Medical Malpractice

Amendment 7

Cedars Healthcare Group v. Ampuero-Martinez, 36 FLW D2071 (Fla. 3d DCA 9/21/11)

The Third District granted a Writ of Certiorari in part and quashed the trial court's order which required the hospital to produce records of adverse medical incidents involving patients other than the Plaintiff which were not limited to the same or substantially similar conditions, treatments or diagnoses as the patient who requested the records.

Acevedo v. Doctors Hospital, 68 So. 3d 949 (Fla. 3d DCA 2011)

The trial court departed from the essential requirements of law in ordering that opinions and comments of a hospital's staff were to be redacted from adverse medical incident reports and by extending the opinion work product doctrine to risk management and incident reports identified as adverse medical incidents and those comments made by such hospital staff. The opinion work product privilege does not apply to the comments and findings of hospital personnel routinely contained in adverse medical incident reports.

Arbitration – Medical Malpractice

Felger v. Mock, 65 So. 3d 623 (Fla. 1st DCA 2011)

The patient sought medical treatment with the Defendant doctors and, in doing so, signed a document which required that any negligence claims be submitted to arbitration. Subsequently, the patient filed a Complaint in the circuit court alleging medical negligence and the surgeons responded with a Motion to Compel Arbitration which the trial court granted. A 3-member arbitration panel heard the merits of the claim and found in favor of the surgeons. In the arbitration award, the arbitrator stated that "according to the evidence presented, none of the witnesses could say with certainty how the injury occurred." The patient asked the trial court to vacate their arbitration award and order a rehearing before another arbitration panel.

The trial court did so pursuant to Florida Statute §682.13(1)(c) which provides that "upon application of a party, the court shall vacate an award when the arbitrators … exceeded their powers." The trial court ruled that the arbitration panel had "gone beyond the scope of its powers under the arbitration agreement" by modifying the burden of proof so that "it would be almost impossible to recover any damages." The surgeons appealed and the First District reversed the trial court noting that the only reasons why an arbitration award can be set aside is if: (1) the award was procured by corruption, fraud or other undue means; (2) there was partiality by an arbitrator appointed as a neutral; (3) corruption of any of the arbitrators or misconduct prejudicing the rights of any party; (4) arbitrators exceeded their powers; (5) the arbitrators refused to postpone the hearing and sufficient cause was shown; (6) refused to hear evidence material to the controversy or conducted the hearing contrary to the provisions of Florida Statute 682.06 regarding notice and entitlement to present evidence; or(7) find there was no agreement or provision for arbitration. The First District added that arguing that the arbitration panel exceeded its powers under the arbitration agreement by applying an incorrect burden of proof has consistently been rejected as a basis for vacating an award.

Arbitration – Nursing Homes

Shotts v. OP Winterhaven, Inc., 36 FLW S665 (Fla. 11/23/11)

Ms. Shotts admitted her uncle to OP Winterhaven. The admission agreement contained a "limitations of remedies" provision which required any dispute to be arbitrated in accordance with the American Health Lawyers Association Rules and also ruled that the arbitrators would have no authority to award punitive damages. The agreement also stated that its terms were severable. After Ms. Shotts filed suit, the nursing home filed a Motion to Compel Arbitration. Shotts argued that the agreement was unenforceable because it was unconscionable and violated public policy. The trial court granted the Motion to Compel Arbitration and the Second District affirmed.

The Supreme Court determined that the trial court erred in failing to rule that the arbitration agreement violated public policy and by allowing that decision to be made by the arbitrator. Second, they held that the District Court erred in failing to rule that the limitations of remedies provisions violated public policy because it underminded specific statutory remedies. Specifically, it precluded the arbitrators from awarding punitive damages. The Supreme Court also ruled that the limitation of remedies provision was not severable because the American Health Lawyers

Association rules went to the very essence of the agreement and if the provisions were severed, the trial court would be forced to rewrite the agreement to add an entire new set of procedural rules, burdens and standards.

Gessa v. Manor Care of Florida, 36 FLW S676 (Fla. 11/23/11)

Angela Gessa was admitted as a resident to Manor Care of Florida. Upon admission, her daughter signed admission documents that included an arbitration agreement. During her stay, Gessa filed suit against Manor Care alleging negligence, violation of resident's rights and breach of fiduciary duty. Manor Care moved to compel arbitration. At the hearing on the Motion to Compel Arbitration, Gessa argued that the arbitration agreement was unconscionable and contrary to public policy due to a limitation of liability provisions that capped non-economic damages at $250,000 and waived punitive damages. The trial court granted the Motion to Compel ruling that, because any offensive clauses could be severed, the agreement was not unconscionable. The court declined to rule on the public policy issue leaving that for the arbitrator to decide. The District Court affirmed. The Supreme Court determined that the trial court erred in ruling that the limitation of liability provisions which placed a $250,000 cap on non-economic damages and waived punitive damages were severable. They also erred in failing to rule that the trial court and not the arbitrator must decide whether the arbitration agreement violated public policy and erred in failing to rule that the limitation of liability provisions violated public policy.

Kissimmee Health Care Associates v. Garcia, 37 FLW D40 (Fla. 5th DCA 12/30/11)

Plaintiff filed a lawsuit against the nursing home for violations of Florida Statute 400.022-.023. The nursing home moved to dismiss based upon the Plaintiff's failure to mediate before filing his lawsuit. The trial court denied the Motion to Dismiss and determined that mediation is not a condition precedent to filing suit under Florida Statute 400.0233(11) which governs pre-suit notice and investigation of claims against nursing homes. This Statute provides that "within thirty days after the claimant's receipt of the defendant's response to the claim, the parties or their designated representatives shall meet in mediation to discuss the issues of liability and damages … At the conclusion of mediation, the claimant shall have sixty days or the remainder of the period of the Statute of Limitations, whichever is greater, within which to file suit." The Fifth District denied the Petition for Certiorari and upheld the denial of the Motion to Dismiss noting that, although subsection (11) contains the mandatory language "shall", it does not

specify which party must initiate mediation. Further, the subsection does not expressly state that mediation is a condition precedent to filing suit whereas other portions of this Statute set forth conditions that are clearly labeled as conditions precedent to filing suit including that a claimant notify each prospective defendant of asserted violations of the Statute before suit is filed.

F.I.-Carrollwood Care v. Gordon, 34 So. 3d 804 (Fla. 2d DCA 2011)

The patient's estate sued Carrollwood Care alleging violations under Chapter 400. The nursing home moved to compel arbitration pursuant to an agreement signed by the patient. The estate responded that no valid agreement existed because the lack of necessary mental capacity to enter into the contract when he signed the agreement and, moreover, the arbitration provision was unconscionable and, therefore, unenforceable. The trial court denied the request for an evidentiary hearing and determined that the patient was incompetent. The Second District reversed and held that an evidentiary hearing was necessary to determine whether he had mental capacity to enter into the arbitration agreement. On remand, the estate made the same two arguments it had made previously and after considering the evidence, the trial court concluded that the estate had shown that the patient lacked mental capacity at the time that he signed the agreement. Nevertheless, the trial court concluded that the arbitration agreement was unconscionable and denied arbitration. The estate argued that limitations on punitive damages, non-economic damages and discovery rendered the arbitration agreement substantive to being unconscionable. The Second District disagreed noting that the arbitration agreement did not place any limitations on an award of punitive damages. Rather, the agreement stated that the arbitration award shall be consistent with Florida law "except as otherwise stated in this agreement." The Second District noted that because the arbitration agreement did not expressly prohibit an award of punitive damages and the agreement requires the arbitrator to follow Florida law, substantive law would allow an award of punitive damages if appropriate. The estate then argued that the agreement's cap of $250,000 on non-economic damages also support a finding of substantive unconscionability. The Second District disagreed with this and noted that they have been unable to locate any cases where a cap on non-economic damages alone without a limitation on punitive damages supported a finding of substantive unconscionability. Additionally, the agreement's limitation on discovery (depositions were limited to those of experts and treating physicians) also did not substantiate a claim for substantive unconscionability. Lastly, they concluded that the agreement's severability clause would have saved the arbitration agreement even if the cap on non-economic damages and limitation on discovery were unconscionable.

Irons v. Arcadia Healthcare, 66 So. 3d 396 (Fla. 2d DCA 2011)

The estate of Ms. Arons appealed a non-final order compelling arbitration of the claims. Prior to her admission to the nursing home, Ms. Arons executed a health care power of attorney appointing her daughter as her "health care surrogate" and permitting her daughter to "make all health care decisions for" her. On appeal, the patient's family argued that the power of attorney was limited in scope and did not give her permission to agree to arbitration on behalf of the patient. The Second District agreed and noted that powers of attorney are to be strictly construed and will be held to grant only those powers that are specified.

Tampa H.C.P. v. Bachor, 72 So. 3d 323 (Fla. 2d DCA 2011)

The trial court denied the nursing home's Motion to Compel Arbitration and the Second District reversed this denial. The patient's representative signed the arbitration agreement which is contained in the admissions paperwork, but did so without reading same. The Second District found that there was no procedural unconscionability because the representative of the patient was not told that she was required to sign the arbitration agreement to have her mother admitted; she was not rushed in signing the agreement; the agreement clearly stated she could review the agreement with a lawyer; the signing of the arbitration agreement was not a pre-condition to admission; and there was a period during which she could rescind the agreement after signing same.

Arbitration – Physician Agreements

Franks v. Bowers, 62 So. 3d 16 (Fla. 1st DCA 2011)

Patient signed a financial agreement with his surgeons in which it was agreed that all disputes including "any negligence claim relating to the diagnosis, treatment or care of patient … shall be resolved by arbitration…". The agreement also provided a limitation on non-economic damages and required compliance with the pre-suit notice requirements of Chapter 766, Florida Statutes. The patient's estate filed suit against the surgeons and the physicians moved to compel arbitration under the terms of the financial agreement. The trial court granted the motion and the First District affirmed finding that there was no procedural nor substantive unconscionability.

Attorney's Fees

Staples v. Duerr, 37 FLW D62 (Fla. 1st DCA 12/30/11)

The Plaintiff's counsel failed to comply with statutory investigation requirements before mailing a Notice of Intent to Initiate Litigation. The trial court awarded attorney's fees against the attorney for the Plaintiff pursuant to Florida Statute §766.206(2) for fees and pre-suit costs spent in investigating the legitimacy of the medical malpractice claim. The trial court also granted post-suit costs spent litigating the entitlement to the fees. The First District reversed this decision in part noting that Florida Statute §766.206(2) only permits an award of attorney's fees and costs "incurred during the investigation and evaluation of the claim."

Causation

Cox v. St. Joseph's Hospital, 71 So. 3d 795 (Fla. 2011)

This was an action against a hospital and a emergency room physician alleging that administration of tPA would have prevented or mitigated the devastating consequences of the Plaintiff's stroke. Reversing judgment for the Plaintiff, the appellate court erroneously reweighed legally sufficient evidence from the Plaintiff's expert witness that the administration of tPA, more likely than not, would have mitigated the damages of the Plaintiff's stroke. Although an expert cannot merely pronounce a conclusion that the negligent act more likely than not caused the injury, here, the Plaintiff's expert did not simply provide a summary conclusion without a factual basis.

Here, the Plaintiff's expert conducted a full review of the Plaintiff's medical records; provided a detailed analysis as to why she believed that the Plaintiff would have been an excellent candidate for tPA; and, based her testimony on her experience, relevant medical literature, and her knowledge about the facts and records involved in this case, including an in depth analysis of the CT scan at issue. The Defendant had the opportunity to cross-examine the foundation of her opinion. During cross-examination, the expert expounded on the factual foundation for her opinion and in fact, explained during cross-examination that she disagreed with defense counsel's characterization of authoritative studies. It was therefore within the juries' province to evaluate the expert's credibility and weigh her testimony.

Conferences with Physicians

Lee Memorial Health System v. Smith, 56 So. 3d 808 (Fla. 2d DCA 2011)

The Second District denied certiorari and upheld the trial court's denial of a protective order filed by the hospital which sought to prohibit the Plaintiff from having communications with the hospital's employed physicians who treated a child as a result of alleged medical negligence. It should be noted that the physicians that they sought conferences with did not have involvement in the medical care alleged to have been negligent.

Duty of Care

McKesson Medication Management, LLC v. Slavin, 75 So. 3d 308 (Fla. 3d DCA 2011)

McKesson provided pharmaceutical services to Mount Sinai Medical Center pursuant to a contract. Under the contract, McKesson operated an on-site 24 hour pharmacy; multiple on-site satellite pharmacies opened during regular business hours; and locked medicine cabinets located in the hospital's surgical suites. Each surgical suite was equipped with a telephone with direct access to the hospital's on-site around the clock pharmacy. The Plaintiff underwent exploratory surgery to repair a spinal fluid leak which presented following a prior spinal surgery. During this surgery, the neurosurgeon asked the circulating nurse to obtain 2 ampules of Methylene Blue; a drug frequently used as a medical dye. The surgeon was having trouble locating the source of the spinal fluid leak; however, he did not advise the circulating nurse as to why he needed the drug or how he intended to utilize it. Likewise, the circulating nurse did not question the surgeon as to its use. Rather, the nurse retrieved the Methylene Blue ordered by the physician and gave it to the surgical assistant who, in turn, gave it to the surgeon who injected it into the spine. While Methylene Blue has been used as a dye marker to locate leaks, it has long been contraindicated for intra spinal injection. As a result of the injection, the Plaintiff developed neurotoxic poisoning and arachnoidictis.

The Plaintiff sued the surgeon, the hospital and McKesson. As to McKesson, the Plaintiff alleged that it breached its duty of care to her by failing to establish appropriate procedures for the management, stocking and dispensation of drugs stored in the surgical suite medicine cabinet, failing to provide written or oral warnings of the contraindications of Methylene Blue to the surgeon during the surgery; and failed to comply with its agreement with the hospital to adequately

train and counsel hospital staff regarding medications retrieved from the cabinet. The jury determined that McKesson was not negligent in the stocking of Methylene Blue ampules in the medication cabinet, in the operating room or in failing to provide written or oral warning to the contraindications of Methylene Blue. It did, however, find that McKesson was negligent in the training of the nursing or medical staff of the hospital concerning the obtaining of information regarding medications utilized during surgery. After a verdict in the amount of $38,323,196 (of which McKesson was found to be responsible for 14%), the Third District reversed the award and found that no such duty existed. While the agreement between McKesson and the hospital generally obligated McKesson to provide educational programs "pertaining to pharmaceutical services" the policies of McKesson did not impose a duty to educate the professional staff as to the "peculiarities and specific properties of drugs" or to train "nursing or medical staff at the hospital concerning the obtaining of information regarding medications utilized during surgery." As such, they concluded that no duty existed and the judgment was reversed.

Good Samaritan Act

Public Health Trust v. Rolle, 36 FLW D2139 (Fla. 3d DCA 9/28/11)

The trial court denied Public Health Trust's Motion for Summary Judgment on its defense of sovereign immunity and its Motion for Judgment on the Pleadings asserting that it was immune from liability under the Good Samaritan Act. In this medical malpractice action, the Plaintiff sued various healthcare providers including the Public Health Trust (a sovereign) and the Broward Hospital District (also a sovereign). Broward Hospital District paid its sovereign limits and then the Public Health Trust argued that it was immune from suit because the Hospital District had paid up to the maximum amount of the statutory cap. The Third District affirmed the denial of the summary judgment noting that, at this point in the proceedings, it was not certain that Public Health Trust's alleged negligence arose out of the same incident or occurrence. Moreover, the jury could enter a verdict against the Trust in excess of the statutory limits thus allowing for a potential claims bill to be filed.

The Trust also asserted that it was immune from suit under the Good Samaritan Act (Florida Statute 768.13). The Third District noted that this was a defense to liability; however, this did not provide sovereign immunity from suit. Thus, certiorari was denied.

Medical Records

Quest Diagnostics, Inc. v. Rapio, 54 So. 3d 545 (Fla. 3d DCA 2011)

Quest mixed up a tissue sample (which later proved to be malignant) with a sample taken from another individual (which was not malignant). The Plaintiff sought discovery including the names of the other patient (with the non-malignant tissue), as well as, the identity of that patient's doctors. Quest objected to producing the information on relevancy grounds and based upon the fact that the information was privileged. The trial court sustained the objection as to the identity of the patients, but ordered Quest to provide the names of the other healthcare providers who treated that patient.

The Third District denied certiorari as to the portion of the trial court order that required production of the medical records of the other patient while redacting the other patient's identity. They granted certiorari as to that portion of the order requiring production of the names of the other healthcare providers because the disclosure was not only irrelevant, but would also lead to the identity of the other patient.

NICA

Orlando Regional Health Care System v. Gwyn, 53 So. 3d 385 (Fla. 5th DCA 2011)

The obstetrician who participated in the infant's delivery was not a "participating physician" as defined by NICA. Thus, even though the hospital had given statutorily required notice of its participation in NICA, the hospital was not protected from a tort claim. The Fifth District noted that the remedies and protection afforded by NICA are limited to those cases in which obstetrical services are provided by a participating physician at the time of the infant's birth.

Anderson v. Helen Ellis Memorial Hospital Foundation, 66 So. 3d 1095 (Fla. 2d DCA 2011)

A civil action was filed against the hospital for birth related injuries. The hospital abated the action pending administrative determination of whether the Plaintiffs had a compensable claim under NICA. The administrative law judge found that the Plaintiffs' claim was compensable under NICA; however, the administrative law judge also found that the hospital failed to provide proper notice under the plan. Her parents then sought to lift the abatement; however, the trial

court continued the abatement until the administrative law judge determined the amount of compensation available to the Plaintiffs under the plan. The hospital argued that, until such time as the administrative law judge determines the amount of compensation available, the parents could not make an informed choice about whether they should reject the benefits available under the plan. The hospital also argued that circuit court ultimately would have to approve any resolution of this matter and that the court could not make a determination about what was in the child's best interest without determining the amount of compensation under the plan. The circuit court agreed with this analysis and denied the lifting of the abatement. The Second District reversed and found that the failure to lift the abatement would cause irreparable harm which would not be remedied on appeal.

Bennett v. St. Vincent's Medical Center, 71 So. 3d 828 (Fla. 2011)

Shortly prior to birth, the infant's mother was involved in a motor vehicle accident and she was transferred to two different hospitals for evaluation. While at the second hospital, the mother declined into kidney failure and underwent a cesarean section. During the cesarean section, a partial placental abruption was noted. After delivery, the baby did not cry, had minimal respiratory effort and required resuscitation "with bulb, free flow oxygen, mechanical suction, and bag and mask ambu." The baby had Apgar scores of 6 and 8 at 1 and 5 minutes. Cord blood gas revealed a profound metabolic acidosis. The baby was initially transferred to the Newborn Nursery, but 25 minutes later, she was transferred to the Special Care Nursery due to moderate respiratory distress and metabolic acidosis. The respiratory distress and metabolic acidosis resolved fairly quickly and within 7 hours, her respirations were noted to be unlabored. Nevertheless, she remained in the Special Care Nursery.

After her initial problems were resolved, she suffered from numerous conditions in the week following her birth, many of which were linked to kidney and liver damage. There was, however, no indication of any ongoing treatment for respiratory distress and no other resuscitative efforts. She was noted to be "grossly intact" from a neurological standpoint. Seven days after her birth, the baby suffered from a pulmonary hemorrhage and had a large amount of blood coming from her mouth. Her heart rate was extremely low and her oxygen saturation levels were very low. By the end of that day, she showed signs of possible neurologic abnormalities including the likely onset of seizure activity. The next day, she underwent an EEG and CT scan and the day after that, a pediatric neurologist concluded that she had neurological damage including multicystic encelophalomalagia of the cortex. The family filed suit in circuit court against the

obstetrician and the hospital. The trial court abated the circuit court proceedings for determination by the Division of Administrative Hearings as to whether the infant's injuries qualified for coverage under NICA.

In a petition for determination of NICA coverage, the family alleged that, long after the post-delivery period had ended, the baby's providers committed numerous errors including administering too much IV fluids and failing to test for serum electrolyte derangements. NICA intervened and took the position that the baby, in fact, did not suffer a birth-related neurological injury. The ALJ entered a finding that the baby's injuries were not within the scope of the NICA plan because, more likely than not, the profound neurological impairment resulted from a brain injury caused by the second incident of oxygen deprivation which occurred approximately a week following delivery. The First District reversed and held that the ALJ should have applied the statutory presumption of compensability set forth under Florida Statute 766.309(1)(a). Further, the First District held that "neurological damage" did not have to be manifested during the labor, delivery or resuscitation in the post-delivery period and noted that the phrase "immediate post-delivery period in a hospital" was construed to "include an extended period of days when a baby is delivered with a life-threatening condition and requires close supervision."

The Supreme Court quashed the First District's decision and held that only individuals seeking compensation under the NICA plan are entitled to the benefit of the statutory presumption of compensability. They also held that for a "birth-related neurological injury" to occur, injury to the brain caused by oxygen deprivation which renders the infant permanently and substantially impaired, must occur during labor, delivery or resuscitation in the immediate post-delivery period and that does not encompass an additional "extended period of time when a baby is delivered in a life-threatening condition."

Pre-Suit Screening

Herber v. Martin Memorial Medical Center, 36 FLW D1819 (Fla. 4th DCA 8/17/11)

The trial court dismissed this cause of action for the Plaintiff's failure to comply with Florida Statute 766.206. The Fourth District previously reversed this decision because the hospital had failed to provide medical records within 10 days thus obviating the need for a corroborating affidavit. The hospital then attacked whether the Plaintiff's claim rested on a reasonable basis. The Fourth District

ruled that there was a reasonable basis based on "a MRSA cluster" at the hospital, the timing of [the Plaintiff's] surgery and the … affidavit of Dr. Bakken's findings that this was sufficient to establish that the claim rested on a reasonable basis. The Fourth District noted that "the reasonableness of an investigation under Section 766.206(2) is a factual matter, which is reviewed on appeal for competent, substantial evidence." The Fourth District added that the reasonableness of the investigation does not have to be determined as of the date the Notice of Intent was filed so long as compliance is accomplished within the Statute of Limitations.

Bery v. Fahel, 36 FLW D2310 (Fla. 3d DCA 10/19/11)

The decedent died of a bacterial infection after being evaluated and treated by Dr. Fahel; a board certified family physician. During pre-suit, the Plaintiff sent a Notice of Intent to Dr. Fahel attaching the affidavit of a board certified Emergency Medicine physician. Shortly after the expert executed the affidavit, he contacted Plaintiff's counsel in an attempt to withdraw this affidavit because he believed he was not qualified to act as an expert witness. During the pre-suit period, Dr. Fahel's counsel also sent letters to the Plaintiffs advising that they had not fully complied with the pre-suit screening requirements because the expert and Dr. Fahel were not of the same specialty.

During the pendency of suit, Dr. Fahel filed a Motion to Dismiss arguing that the corroborating affidavit filed during pre-suit was insufficient because they were not of the same specialty. At the time of the Motion to Dismiss, the trial court, without objection, ordered that an evidentiary hearing be held to address the expert's qualifications. Dr. Fahel then unsuccessfully attempted to depose the expert who had, by then, moved to a different state. Dr. Fahel then requested that a commissioner be appointed to depose the expert. At a subsequent hearing, Plaintiff's counsel objected on the basis of privilege pursuant to Florida Statute 766.205(4) which provided that "no … work product generated solely by the pre-suit investigation process is discoverable or admissible in any civil action for any purpose by the opposing party." The trial court then learned, for the first time, that the Plaintiff's expert had attempted to withdraw his corroborating affidavit. As a result and without conducting an evidentiary hearing, Dr. Fahel's Motion to Dismiss was granted. The Third District reversed the trial court's decision and directed the trial court to conduct an evidentiary hearing to determine whether the Plaintiff's expert was qualified to testify against Dr. Fahel in light of his qualifications and his attempt to withdraw his affidavit.

Houston v. Global Experts in Outsourcing, Inc., 36 FLW D2361 (Fla. 4th DCA 10/26/11)

Houston is a prisoner incarcerated at a facility operated by Global Experts in Outsourcing, Inc. He filed a complaint against Global and three of its alleged employed physicians. Prior to filing the complaint, he filed a State of Florida Department of Corrections form request for administrative remedy or appeal asking for a copy of his medical files in order to comply with pre-suit notice requirements. Because he did not have any money in his prison account, he asked that a lien be placed against the account for the fees charged. The request was responded to by one of the individuals named in the complaint. He advised that the medical records were available for review, but that copies could not be made until all fees were paid to the Department of Corrections. As such, his grievance was denied.

The trial court granted a Motion to Dismiss for Houston's alleged failure to properly pre-suit the matter. The Fourth District reversed and directed the trial court to conduct an evidentiary hearing in order to make findings of fact regarding the issue of waiver.

Palms West Hospital v. Burns, 36 FLW D2612 (Fla. 4th DCA 11/30/11)

Burns is the Personal Representative of the Estate of Enrique Casanovas. Casanovas was taken to the Palms West Emergency Department with complaints of abdominal pain, nausea and vomiting blood. It was determined that he suffered from an emergency medical condition and was in need of a gastroenterologist; however, none were available in the hospital. Every off-site doctor that Palms West contacted refused to come to the hospital to treat Casanovas. It was alleged that this was because he did not have insurance. Casanovas was transferred to North Broward Medical Center where he subsequently died. The Estate filed suit against Palms West alleging that the hospital negligently retained physicians who it knew would not treat patients without insurance. The Plaintiff further complained that the hospital was aware that its doctors would not show up to treat uninsured patients because a similar incident happened one month prior to the patient's death. Palms West sought to dismiss the claim for failure to follow the pre-suit screening procedures. The Fourth District found that the claims arose out of the provision of medical treatment and, therefore, the pre-suit screening requirements had to be complied with and dismissed the complaint. In so doing, they noted that it was particularly important that Casanovas was treated by Palms West.

Weiss v. Pratt, 53 So. 3d 395 (Fla. 4th DCA 2011)

The Plaintiff was injured while playing at a varsity football game. The volunteer team physician, an orthopedic surgeon who had previously worked in an Emergency Department and who had received training in Pediatric Orthopedics and Sports Medicine, evaluated the patient on the field. After examining the patient, he was taken to the Emergency Department where he ordered x-rays and interpreted same. He showed them to the Emergency Department physician on duty. The Defendant doctor then ordered a CT scan and excluded the possibility of a spinal cord injury based upon his clinical examination and x-rays. He diagnosed the patient with a neck strain and right shoulder contusion and gave the patient pain medication, a soft cervical collar and an arm sling and told the patient to follow up. Within a few days, the patient had lost significant strength in his arm and an MRI was ordered which revealed an epidural hematoma adjacent to the spinal cord and a non-hemorrhagic cord contusion. A verdict was rendered against the team physician and the doctor appealed arguing that it was error to allow an Emergency Department physician to render expert opinions concerning a doctor's treatment of the Plaintiff from the football field because he was not an orthopedic surgeon or a volunteer team physician. He argued that Florida Statute 768.135 which provides immunity for volunteer team physicians precluded such testimony. The Fourth District disagreed because liability only attaches if the Defendant fails to act "as a reasonably prudent person similarly licensed to practice medicine would have acted under the same or similar circumstances."

The Fourth District also considered the limitations on expert witness testimony under Florida Statute 766.102; however, they found that the expert was properly permitted to offer opinions regarding the Defendant orthopedic surgeon because the claim in question had to deal with whether it was appropriate to fail to place the Plaintiff on a backboard on the football field and both the orthopedic surgeon and the Emergency Department physician had expertise in such a circumstance. The Fourth District also noted that "our decision is based upon the specific facts of this case."

Galencare, Inc. v. Mosley, 59 So. 3d 138 (Fla. 2d DCA 2011)

Plaintiff filed a negligence action against a pharmacist employed by the hospital and parent company of the hospital alleging that the decedent died while under the care of the hospital due to an overdose of narcotics. The hospital's parent company was sued because it allegedly negligently provided, designed or maintained the narcotics delivery system. The trial court denied the Defendants'

motion to dismiss and the Second District upheld the denial finding that a pharmacist licensed under Chapter 465 is not a healthcare provider entitled to pre-suit notice and the hospital's parent company was not entitled to pre-suit notice because it was alleged that they were negligent in providing, designing and maintaining a narcotic delivery system. As for the hospital, it was determined that they were not entitled to pre-suit notice because they were being sued under a theory of spoliation for failure to maintain proper records that could support a claim against the other Defendants who were not healthcare providers.

Williams v. Oken, 62 So. 3d 1129 (Fla. 2011)

Plaintiff went to the Emergency Department complaining of chest pain. While there, he was evaluated by an Emergency Department physician who ordered a consultation with a cardiologist. The Plaintiff alleged that the cardiologist was negligent and caused him to suffer an acute myocardial infarction. In placing the cardiologist on notice, the Plaintiff used the affidavit of an Emergency Department physician who stated that he was "familiar with the appropriate work-up and treatment of suspected cardiac patients in Emergency Rooms, and the consequences of failure to timely provide appropriate work-up and treatment under such circumstances," and that he was "familiar with the standard of care of reasonably careful physicians in diagnosing and treating impending myocardial infarction under the same or similar circumstances as those presented in the case." The Defendant cardiologist sent a letter requesting additional collaboration of the claim. The Plaintiff then filed a Complaint and the cardiologist filed a Motion to Dismiss for alleged failure to timely comply with statutory pre-suit requirements alleging that the Plaintiff's expert was not an expert in the field of cardiology and, therefore, the Plaintiff failed to attach a corroborating affidavit from a qualified medical expert. The Plaintiff then filed a supplemental affidavit from his expert indicating that he was board certified in Emergency Medicine and Family Medicine and that both of these medical fields involved the "evaluation, diagnosis, or treatment of acute chest pain and impending myocardial infarction" and that he had " performed 15,000-20,000 evaluations of chest pain in an Emergency Department setting." Accordingly, the trial court concluded that the expert was qualified and denied the Motion to Dismiss.

Dr. Oken then filed a Writ of Certiorari with the First District and the First District held that certiorari review was appropriate and that the expert was not qualified to offer opinions as to Dr. Oken's care. As a result, they quashed the Motion to Dismiss.

The Supreme Court quashed the First District's decision and reinstated the lawsuit. They found that the First District exceeded its certiorari authority in granting review as to whether the expert met statutory qualifications. In so doing, they noted that certiorari review applied only to ensure that the procedural aspects of the pre-suit requirements were met adding that "the First District would have been correct in granting certiorari review to determine whether Williams complied with the procedural pre-suit requirements in terms of submitting a collaborating affidavit" adding that "the First District exceeded the scope of certiorari review when it granted the petition to determine whether Dr. Foster was a qualified expert." As such, they stated that the petition should have been dismissed and remanded to the trial court for an evidentiary hearing on whether Dr. Foster was qualified as an expert because there was no doubt that the Plaintiff complied with the pre-suit requirements.

Joseph v. University Behavioral, LLC, 71 So. 3d 913 (Fla. 5th DCA 2011)

The patient was 14-years old when he was ordered confined to University Behavioral pursuant to court order after being charged with arson, destruction of school property and making a bomb threat. While there, he was playing in a tackle football game. The Plaintiff tackled another resident who responded by throwing punches at the Plaintiff. The hospital personnel separated the boys; however, the other resident continued to bully the Plaintiff and made threats. The Plaintiff asked the facility to separate him from this individual and he testified that the hospital refused his request. Thereafter, the Plaintiff and this other individual were in a cafeteria lunch line. The Plaintiff was talking to a friend and recounted how he had tackled the other resident. The other resident became angry and punched the Plaintiff in the left eye causing him to suffer a detached retina and then eventually the loss of the left eye. The Plaintiff filed a negligence action against the hospital and the other resident. The hospital argued that they were entitled to pre-suit notice and the trial court granted summary judgment.

The Fifth District determined that this action did not require pre-suit screening notice because it was not a claim involving medical malpractice. They noted that "the test for determining whether a Defendant is entitled to the benefit of the pre-suit screening requirements of §766.106 is whether a Defendant is liable under the medical negligence standard of care set forth in §766.102(1). The fact that a wrongful act occurs in a medical setting does not necessarily mean it involves medical malpractice." As such, they noted that "the wrongful act must be directly related to the improper application of medical services and the use of professional judgment or skill."

Sovereign Immunity

Public Health Trust v. Rolle, 36 FLW D2139 (Fla. 3d DCA 9/28/11)

The trial court denied Public Health Trust's Motion for Summary Judgment on its defense of sovereign immunity and its Motion for Judgment on the Pleadings asserting that it was immune from liability under the Good Samaritan Act. In this medical malpractice action, the Plaintiff sued various healthcare providers including the Public Health Trust (a sovereign) and the Broward Hospital District (also a sovereign). Broward Hospital District paid its sovereign limits and then the Public Health Trust argued that it was immune from suit because the Hospital District had paid up to the maximum amount of the statutory cap. The Third District affirmed the denial of the summary judgment noting that, at this point in the proceedings, it was not certain that Public Health Trust's alleged negligence arose out of the same incident or occurrence. Moreover, the jury could enter a verdict against the Trust in excess of the statutory limits thus allowing for a potential claims bill to be filed.

The Trust also asserted that it was immune from suit under the Good Samaritan Act (Florida Statute 768.13). The Third District noted that this was a defense to liability; however, this did not provide sovereign immunity from suit. Thus, certiorari was denied.

Florida Department of Health v. Dinnerstein, 36 FLW D2739 (Fla. 4th DCA 12/14/11)

Dr. Dinnerstein entered into a contract with the Florida Department of Health whereby he agreed to participate in Florida's volunteer healthcare provider program under Florida Statute 766.1115 in which he agreed to offer free health care to indigent residents in return for immunity from suit. At some point shortly before the treatment in question, Dr. Dinnerstein advised a representative of the Palm Beach County Health Department that he was winding down his private practice and was going to start working at Bethesda Memorial Hospital. He advised that he no longer wanted to accept patients from the network, but he never withdrew from the network and his volunteer contract was still in effect at the time of the subject treatment. On March 5, 2007, the patient arrived at Bethesda Memorial Hospital complaining of abdominal pain. This was a self-referral and not one made by the clinic. Dr. Dinnerstein was the physician on call and he initially saw the patient and rendered some treatment. The patient was instructed

to return to the hospital if she experienced other problems, but otherwise was told to continue being followed at the Health Department's clinic. Three days later, she went to the clinic for her appointment where she was seen by a nurse. The nurse believed that the patient was suffering from pre-eclampsia and needed immediate delivery. The nurse arranged for an ambulance to take the patient to Bethesda Hospital and, on a prescription pad, the nurse noted the vital signs, as well as her symptoms. The nurse did not know which physician was on duty nor did she speak to any doctor reverting the patient. She also had no responsibility for referring patients to doctors pursuant to the volunteer health program. Dr. Dinnerstein saw the patient at Bethesda later that day and gave her two prescriptions and told her to return the following day to get her blood pressure checked. She returned the following day and he again examined her and released her this time advising her to return in two days to have her blood pressure checked. Unfortunately, the patient died two hours after leaving the hospital.

The patient's Personal Representative brought a claim against Dr. Dinnerstein and Bethesda Memorial Hospital. The Department of Health took the position that Dr. Dinnerstein was not entitled to sovereign immunity and refused to defend him. He then filed a declaratory judgment seeking to establish his immunity from suit pursuant to the contract. In the declaratory action, he contended that the patient had been referred to his care by the clinic in compliance with the terms of the contract and he also noted that he relied on the nurses' note on the prescription pad and considered it to be a referral. The Fourth District reversed the summary judgment noting that a patient referral form could have been completed had it been shown that the patient had the mental capacity to consent to treatment and that the treatment rendered did not necessarily constitute treatment of a medical emergency.

Statute of Limitations

Schantz v. Sekine, 60 So. 3d 444 (Fla. 1st DCA 2011)

A settlement proposal which was conditioned on the Plaintiffs' joint acceptance was invalid even though the settlement offer apportioned the offered amount among the Plaintiffs and the Defendants. Although Rule 1.442 permits joint proposals if they break-out terms and amounts as to each party, a settlement offer conditioned on a joint acceptance is invalid. Therefore, while the amounts offered as between Plaintiffs and Defendants satisfied Rule 1.442, Florida Rules of Civil Procedure, requiring a joint acceptance as a condition of settlement violates the Rule.

Patrick v. Gatien, 65 So. 3d 42 (Fla. 1st DCA 2011)

Where the Plaintiff purchased an automatic 90 day extension of the statute of limitations on March 21, 2006, prior to the time the limitations period would have otherwise expired on June 10, 2006, and the Defendant received Plaintiff's Notice of Intent to Initiate Litigation on August 2, 2006, the statute of limitations period began to run again 90 days later on November 1, 2006. Because immediately after the tolling period, 37 days of the 90 day extension had remained, and the remainder of the period of the statute of limitations was less than 60 days, the Plaintiff had 60 days from November 1, 2006 within which to file her Complaint. The Complaint, which was ultimately filed on January 17, 2007, was 70 days after November 1, 2006, was untimely and summary judgment was therefore properly granted on the statue of limitations.

Joseph v. University Behavioral, 71 So. 3d 913 (Fla. 5th DCA 2011)

This was an action by a Plaintiff who had been a resident of a psychiatric facility for young boys. He alleged that the facility was negligent for failing to separate the Plaintiff from another resident who had bullied the Plaintiff and eventually attacked the Plaintiff, causing him serious physical injury. The action was filed as a negligence action. The Defendant moved to dismiss alleging that the two year statute of limitations for a medical negligence claim had expired before suit was filed. The Plaintiff contended that this was a claim of ordinary negligence and not medical negligence. The trial court ruled in favor of the Defendant. The trial court was reversed on appeal.

On appeal, the Court noted that claims of simple negligence or intentional torts which do not invoke the previsions of medical care or services do not require compliance with Chapter 766 pre-suit requirements. The test for determining whether a Defendant is entitled to the benefit of pre-suit notice is set forth in Section §766.102(1). The mere fact that a wrongful act occurs in a medical setting does not mean that it necessarily involves medical negligence. Here, the appellate court noted that the trial court essentially adopted the approach that anything happening in a psychiatric care facility is psychiatric treatment and therefore, any negligence therein is within the realm of medical malpractice. Here, there was no record evidence to support that the Plaintiff's injuries resulted from any decision made in the course of the Plaintiff's psychiatric treatment. There was no indication that any psychiatric medical care or judgments based on medical care and treatment were involved in the allegations leading to the injury in this case. The

case therefore was not subject to pre-suit screening and was not subject to the two year medical negligence statute of limitations and instead, was properly brought within the four year statute of limitations for general negligence cases.

Undertaker's Doctrine

White v. Advanced Neuromodulation Systems, Inc., et al., 51 So. 3d 631 (Fla. 2d DCA 2011)

The Plaintiff became paralyzed after an infection developed around a surgical device which had been implanted into his back to treat chronic pain. The Complaint alleged that a nurse, acting as an agent of the surgical device implementation company, negligently rendered nursing care while reprogramming the device. The nurse was an employee of the device company who was hired to program the simulator. Knowing that the nurse had a medical background, the day after the stimulator was implanted the Plaintiff complained to the nurse about seepage from the surgical site. The nurse instructed the Plaintiff to contact a physician.

The Plaintiffs alleged that the nurse, the device company and the pain management company were all liable under the "undertaker's doctrine" which provides that, whenever one undertakes to provide a service to other, whether gratuitously or by contract, the individual who undertakes the service assume a duty to act careful and not put another at undue risk of harm. This doctrine also comes into play where a Plaintiff alleges that a Defendant voluntarily undertook an action which, although statutorily authorized, is not required.

Here, the Plaintiff contended that the nurse gratuitously undertook a duty to provide nursing care when she voluntarily exceeded her role as a programming technician. The Court noted that the Plaintiff's did not contend that the nurse acted negligently in observing and assessing the Plaintiff and that the nurse's actions did not place the Plaintiff in a worse condition than when he was found.

The appellate court affirmed the trial court's entry of summary judgment. Here, the nurse's actions of observing and assessing the incision site did not increase the risk of harm to the Plaintiff. Likewise, the nurse's actions did not cause other people to refrain from rendering aid. In summary, the court held that the nurse's voluntary actions did not impose an affirmative duty on her to do more than that which she had already done.