

CASE LAW SUMMARY
2010

Medical Malpractice

Amendment 7

Baldwin v. Shands Teaching Hospital, 45 So. 3d 118 (Fla. 1st DCA 2010)

Plaintiff filed suit alleging that he was negligently intubated causing a perforation that injured his hypopharynx with severe damage to his larynx and throat. The Plaintiff sought to compel Shands to produce his Risk Management Incident Report, peer review records and other records of adverse medical incidents involving the patient. The Plaintiff argued that because he was under the affects of pre-anesthesia when the injury occurred and could not recall what happened, these records were the only accurate records of the injury and could not be substituted. Shands opposed the request on the grounds that its own investigation concluded that the incident did not involve negligence and was therefore “not an adverse medical incident” requiring disclosure under Amendment 7. The trial court refused to require production of the two documents.

The Plaintiff then filed a Writ of Certiorari and the First District granted the petition and quashed the lower court’s order. The First District held that a hospital may not avoid the dictates of Amendment 7 by determining, through its own investigation, that the records sought do not constitute “an adverse medical incident” report. In doing so, they noted that a verified medical expert’s opinion from the Plaintiff’s expert provides at least a threshold showing of an adverse medical incident for purposes of Amendment 7. The First District also added that liberal access to records of past adverse medical incidents should not be denied to a current or former patient when that patient has suffered a serious injury based upon a medical provider’s sole determination. Rather, they noted that it was the court’s power to make this determination.

Arbitration

Gordon v. Shield, 41 So. 3d 931 (Fla. 4th DCA 2010)

The patient sought treatment at the Strax Institute. Dissatisfied with the results, she filed a Notice of Intent. The physician and Strax Institute participated

in pre-suit discovery and at the conclusion of the pre-suit period denied the claim. Thereafter, the Plaintiff filed suit against the physician and Strax and they, in turn, moved to dismiss the lawsuit and compel arbitration pursuant to a general consent executed by the patient prior to treatment. Although the Florida Supreme Court has found that the right of arbitration can be waived by actions inconsistent with the right to arbitrate, they found that the Defendant's participation in pre-suit did not constitute a waiver of the arbitration clause previously agreed to by the parties noting that all of the actions of the Defendants were compelled as a direct result of the Plaintiff having filed her Notice to Intent to Initiate Litigation.

Deno v. Lifemark Hospitals of Florida, 45 So. 3d 959 (Fla. 3d DCA 2010)

The Third District held that non-economic damages are capped at \$250,000 per claimant per incident in a medical malpractice arbitration brought pursuant to Florida Statute 766.207. In so doing, they rejected the Plaintiff's contention that the survivors were entitled to claim \$250,000 in non-economic damages per claimant per Defendant.

Arbitration - Nursing Home

Smith v. Southland Suites, 28 So. 3d 103 (Fla. 5th DCA 2010)

The daughter of a nursing home resident signed a nursing home admission contract under a durable power of attorney. The Fifth District found that the document which granted the daughter the power "generally to do and perform all matters and things, transact all business, make, execute and acknowledge all contracts, whether involving real property or not, orders, deeds, writings, assurances and instruments which may be requisite or proper to effectuate any matter or thing appertaining to or belonging to me and generally to act for me in all matters affecting my business or property" was broad enough to allow the daughter to enter into a binding arbitration agreement on behalf of the decedent even though the power of attorney did not specifically reference arbitration agreements.

Stalley v. Transitional Hospital Corp., 44 So. 3d 627 (Fla. 2d DCA 2010)

On admission to a rehabilitation hospital, the decedent's wife signed admission papers including an arbitration agreement. At the time of the decedent's admission, he was conscious, alert and able to speak and his wife did not have a power of attorney or other written consent authorizing her to act on behalf of the decedent. The Second District found that the wife was not acting as the decedent's

apparent agent when she signed an arbitration agreement because her husband made no representation that his wife was his agent. Further, although she had the decedent's authority to sign papers regarding his admission, the arbitration agreement was not a document necessary for his care and treatment. Lastly, the court held that the decedent was not a third-party beneficiary of the arbitration agreement where the arbitration agreement was a separate document and the hospital's provision of services to the decedent was not dependent on his acceptance of the arbitration agreement.

FL-Carrollwood Care Center v. Gordon, 34 So. 3d 804 (Fla. 2d DCA 2010)

The decedent signed an admissions agreement at the nursing home which included an arbitration clause. After the estate filed its complaint, the nursing home moved to dismiss and to compel arbitration pursuant to the agreement. The estate filed a response arguing that there was no valid arbitration agreement because, at the time he signed the agreement, the resident lacked the necessary capacity to enter into a contract. Because there was a substantial issue concerning the resident's capacity to enter into the contract, the Second District ruled that it was error for the trial court to deny the motion to compel arbitration without conducting an evidentiary hearing. As such, the trial court's order was reversed and remanded for an expedited evidentiary hearing.

Caps on Non-Economic Damages

Weingrad v. Miles, 29 So. 3d 406 (Fla. 3d DCA 2010)

The Third District held that the caps on non-economic damages were constitutional and applied retroactively even though the care was provided prior to the effective date of the statute because the Notice of Intent and suit was filed after the enactment of Florida Statute 766.118. The Third District found that Florida Statute 766.118 was a substantive statute; however, there was an unambiguous legislative intent for it to apply retroactively and the plaintiff had no vested right to a specific damage award at the time the injury occurred.

Collateral Sources

Ingenix v. Ham, 35 So. 3d 949 (Fla. 2d DCA 2010)

After a settlement in a medical malpractice case, the estate filed a motion for equitable distribution arguing that the health insurer was not entitled to full

repayment of its bills pursuant to the language of the insurance policy. Instead, they argued that, pursuant to Florida Statute §768.76(4), the insurance company was only allowed reimbursement of its payments after a deduction for the health insurer's pro-rata share of attorney's fees and costs.

The Second District held that even when an insurance policy contains an absolute right of reimbursement, the statute applies and requires the reduction of the reimbursement by the pro-rata share of attorney's fees and costs.

Comparative Negligence of Patient

Drew v. Tenet St. Mary's, Inc., 46 So. 3d 1165 (Fla. 4th DCA 2010)

The trial court denied Plaintiff's motion for directed verdict on the issue of comparative negligence and, subsequently, the jury found Plaintiff to be 70% comparatively negligent. The Fourth District affirmed the trial court's denial of the motion for new trial. The factual background of the case was as follows: after being diagnosed with breast cancer and treated with a lumpectomy, the Plaintiff sought radiation treatment. Before starting treatment, the Plaintiff and her surgeon had a phone conference with the radiation oncologist to discuss the course of treatment and the role of radiation would play in the reduction of possible recurrences. During the conference call, the Plaintiff inquired as to whether transportation needed to be arranged after radiation treatment. She was advised that radiation did not affect one's physical or mental functioning and that no arrangements were necessary.

On arrival at the Cancer Center the following Monday, the doctors noted that the Plaintiff required an additional procedure to inflate a balloon previously inserted in her lumpectomy cavity. The radiation oncologist prescribed 2 mgs. of Ativan. Shortly after the Ativan was ordered, a nurse entered the patient's room to administer it and the patient inquired as to whether she could drive home after taking the drug. During this time, she noted her familiarity with the medicine because she took it after the passing of her husband and noted that she had never seen an Ativan the size of the one that was going to be given to her. In response to the Plaintiff's inquiry about her ability to drive, the nurse replied that she could not tell her if she could drive and that she should speak to her radiation oncologist about this. Approximately 80 minutes after receiving the Ativan, the Plaintiff found it necessary to leave the facility. While driving home, the Plaintiff crashed her car into a tree and suffered serious injuries.

The Fourth District noted that the question of whether anyone definitively told the Plaintiff that she could not drive home after taking the Ativan was not dispositive of whether she was comparatively negligent. Rather, the question was whether, given the circumstances of the case, she exercised adequate care for her own safety when she took the medication and proceeded to drive home without awaiting clarification from her doctors to the safety of driving on the drug. Given her prior knowledge and experience regarding the affects of Ativan and her repeated suspicions that she might not be able to drive, the Fourth District found that this was an issue for the jury.

Conferences with Employed Physician

Lee Memorial Health System v. Smith, 40 So. 3d 106 (Fla. 2d DCA 2010)

The Plaintiffs filed suit against Lee Memorial for medical negligence. In its Answer, the hospital admitted that its employees and agents fell below the standard of care but they denied that the failures caused the injuries to the patient. Since the date of alleged negligence, she had received follow up medical care and treatment from several physicians employed by the hospital. Thereafter, the patient's family filed a Motion for Protective Order seeking to prohibit the hospital and its counsel from having ex-parte communications with her current treating physicians who were employed by the hospital citing the confidentiality provision of Florida Statute 456.057(8).

The Second District quashed the trial court's Order Granting the Motion for Protective Order noting that employed physicians are entitled to discuss and disclose patient information with the hospital's Risk Manager and their counsel and that this does not constitute a disclosure under Florida Statute 456.057.

Disclosure of AIDS Status

D.E.W v. Krouse, 41 So. 3d 320 (Fla. 4th DCA 2010)

The trial court entered summary judgment in favor of the Defendant physician. The patient, who is HIV positive, was admitted to the hospital for treatment of a kidney infection. The patient's mother brought her two minor daughters, who were unaware of their mother's HIV status, for a visit. While the family members were in the room, the Defendant physician entered and asked if the patient was taking any medication for her AIDS. She then filed a complaint

against the physician alleging medical malpractice based upon his improper disclosure and seeking damages for her mental anguish and emotional distress.

Thereafter, she filed a motion for protective order to prevent her daughters from being deposed in the lawsuit explaining that her daughters “do not know that Plaintiff is, in fact, HIV positive.” Accordingly, the physician filed summary judgment arguing that the patient could not demonstrate causation or damages because she could not prove that her daughters heard the statement and they did not think their mom was HIV positive. The Fourth District affirmed the summary judgment noting that they did not need to address the exceptions to the impact rule because the record was devoid of any evidence that the patient’s daughters heard what the doctor allegedly said. Due to her obtaining a protective order, the patient could not prove an actual disclosure of her medical condition.

Intentional Misrepresentation

Thomas v. The Hospital Board of Directors of Lee County, 41 So. 3d 246 (Fla. 2d DCA 2010)

Following surgery, the patient’s heartbeat and blood pressure increased and a nurse and physician injected the patient with a medication used to treat this condition. In doing so, they apparently gave her a lethal overdose that led to a cardiac arrest. Subsequently, the physician and two nurses agreed to conceal the real cause of the death and, instead, chose to notify the family that she died “from the stress of surgery.” In fact, this was listed as the cause of death. Later on, the real cause of death was determined by others, including the hospital attorney; however, they failed to disclose it to the family.

Because the cause of death had been listed as “natural causes” the Medical Examiner did not conduct a complete autopsy and the patient’s body was released to her family for burial. During the funeral, the decedent’s daughter received a phone call from the hospital’s attorney and the Medical Examiner and he demanded that the body be returned to him immediately for a second autopsy. This demand was made after the Medical Examiner learned of the real cause of the patient’s death. After the body was returned, a second autopsy was conducted and he attributed her death to a lethal overdose.

The trial court granted summary judgment on a claim of intentional misrepresentation finding that the Personal Representative was precluded from seeking non-economic damages in her capacity as Personal Representative because

the decedent's children were all adults and because the complaint arose only after the decedent died as a result of alleged malpractice.

The Second District reversed and found that although the complaint contained claims for wrongful death arising out of medical malpractice, the claim for intentional misrepresentation had nothing to do with the purported wrongful death arising out of the malpractice and reversed the summary judgment. They also found that the intentional misrepresentation claim was not barred under the Impact Rule.

Liability for Staff Physicians

Quesada v. Mercy Hospital, Inc., 41 So. 3d 930 (Fla. 3d DCA 2010)

The patient sued his surgeon and Mercy Hospital for medical negligence. He testified that he came into the hospital via the Emergency Department and could not recall meeting or being introduced to the surgeon before the surgery. He testified that "maybe the surgeon came after the operation and said such and such, I operated on you." The patient was not told that the surgeon was an employee of the hospital and did not ask anyone about the relationship between the hospital and surgeon. The Third District held that a hospital's consent form for a doctor to perform a procedure within the hospital was not, without more, a representation that the doctor is an agent of the hospital. Accordingly, because the surgeon was a private physician with staff privileges at the hospital; had no contract with the hospital; and was not "hospital based", summary judgment in favor of the hospital was appropriate based upon the general principle that a hospital is not ordinarily liable for the negligence of independent contractor physicians to whom it merely grants staff privileges.

Medicare/Medicaid Liens

Russell v. Agency for Health Care Administration, 23 So. 3d 1266 (Fla. 2d DCA 2010)

The Plaintiff filed a medical malpractice action on behalf of her son. A settlement was reached and the trial court ordered full satisfaction of the Medicaid lien from the proceeds of the settlement. The case was settled for \$3 million dollars and the lien was for \$221,434. The settlement agreement contained no allocation of the amount recovered amongst the various elements of damages suffered nor did the parties to the settlement or AHCA otherwise agree to such an

allocation. Because the lien amount did not exceed 50% of the amount recovered by the settlement, the Second District affirmed the trial court's decision finding that AHCA was entitled to full satisfaction of its lien pursuant to Florida Statute 409.910 (11)(f)(1).

The Second District rejected the Plaintiff's reliance on the United States Supreme Court decision of *Arkansas Department of Health v. Ahlborn*, 547 U.S. 268 (2006) finding that in *Ahlborn*, the state stipulated to the portion of the settlement attributable to the medical expenses also noting that it exceeded that portion of the settlement that represented payment for medical care. In this case, there was no such stipulation and no similar basis for determining an allocation of the settlement proceeds.

NICA

NICA v. Bayfront Medical Center, 29 So. 3d 992 (Fla. 2010)

In these consolidated cases, the Supreme Court ruled that a physician's pre-delivery notice to the patient of his or her participation in NICA did not satisfy the notice requirements where the hospital also failed to provide notice of any kind. In order to satisfy the notice requirements of NICA, both the participating physicians and the hospitals must provide patients with notice of participation in the plan. If either the participating physician or the hospital fails to give notice, then the claimant can either accept the NICA remedies and forego any civil suit against any other person or entity involved in the labor and delivery or pursue a civil suit only against the person or entity who failed to give notice and forego any remedies under NICA.

NICA v. Michael, 35 FLW D493 (Fla. 2d DCA 3/3/10)

Parents of a child that had already been approved for NICA benefits submitted a claim for residential and custodial care of services provided to the minor child. The claim resulted in a settlement; however, the claimants were concerned with the potential tax ramifications and requested that NICA purchase a structured settlement in order to avoid taxation. When they were unable to reach an agreement, the claimants filed a motion to enforce the settlement and both sides moved for summary judgment. The administrative law judge entered a summary judgment in favor of the claimants; however, the Second District reversed finding that NICA never expressly agreed that it would execute a structured settlement agreement.

Samples v. NICA, 40 So. 3d 18 (Fla. 5th DCA 2010)

Parents of a child found to have a compensable injury under NICA appealed an administrative order awarding them \$100,000 jointly for parental compensation arguing that the statute which provides for “an award of compensation ... to the parents or legal guardians ... which award shall not exceed \$100,000” was ambiguous and should be construed to authorize an award of up to \$100,000 to each parent. They also argued that to construe the statute otherwise would violate the Equal Protection Clause, violate the access to court’s clause and would be vague. The Fifth District found the Statute to be constitutional and agreed with the administrative order that the parents were only entitled to \$100,000. They then certified the following question to the Florida Supreme Court: “Does the limitation in Section 766.31(1)(b)(1) of a single award of \$100,000 to both parents violate the Equal Protection Clause of the United States and Florida Constitutions?”

Non-Delegable Duty

Kristensen-Kepler v. Cooney, et al., 39 So. 3d 518 (Fla. 4th DCA 2010)

A surgical center did not owe a duty of care arising out of inappropriate administration of anesthesia where the surgical procedure was performed by a physician selected by the patient and the surgical center had no right to control or direct the treatment. The patient chose the physician to perform the procedure and the patient-selected physician directed the anesthesiologist to the surgery facility as the location where the procedure would be performed. The patient did not rely on the surgical center to select the doctor and neither of the physicians (the surgeon or the anesthesiologist) was employed by the surgical center. The hospital could not be liable based upon non-delegable duty.

Further, the patient could not argue that the anesthesiologist was an apparent agent of the surgical center where the surgical center: made no representation to the patient about the anesthesiologist; there was no reliance by the patient on any representation made by the surgical center; and, the patient did not change his position as a result of any reliance. The fact that the consent form disclosed that the physician had a financial relationship with the surgical center did not interject apparent authority liability into the case.

Tarpon Springs Hospital v. Reth, 40 So. 3d 823 (Fla. 2^d DCA 2010)

In certifying conflict with the *Wax* decision, the Second District concluded that, while a hospital has a statutory obligation to have an Anesthesia Department directed by a physician member of the hospital's professional staff, the applicable Florida Statutes and Administrative Rules do not impose a non-delegable duty to provide anesthesia services to surgical patients. Thus, a hospital does not have a non-delegable duty to provide non-negligent anesthesia services to surgical patients.

The statutory duty of hospitals is to have available competent and adequately staffed Anesthesia Departments. If a hospital fails to have an anesthesia service directed by a physician member of its medical staff, or to provide for adequate numbers of anesthesia providers, or if it allows incompetent anesthesia providers to be granted privileges, it could be held liable if this proximately caused injury to a patient.

Here, the patient expressly consented to the delegation of both the performance and responsibility for performing anesthesia services to the anesthesiologist. The evidence established that anesthesia services provided by the patient's nurse anesthetist were provided under the direction, supervision and control of the anesthesiologist, not the hospital. The fact that the anesthesiologist used a nurse anesthetist employed by an anesthesia practice to assist did not operate to "re-delegate" any duty back to the hospital.

Nursing Homes

Estate of Murray v. Delta Health Group, 30 So. 3d 576 (Fla. 2d DCA 2010)

A resident of a nursing home died and his personal representative sued the nursing home for negligence. The trial court allowed portions of the decedent's doctor's deposition to be read. In the deposition, the doctor opined that the nursing home was "not negligent" in his care of the decedent. The plaintiff argued that the physician was an expert who should not have been permitted to render an opinion that applied a legal standard to the facts of the case and that his testimony invaded the province of the jury. The Second District reversed and found that a new trial was required because while experts may render opinions on the ultimate issue in the case, they are not permitted to render opinions that apply legal standards to a set of facts.

Presuit Screening

Variety Children's Hospital v. Boice, 27 So. 3d 788 (Fla. 3d DCA 2010)

The plaintiff served a notice of intent on a physician. Six months later they filed an amended complaint naming the hospital as a defendant. The trial court dismissed the amended complaint against the hospital for failure to comply with presuit screening. The plaintiff then served a statutory notice of intent upon the hospital. On the same day, they also served a notice to produce documents and a subpoena duces tecum for videotaped deposition of numerous hospital personnel. The hospital moved for protective order and to quash the subpoenas on the grounds that the presuit period had not yet been completed. The trial court denied the motions.

The Third District issued a writ of certiorari and found that even though the complaint against the hospital involved the same issues relevant to the impending lawsuit against the hospital, because the hospital was not yet a party to the action, the plaintiff was not entitled to take formal discovery from the hospital.

Hunt v. Huppmann, 28 So. 3d 989 (Fla. 2d DCA 2010)

The Second District granted certiorari and found that the plaintiff's complaint should have been dismissed for failure to comply with presuit where the plaintiff provided an affidavit from a certified medical assistant that did not have a college degree nor was the expert noted to be a licensed healthcare provider.

South Miami Hospital, Inc. v. Perez, 38 So. 3d 809 (Fla. 3d DCA 2010)

The Plaintiff alleged that a patient fell from his hospital bed while in the Critical Care Unit at the hospital while unrestrained and unattended and that the hospital, by and through its agents and employees, failed to monitor and supervise him. Despite this, the Plaintiff attempted to make a claim for general liability and avoid the caps on medical malpractice claims by alleging that he was a "business invitee". The Third District Court of Appeal found this argument to be disingenuous and concluded that this was a claim for medical malpractice. Because the Plaintiff failed to issue a Notice of Intent, they directed that the claim be dismissed.

Dirga v. Butler, 39 So. 3d 388 (Fla. 1st DCA 2010)

The trial court dismissed the Plaintiff's Complaint against an Alabama-licensed physician due to the Plaintiff's failure to comply with the pre-suit provisions of Florida Statute 766. Because it was determined that the physician was not a "healthcare provider" as defined under Florida Statute 766.202(4), the First District found that the trial court improperly dismissed the Complaint because the physician was not entitled to pre-suit notice.

Baptist Medical Center of the Beaches v. Rhodin, 40 So. 3d 112 (Fla. 1st DCA 2010)

The patient initiated a malpractice suit against the hospital. In support of their Notice of Intent, they attached an affidavit from a Registered Nurse with a Ph.D. This expert noted various deficiencies in the hospital personnel's care and treatment and concluded that the deviations caused or contributed to causing the Plaintiff's permanent injury. The Defendant moved to dismiss the Complaint finding that the expert was unqualified to offer an opinion because she was an operating room nurse and was offering opinions on the medical cause of his central nervous system injury and paralysis. Secondly, one of the expert's prior opinions was disqualified and third, they argued that she was not duly and regularly engaged in the practice of nursing as required by law.

The First District found that the denial of the Motion to Dismiss was appropriate pointing out that the expert had a Bachelor's, Master's and Ph.D. in Nursing; was an Associate Professor of Nursing; was a Program Coordinator for a Master's Nursing Education Program; was a Registered Nurse licensed in Georgia; had over 25 years of nursing experience in the clinical and academic settings; served as an operating room staff nurse for 14 years and had conducted extensive research in the field of nursing and was widely published in journals and academic texts. The expert's affidavit also noted that her nursing practice during the three years prior to the date of incident included the provision of nursing care to patient in circumstances similar to that of the patient.

The First District found that the expert was qualified to opine as a medical expert on the issues of standard of care and medical causation and noted that Florida Statute 766.203 merely requires a corroborating opinion provide "reasonable grounds" to believe that the negligence resulted in the patient's injury and does not require "proof after a mini-trial of actual malpractice on the facts presented."

As for the issue of her prior opinion being disqualified, the court reviewed the underlying case and found that her report in a Texas case did not constitute a good-faith to comply with the statutory requirements, but did not find that she was disqualified as an expert; only that her opinion was insufficient regarding evidence of a physician's standard of care. Lastly, they found that the expert had devoted professional time to teaching and the practice of professional nursing thereby qualifying her under the statute to offer her opinions.

Indian River Memorial Hospital v. Browne, 44 So. 3d 237 (Fla. 4th DCA 2010)

While in the emergency room, the Plaintiff fell off a stretcher, suffered head injuries and died. The Complaint set forth a claim for general negligence, alleging that the hospital improperly supervised the decedent and left the stretcher's guardrails unsecured. The hospital filed a motion to dismiss for the failure to comply with the presuit screening requirements set forth in § 766.106, Florida Statutes.

On appeal it was determined that the claim was based, in part, on: (1) the hospital's evaluation of the decedent's medical condition when he was admitted to the emergency room and (2) the hospital's failure to implement adequate procedures to protect patients from falling from hospital beds. Because those allegations implicated the prevailing professional standard of care for managing and supervising patients, the claim arose out of the rendering of, or failure to render, medical care or services and was subject to presuit.

Oliveros v. Adventist Health Systems, et al, 45 So. 3d 873 (Fla. 4th DCA 2010)

Just prior to trial, the defendant-healthcare providers filed motions for leave to amend their answers and affirmative defenses, and motions to dismiss, arguing that the Plaintiffs had failed to comply with the presuit corroborating affidavit requirement because their expert was not a qualified expert in emergency medicine. The motions were granted and dismissal was deemed a final resolution of the case because the Statute of Limitations had expired.

Dismissal was reversed on appeal. The appellate court determined that the alleged failure to comply with the presuit corroborating affidavit requirement of Section 766.203(2) must be specifically pled with particularity in an answer and/or motion to dismiss the complaint. When filing their initial Answers, none of the healthcare providers denied that the Plaintiff's expert affidavit failed to comply with Section 766.203(2).

While the defendants contended that they could not ascertain that the expert did not possess the statutorily required qualifications until after the expert's deposition was conducted, the Court noted that the healthcare providers had almost one year from receiving the Notice of Intent, as well as, several months from the filing of Complaint, to investigate same.

Holmes Regional Medical Center v. Wirth, 49 So. 3d 802 (Fla. 5th DCA 2010)

The Plaintiff was admitted to the hospital in November, 2005. He was prescribed narcotics; however, the nurses failed to monitor him for possible known side effects and failed to document his vital signs throughout the night. In the early morning, the nurses found the patient unresponsive and suffering from respiratory distress. It was alleged that he stopped breathing for 13 minutes and suffered brain damage as a result. In 2008, a Notice of Intent was filed and an affidavit from a nurse was attached indicating that, from 1993 through 2006 she was the President and owner of a company and her responsibilities were primarily supervisory and administrative. Her affidavit did not indicate that she had any experience as a hospital nurse within the three years prior to this incident; however, the affidavit outlined the nurse's understanding of the facts and her opinion that the hospital and staff were negligent and breached the applicable standard of care which caused severe harm to the patient.

The hospital advised the Plaintiffs that it believed the nurse was unqualified to render this opinion because she had not devoted any time to clinical practice or consulting in hospital based nursing since 1993 and did not have the appropriate training or experience to opine about the medical causation or the injuries for pre-suit purposes. Subsequently, the Plaintiffs filed their Complaint and the hospital moved to dismiss based upon the above defects. Prior to the hearing on the motion to dismiss, Plaintiffs filed a second affidavit to clarify her qualifications. The expert stated that since August 1985, she worked "as a Medical Case Manager" providing nursing care and consultation for all types of orthopedic and neurological injuries ... from my experience as both a floor nurse and a Medical Case Manager, I can affirm that I typically spend more time with a patient and their doctors and in assessing and coordinating their medical care than a hospital floor nurse who typically practices in one specialty area." Based upon this background, this allowed her to be able to state that a patient left without oxygen over a 3-6 minute period of time would incur loss of brain cells and permanent brain damage and/or death as a result.

The trial court found the affidavit insufficient because the expert did not specifically state her experience for the three years prior to the incident, but only generalized about her experience over the past 31 years. The trial court granted the Plaintiffs 10 days to file an amended affidavit that clarified her experience for the three years prior to the incident. The expert subsequently averred that during those three years she worked as a nursing and medical consultant and actively consulted with the patients and their medical providers to assess, recommend and coordinate the patient's medical care. The hospital renewed its motion to dismiss and, just prior to the hearing, the Plaintiffs filed a fourth affidavit from their expert. At the hearing, the hospital argued that the third and fourth affidavits were filed outside the Statute of Limitations and the fourth affidavit was untimely. Without addressing this argument, the trial court denied the motion to dismiss.

The Fifth District found that when the expert's three affidavits were reviewed in their totality, they were sufficient to qualify her as an expert under Florida Statute 766.102 and to corroborate that the hospital committed negligence and that the negligence caused the Plaintiff's injuries.

Wrongful Death

Greenfield v. Daniels, 35 FLW S685 (Fla. 11/24/10)

The Supreme Court held that a survivor's claim may be brought on behalf of a child who is alleged to be the decedent's biological child, but whose mother was married to another man at the time of the child's conception and birth. Under Florida law, a child born to an intact marriage is required to have the husband's name listed as the father on the birth certificate. Nevertheless, this child was allowed to bring a survivor's claim for the death of his putative father. Moreover, the Supreme Court determined that the facts necessary to establish that the child qualifies as a survivor may be determined in the wrongful death action rather than in a paternity action brought under Florida Statute 742.