centre of the Palm Beaches v. Miller, 22 So.3d 776 (Fla. 4th DCA 2009)

The Defendant filed a Petition for Certiorari in order to review an order denying a Motion to Dismiss the Plaintiff's Complaint for non-compliance with the pre-suit screening requirements. The case involved laser hair removal and the Plaintiff alleged that the doctor's negligence in performing the procedure caused severe burns. It specifically alleged that the doctor was not performing medical treatment but was performing cosmetic electrolysis as defined by Florida Statute Section 478.42. The Fourth District granted the Petition and directed the trial court to dismiss the Complaint finding that laser hair removal is a medical procedure because it must be performed by a physician or a non-physician supervised by a physician.

The Fourth District noted that while it did not normally review orders denying motions to dismiss because there are adequate remedies at law in a final appeal, they found that declining to do so in this case would cause irreparable harm and would vitiate the cost saving pre-trial procedures required under Florida Statute Section 766.106.

Oken v.Williams, 23 So.3d 140 (Fla. 1st DCA 2009)

The First District held that the trial court erred in denying the hospital's Motion to Dismiss pursuant to Fla.Stat. §766.206. The court held that the trial court departed from the essential requirements of law in denying the hospital and physician's motion to dismiss because the plaintiff failed to timely attach a corroborating affidavit of a "medical expert" as defined in §766.202(6).

The plaintiff present to the emergency department at St. Lukes Hospital complaining of chest pain. They claimed that the emergency room physician ordered a consultation with Dr. Oken, a board certified cardiologist who was negligent in misreading the EKG, failing to admit the plaintiff to conduct a full cardiac work up and recommended that the respondent take Maalox when he called back with worsening cardiac symptoms and they claimed that the plaintiff suffered an acute myocardial infarction as a result of the negligence of the cardiologist.

The First District held that the 2003 Medical Malpractice Tort Reform required that the specialist who corroborates the medical negligence be of the same skill and training as the prospective defendant served with the Notice of Intent. Accordingly, an emergency room physician does not have the specialized training as a cardiologist, simply because an emergency medical physician sees patients with cardiac problems in the emergency room. Therefore, the affidavit of an

emergency room physician to criticize or corroborate medical negligence of a cardiologist was invalid.

The trial court also erred in treating the emergency room physician as a "generalist" making him a "specialist" in all areas of medicine he encountered in the emergency room. The court disagreed that emergency room physicians are similar to family medicine doctors and would improperly be qualified, under the standard of care law specialist which is neither what the law now permits nor what the legislator intended. Therefore, the affidavit should have been stricken and the case dismissed.

Statute of Limitations

Abbey v. Patrick, 16 So.3d 1051 (Fla. 1st DCA 2009)

The trial court denied defendant's Motion for Summary Judgment on the grounds that the statute of limitations had expired. The First District ruled that such an order is not reviewable by certiorari because any alleged error in the computation of the statute of limitations period would not deprive the defendant of his rights under the medical malpractice pre-suit screening statutes nor was it a violation of clearly established principles of law resulting in a miscarriage of justice.

Cohen v. Cooper, 20 So.3d 453 (Fla. 4th DCA 2009)

In November, 1997 a doctor performed a face lift. The Plaintiff awoke to excruciating pain in her left eye and also had severe jaw pain. She had additional procedures on her eyelid and testified that in September, 1998, she realized that the doctor "had somehow erred in the procedure on her face." Nevertheless, she also testified that the doctor assured her that this was a "slow recovery process" and that her pain was normal and that "the dents that existed on her face would go away." Because there was conflicting evidence as to when the Plaintiff should have known of a reasonable possibility that her eye pain was as a result of medical negligence and because "simply suspecting wrong doing was not enough", the Fourth District reversed the granting of summary judgment in favor of the Defendant.