2015
CASE LAW SUMMARY

Medical Malpractice

Affidavit Which Did Not Address Deficiencies In Care By Nursing Staff Did Not Support A Claim Against Hospital For Its Nurses

University of South Florida v. Mann, 159 So. 3d 283 (Fla. 2d DCA 2015)

The Defendant hospital filed a certiorari action following the trial court's denial of their Motion to Dismiss in which they allege that the presuit Affidavit obtained from a physician was legally insufficient. Although the Second District agreed that the Affidavit could be more detailed, they could not conclude that the trial court departed from the essential requirements of the law when denying the Motion to Dismiss except with respect to one count of the Amended Complaint.

Specifically, one count alleged that the hospital was liable to the Plaintiff for deviations from the standard of cared owed by its nursing staff and supervisors. The Second District stated that assuming without deciding that Plaintiff's expert was competent to provide an Affidavit addressing errors by the hospital's nursing staff and supervisors, nothing in the Affidavit addressed any deficiencies in the care provided by the nursing staff or supervisors. As such, the Affidavit was found to be insufficient to corroborate reasonable grounds to support a claim of medical malpractice and, therefore, certiorari was granted as to this count of the Complaint.

Amendment 7

Bartow HMA, LLC v. Kirkland, 171 So. 3d 783 (Fla. 2d DCA 2015)

The trial court conducted an *in-camera* inspection which required disclosure of various documents in response to an Amendment 7 Request for Production. The Second District granted certiorari and concluded that the trial court departed from the essential requirements of law by requiring the production of documents which do not appear to be related to adverse medical incidents within the meaning of Amendment 7 and for which a statutory protection from disclosure might apply.

In their prior decision in this case, the Second District noted that "under Amendment 7, patient is 'entitled to any of the hospital's records relating to any

adverse medical incident' and 'there is no requirement that the records…be relevant to any pending litigation'".

It added that "'Amendment 7 does not require production of documents relating to general policies and procedures of [healthcare facility peer review, risk management, quality assurance, credentials, or similar] committees or other documents that do not contain information about particular adverse medical incidents.'" Thus, neither a document detailing policies and procedures for handling adverse medical incidents generally nor a document containing general credentialing information unrelated to an adverse medical incident would be discoverable under Amendment 7.

The Second District reviewed the challenged documents and it was apparent to them that not all of the documents related to adverse medical incidents. Further, some of the meeting minutes involved discussion of issues that could relate to adverse medical incidents, however, those same meeting minutes also included discussion of issues unrelated to adverse medical incidents including: general policies and procedures for handling patient cases; minutes involving discussion of policies on how to handle adverse events generally; reports from various hospital departments that contain no indication they related to adverse medical incidents; credentialing committee reports listing various physician credentials; performance and improvement plans and risk management safety program documents; quality assessment documents relating to the handling of sentinel events or other significant acts generally; committee minutes involving discussion of hiring decision and future hospital development plans; certification form listing various physicians and their training; and lab culture reports.

Further, a review of the entire credentialing file of the physician involved in the case also contained documents unrelated to adverse medical incidents including: thank you notes; re-appointment forms; delineation of privilege forms; listed types of surgeries performed; personal references; insurance policy information; college transcripts; license verification, continuing education and board certification forms. In remanding the case to the trial court, the Second District stated that if the trial court decides to again conduct an *in-camera* review, it should list each document and delineate whether it is subject to discovery under Amendment 7 or, if not, whether it is subject to protection from disclosure under the various statutes relied on by the hospital including Florida Statutes 381.028(6)(b), 395.0191(8), 395.0193(a) and 766.101(5).

Bartow HMA, LLC v. Edwards, 175 So. 3d 820 (Fla. 2d DCA 2015)

Plaintiff filed an Amendment 7 Request for Production. In response thereto, the hospital provided the Plaintiff with documents related to internal peer review but objected to production of external peer review reports. The hospital argued that the external peer review reports did not fall within Amendment 7 because they were not "made or received in the course of business." Rather, they were generated in response to letters sent by the hospital's attorney to the director of client services at a business called "M.D. Review."

On behalf of the hospital, its counsel requested that "M.D. Review conduct an external peer review concerning the medical care and treatment rendered by one of its physicians [name and specialty] to [number] different patients at the facility. We are requesting this external peer review investigation to be done on an attorney/client, work product and peer review privilege basis." Counsel then included medical records from certain specified patients. The hospital consistently maintained that counsel requested the reports at issue for purposes of litigation.

The Second District granted certiorari finding that the external peer review reports were not "made or received in the course of business." They also found that on the limited record before the Court, the reports were not obtained as part of the hospital's regular peer review process and were not obtained in an attempt to circumvent the disclosure requirements of Amendment 7 noting that the hospital had already satisfied those requirements by providing access to numerous documents pertaining to internal adverse incident reporting and peer review. The court added, however, that the results reached may have been different if the hospital had not conducted an internal peer review of the incidents in question.

Southern Baptist Hospital Florida, Inc. v. Charles, 178 So. 3d 102 (Fla. 1st DCA 2015)

The First District granted certiorari and quashed the trial court's order compelling the hospital to turn over documents pursuant to Amendment 7. The First District noted that the records ordered to be produced constituted "patient safety work product" under the Patient Safety and Quality Improvement Act (PSQIA). In so doing, the court ruled that, if documents meet the definition of patient safety work product, they are protected from disclosure. Documents, which were not original patient records and which were not collected, maintained or

developed separately from the patient's safety evaluation system were, therefore, entitled to federal protection. The district court added that absent a claim that the hospital was in someway not compliant with its reporting or record keeping requirements, there was no need for the trial court to consider whether the documents simultaneously satisfied any state law obligations.

Bad Faith Summary Judgment

Samiian v. First Professionals Insurance Company, Inc., 180 So. 3d 190 (Fla. 1st DCA 2015)

Shortly after a Notice of Intent was served on Dr. Samiian, FPIC made a determination to tender his policy limits. Thereafter, FPIC timely delivered a check tendering its policy limits to the attorney for the Plaintiff. Two days later, counsel for Dr. Samiian who had been retained by FPIC sent a letter to counsel for the Plaintiff offering to submit the case to binding arbitration.

The letter made clear that FPIC was not altering its outstanding offer to settle for policy limits. Moreover, the offer was not contingent upon any limitation of damages. The Plaintiff then accepted the offer to arbitrate. The arbitration panel awarded the Estate and its survivors $35,315,789. This award was affirmed on appeal and Final Judgment was eventually entered against Dr. Samiian for $43,347,183.

Subsequently, Dr. Samiian and his professional association filed an action for damages against FPIC alleging that it breached its insurance contract with him and acted in bad faith. FPIC filed a Motion for Summary Judgment arguing that it had tendered its policy limits promptly and that any bad faith action was barred by the Safe Harbor provision of Florida Statute §766.1185(1)(a)(1) and that it was not legally responsible for the decision to offer to arbitrate; a decision which FPIC contended was made by Dr. Samiian in consultation with his legal team independent of FPIC.

The First District reversed the summary judgment because there remained a factual issue as to whether FPIC participated in the decision to offer to arbitrate and therefore whether it timely tendered its policy limits was irrelevant to the question as to whether they acted in good faith pursuant to Florida Statute §766.1185(2).

Caps Cannot Be Applied Retroactively

Miles v. Weingrad, 164 So. 3d 1208 (Fla. 2015)

This medical malpractice case arose before the enactment of the pain and suffering caps under Florida Statute §766.118. In trial, the jury rendered a verdict in excess of the damage cap. The Defendant moved to reduce the award pursuant to the statute and the trial court denied same. The Third District reversed and held that the damage cap could be applied retroactively in a constitutional fashion. The Supreme Court reversed finding that the caps on non-economic damages cannot be applied retroactively adding that the Plaintiff had a vested right at the time that the malpractice incident occurred and that this vested right could not be infringed upon by retroactive application of a sustentative statute.

Damage Caps Are Unconstitutional

North Broward Hospital District v. Kalitan, 174 So. 3d 403 (Fla. 4th DCA 2015)

In a case of first impression, the Fourth District held that the caps on non-economic damage awards and personal injury medical malpractice cases were unconstitutional adopting the reasoning of the Florida Supreme Court in *McCall v. United Stated*, 134 So. 3d 894 (Fla. 2014).

The Fourth District also reversed judgment entered against Barry University for the conduct of a nurse anesthetist supervising a student nurse during a surgical procedure. In this case, the Plaintiff failed to specifically plead the theory of vicarious liability as to the University for the actions of the nurse. By contrast, the Plaintiff specifically plead vicarious liability claims against other parties in the same complaint. Having found that the record did not support a finding that the University expressly agreed to try the issue at trial, the Fourth District reversed this portion of judgment.

Daubert Standard Did Not Exclude Expert's Opinions

Baan v. Columbia County, 40 FLWD 2707 (Fla. 1st DCA 12/8/15)

Columbia County Paramedics responded to a 911 call for a child in respiratory distress. The parties agreed that the EMS personnel left the scene

within 10 minutes of arrival after showing the child's aunt how to use a nebulizer. A neighbor testified by Affidavit and by deposition that she held the child over her shoulder during the entire time that EMS personnel were on the scene during their first visit and that paramedics did not conduct any examination of the child and didn't even touch him.

By contrast, the EMS report documented an examination and normal vital signs. The report also indicated that EMS personnel were told that the child had earlier been diagnosed with asthma and concluded that he might have been suffering an asthma attack before they arrived. They also noted that the child had throat congestion which he cleared upon coughing and that his lungs sounded clear.

Approximately 50 minutes after they left, another 911 call was made advising that the child was not breathing at all. A different neighbor who was a trained ENT found the child lying on the floor face up with his face turning blue. He then turned the child over to allow copious amounts of mucus and fluid to drain from his mouth and nose. On arrival, the EMS personnel made attempts to resuscitate the child. They were unable to find a pulse and airlifted him to a nearby hospital where he was pronounced dead the following day.

Plaintiff's emergency medicine expert concluded that EMS breached the prevailing standard of care by failing to place the child in an ambulance during the first run and take him to a hospital for evaluation and treatment. He also concluded that, had the standard of care been met, he would have been treated for lack of oxygen and would have survived. He noted that this failure to do so violated their own treatment protocols for respiratory distress and concluded that his respiratory condition deteriorated after EMS failed to transport the child until the airway was obstructed by mucus, congestion, and "more likely than not" bronchospasm.

Columbia County moved to exclude the expert testimony arguing that it was unreliable under the *Daubert* standard. Specifically, they argued that his testimony was essentially based upon an assumption that because the child experienced a respiratory arrest within one hour after the first EMS call, he must have been experiencing a detectible respiratory problem at the time of the first call. The trial court granted the motion and the First District reversed analyzing this testimony both under *Frye and Daubert*. They noted that under *Daubert*, although "an expert

may be qualified by experience," it does not follow "that experience, standing alone, is a sufficient foundation rendering reliable any conceivable opinion the expert may express."

The First District added that, the expert's opinions were based upon his review of the child's medical records, the autopsy report, the EMS records and statements from witnesses who observed the child in the last hours and minutes of his life. Further, the Emergency Department expert relied upon his first-hand knowledge of children's respiratory problems, his 30-years experience as an Emergency Department physician and his 25-years as an advisor to other Fire Rescue Departments, as well as, the Department's own treatment protocol.

The Appellate Court noted that the Plaintiff did not argue that the amendment to the Florida Evidence Code which adopted the *Daubert* standard affected a change in procedure which must first be adopted by the Florida Supreme Court. The court suggested that a constitutional challenge to the *Daubert* standard might have resulted in a Frye-based analysis.

Discovery About Expert's Credentials

Plantz v. John, 170 So. 3d 822 (Fla. 2d DCA 2015)

The Plaintiff filed a medical negligence and wrongful death complaint against Dr. Plantz; an emergency room physician. Plantz filed a Motion to Dismiss, which remains pending, asserting that the Plaintiff did not comply with the presuit notice requirements and specifically alleged that the Plaintiff's expert was not qualified to offer opinions against him and that the expert did not conduct a complete review of available records in forming his opinions corroborating the grounds to support Plaintiff's claim.

While the Motion to Dismiss was pending, Plantz commenced formal discovery concerning the expert's credentials. The discovery included two depositions of the expert totaling 13 hours. Plantz also requested non-party hospitals to produced records of the experts status at those facilities and also requested the Plaintiff's trial counsel produce all prior Notices of Intent to initiate litigation which contained verified medical expert opinions signed by the same expert.

The Plaintiff objected and following a hearing, the objections were sustained. Plantz then filed a Petition for Certiorari which the Second District dismissed for lack of jurisdiction. In doing so, they stated that "it is unclear to this court whether Dr. Plantz has a legal right to engage in discovery as to the credentials of a person who merely signs a presuit Affidavit and is not currently listed as an expert witness expected to testify at trial." They also noted that any possible error in denying the discovery will not result in material injury because Plantz will have the opportunity to raise the issue via certiorari in the event his pending Motion to Dismiss is denied.

Elopement From Hospital Subject to Presuit Screening

Shands Teaching Hospital and Clinics, Inc. v. Lawson, 175 So. 3d 327 (Fla. 1st DCA 2015)

In an *en banc* decision, the First District granted certiorari and held that the trial court departed from the essential requirements of law by denying the hospital's Motion to Dismiss where the Plaintiff alleged ordinary negligence against the hospital arising out of the death of a psychiatric patient who allegedly took an employee's unattended keys and badge and escaped the hospital and made her way on to a nearby interstate highway and into the path of a truck which struck and killed her. Because the claims arose from services and care the hospital was giving to the patient who was confined within the hospital's locked psychiatric unit which was the service that the decedent's condition allegedly required, the court found that this was an action for medical negligence and was, therefore, subject to Florida Statute 766.

***Ex-Parte* Conferences with Employed Physicians**

Damsky v. University of Miami, 166 So. 3d 930 (Fla. 3d DCA 2015)

The trial court entered an Order allowing the University of Miami and their counsel to engage in *ex parte* communications with an employed treating physician who was a non-party to the litigation. After an evidentiary hearing, the trial court determined the physician was an employee of the University and, therefore, concluded that such communications were not prohibited under Florida Statute 456.057. As such, the Petition for Certiorari was denied.

***Ex-Parte* Interviews Do Not Violate HIPAA**

Weaver v. Myers, 170 So. 3d 873 (Fla. 1st DCA 2015)

The First District upheld the constitutionality of the amendments to Florida Statutes 766.106 and 766.1065 and specifically held that the statutory amendments which allow for presuit *ex parte* interviews between potential Defendants and potential Claimant's treating healthcare providers and which require potential Claimants to sign a written waiver of Federal privacy protection concerning relevant medical information prior to instigating a medical malpractice lawsuit are constitutional and are not pre-empted by HIPAA.

IME's

Grabel v. Roura, 174 So. 3d 606 (Fla. 4th DCA 2015)

The trial court found that there were inconsistencies between Interrogatory answers provided by defense counsel and deposition responses provided by Dr. Grabel, the defense expert witness concerning the percentage of income the doctor derived from working as an expert witness and the number of times he had testified for Plaintiffs and Defendants in personal injury litigation. The Fourth District granted certiorari and found that the disputed discovery exceeded the provisions of Florida Rule of Civil Procedure 1.280 which limits discovery to an approximation of the expert's involvement as an expert witness.

The court noted that the trial court allowed the Plaintiff to issue subpoenas to 20 non-party insurance carriers not shown to have any involvement in the litigation. The subpoenas required production of financial records including tax records showing the total amount of fees paid to the doctor for expert litigation services since 2009. The court pointed out that the rule expressly provides that "the expert shall not be required to disclose his or her earnings as an expert witness."

Bodzin v. Leviter, 174 So. 3d 608 (Fla. 4th DCA 2015)

A non-resident Defendant, who had not sought affirmative relief, was ordered by the trial court to appear for an independent medical examination in Florida in order to determine his capacity to testify after his counsel alleged that he

was incapacitated by Alzheimer's. The court noted that the Defendant had given multiple depositions in the case without having raised incapacity to testify at those depositions and that the Plaintiff had already received the Defendant's medical records and retained an expert to review the records and form an opinion as to the Defendant's capacity. As such, they granted certiorari and quashed the trial court's order.

Negligent Training Claim Not Subject to Presuit Screening

Doe v. Baptist Primary Care, Inc., 177 So. 3d 669 (Fla. 1st DCA 2015)

An employee of the patient's former primary care physician disclosed to third parties that the Plaintiff was HIV positive. The Plaintiff sued the employer for negligent training and supervision alleging that it had a duty to prevent disclosure for confidential medical information without her specific consent and that it was negligent in failing to have in place and enforce adequate and appropriate policies and procedures to insure the protection of confidential medical information. The trial court dismissed this count of the complaint finding that the Plaintiff should have submitted it to the Presuit screening requirements of Florida Statutes §766.106. The First District reversed finding that jurors could resolve the negligence question herein by referring to common experience and that the medical standards of care were inapplicable.

NICA

Children's Medical Center v. Kim, 40 FLWD 1245 (Fla. 4th DCA 5/27/15)

The Defendant pediatricians were sued for malpractice which allegedly occurred during the days and weeks after the infant's birth and not within the "immediate post-delivery period in a hospital." Further, the Plaintiffs did not seek nor have they accepted NICA benefits as to any covered doctor or entity and the Defendants clearly did not provide any obstetrical services nor did they provide pre-delivery notice as required to claim immunity from civil suit under NICA. Further, as the Fourth District pointed out, the Defendants were not participating physicians or within the class of doctors covered by the NICA statute.

Despite this, the Defendants sought to abate the negligence action in order to have the administrative law judge determine whether the injuries suffered by the

infant fell within the purview of the NICA plan. In denying certiorari and finding that abatement was not appropriate, the Fourth District stated that the Plaintiffs have elected to pursue their claim as a civil action against the Defendants who are non-covered persons or entities under the NICA statute. As such, the Defendants failed to make a *prima facie* showing of any entitlement to the exclusive remedy provisions of NICA.

University of Miami v. Ruiz, 164 So. 3d 758 (Fla. 3d DCA 2015)

Michael Ruiz was born at Jackson North; a hospital owned by the Public Health Trust. Two doctors from UM's OB/GYN practice, Dr. Norris and Dr. Barker, provided obstetrical services. The infant unfortunately suffered a serious brain injury caused by oxygen deprivation during the course of labor and delivery. The parents then filed a Complaint against UM and the PHT for medical malpractice asserting both claims of direct negligence and vicarious responsibility. The Plaintiffs did not file any action against the doctors themselves.

After the Plaintiffs filed suit, the case was abated to allow an ALJ to determine whether the injury was compensable under NICA. The Plaintiffs file a claim with the Division of Administrative Hearings to receive compensation from NICA and the ALJ determined that the injury was in fact compensable under NICA. The ALJ also found that PHT had provided the Plaintiffs with notice that it participated in the NICA plan, but that Drs. Norris and Barker had not complied with the notice requirements. The ALJ made no finding whether UM had given or was required to give notice of its participation under the statute.

The University of Miami then appealed the ALJ's findings that its doctors had not given the required notice of NICA participation however, that ruling was affirmed. That appeal essentially ended the administrative portion of the proceedings and cemented the Plaintiff's ability to receive NICA benefits from the Association. The Plaintiffs have not, however, accepted nor declined the award; opting instead to hold in abeyance their decision whether to accept NICA benefits as their exclusive remedy while pursuing their civil suit against UM.

During the civil litigation, UM filed a Motion for Summary Final Judgment claiming immunity from the suit under §766.303 which mandates compensation from the Association as the exclusive remedy for injuries found to be compensable under NICA. Further, UM argued that because it is not a participating hospital or

doctor, it was not required to give notice under §766.316 and therefore, should be immune from suit. The Plaintiffs responded by arguing that Drs. Norris and Barker are employed by UM and because they failed to give notice, UM is not immune from suit. The trial court denied the University's Motion for Summary Judgment without explanation and the University filed a Petition for Certiorari.

The issue before the Court was whether an entity that is neither a hospital nor a physician participating in the NICA plan may invoke NICA's immunity from suit when its employees or participating doctors who have waived their personal immunity by failing to comply with NICA's notice provision. The Third District held that NICA immunity applies to such entities when the allegations of the Complaint indicate that they were "directly involved" and the medical care provided during or after labor and delivery, but that NICA immunity does not apply when the allegations are based on such entity's vicarious liability for the medical malpractice of their employees when those employees have failed to comply with NICA's notice provision. Thus, Summary Judgment should have been granted on Plaintiff's claim alleging direct liability, but there was no departure from the essential requirements of the law in denying the Motion for Summary Judgment as to the Plaintiff's claim that the University of Miami was vicariously liable for the medical negligence of its employed physicians.

Nursing Home Arbitration Agreements

Davis v. Hearthstone Senior Communities, Inc., 155 So. 3d 1232 (Fla. 2d DCA 2015)

The trial court granted the nursing home's Motion to Compel Arbitration. Upon the resident entering the nursing home, she signed several documents as part of the admissions process including one that was alleged to be an Arbitration Agreement. The resident ultimately died and her Estate filed an action alleging Chapter 400 violations. The nursing home filed a Motion to Compel Arbitration pursuant to the agreement signed during the admissions process. During discovery, the Estate requested that the nursing home provide a complete copy of the set of documents signed by the resident on admission. The only document provided, however, was the signature page of what was alleged to be the Arbitration Agreement.

Witnesses testified that the original document consisted of seven pages, but that it was the practice of the nursing home to retain only the signature page of the Arbitration Agreement in its file and provide the first six pages to the resident. Based upon the absence of the original six pages, the Estate argued that the nursing home had failed to prove that there was a binding, valid and enforceable Arbitration Agreement. Finding that the nursing home failed to provide proof of the existence of a valid written agreement to arbitrate because of its failure to include any of the terms of the alleged Arbitration Agreement, the Second District reversed the Motion to Compel Arbitration.

4927 Voorhees Road, LLC v. Mallard, 163 So. 3d 632 (Fla. 2d DCA 2015)

The trial court denied the nursing home's Motion to Compel Arbitration on the basis that a second re-admission agreement was invalid because it was executed by the resident's son who did not have Power of Attorney or other legal authority to act on behalf of the resident. The Second District reversed because the initial Arbitration Agreement signed by the resident as part of the admission agreement bound the resident from the time of the first admission up through and including all of the resident's other admissions to the facility without any need for further renewal. As such, they directed the trial court to determine whether the original Arbitration Agreement was valid on its face.

Fi-Evergreen Woods, LLC v. Robinson, 172 So. 3d 493 (Fla. 5th DCA 2015)

On admission to the nursing home, the nursing home's admissions director recalled that when she entered the patient's room, the patient was alert with her husband standing nearby. The director told the patient that she was there with the admission documents which needed to be signed. The patient responded that she wanted her husband to handle (review and sign) the documents. The husband then proceeded to sign the documents (which included an Arbitration Agreement) in the presence of both his wife and the admission's director.

During the process, the admission's director expressly noted the Arbitration Agreement in the patient's presence explaining that the facility did not require entry into the Arbitration Agreement as a condition to admission. By contrast, the husband testified that he had no clear recollection of the admission process. Under these circumstances, the Fifth District found that the husband had apparent

authority to sign the agreement on behalf of the patient and, therefore, it was error to deny the nursing home's Motion to Compel Arbitration.

Pharmacist Liability

Oleckna v. Daytona Discount Pharmacy, 162 So. 3d 178 (Fla. 5th DCA 2015)

In May, 2009, the patient, (now deceased) began treatment with Dr. Hunt who diagnosed him with "stress syndrome" and prescribed Xanax and Hydrocodone/Oxycodone. It was alleged that, over the next two years, Dr. Hunt repeatedly prescribed these drugs before the patient should have depleted the preceding prescriptions. It was alleged that Daytona Discount Pharmacy filled at least 30 of these prescriptions without question even though the prescriptions were issued too close in time and days before the patient should have exhausted the preceding prescription. In March, 2011, the patient died due to combined drug intoxication of Xanax and Hydrocodone.

Suit was filed against Dr. Hunt and the pharmacy and the pharmacy filed a Motion to Dismiss arguing that there was no duty to the decedent other than to properly fill his valid and lawful prescriptions. The trial court granted a Motion to Dismiss with prejudice. The Fifth District reversed and held that a pharmacist's duty to use due and proper care in filling a prescription extends beyond simply following the prescribing physician's directions. In doing so, they stated "we refuse to interpret a pharmacist's duty to use 'due and proper care in filling the prescription' as being satisfied by 'robotic compliance' with the instructions of the prescribing physician."

Retained Foreign Object

Dockswell v. Bethesda Memorial Hospital, 177 So. 3d 270 (Fla. 4th DCA 2015)

Mr. Dockswell was admitted to the hospital for surgery. The procedure included placement of a drainage tube to evacuate post-operative fluid. The following day, a nurse came to his room to remove the drainage tube. The patient's wife was present in the room and saw the nurse pull the tube. The patient experienced no immediate discomfort, but a 4½" section of the tube was unknowingly left inside of him. Approximately four months later, after he experienced continuing pain in the region, a CT scan revealed that a portion of the

drain remained in the body. A second surgery was performed to remove the remaining piece of the drain.

In their suit against the hospital, the Dockswells allege that the tube was negligently removed with excessive speed and force and, that the nurse negligently failed to inspect the drainage tube to insure that it was removed entirely which resulted in the tube fragment being overlooked. At trial, the patient testified that while he was on pain medication at the time the nurse attempted to remove the tube, he had a general recollection of her coming into his room and saying the drain needed to be removed. His wife also testified about the nurse removing the drain.

The Dockswells sought a jury instruction establishing a presumption of negligence against the hospital because of the presence of the tube fragment. The proposed instruction was based upon Florida Statue §766.102(3) which provides that a Plaintiff generally maintains the burden of proving a breach of the professional standard of care but that "the discovery of the presence of a foreign body…commonly used in surgical, examination, or diagnostic procedures, shall be prima facia evidence of negligence…"

The hospital asserted two arguments in opposing the instruction: (1) the presumption of negligence does not apply in instances where the Plaintiff is aware of and has evidence as to the culpable party; and, (2) the foreign body instruction is inapplicable to the first of the Plaintiffs' two claims (that the nurse negligently applied excessive speed and force) because the instruction in question would be applicable only as to the nurse's alleged failure to inspect which then resulted in the tube being left behind for later medical discovery.

Recognizing the distinction between the two claims, the trial court sought a set of proposed instructions applying the foreign body instruction to only the negligent inspection claim and not to the claim that alleged excessive speed and force during the removal of the drain. Neither the Dockswells nor the hospital submitted the instructions as requested and the trial court ultimately denied the requested instruction explaining that the Plaintiffs had the ability to present direct evidence of the nurse's negligence, whereas the word "discovery" in §766.102 and the jury instruction suggests a situation where a patient is uncertain as to where responsibility for negligence lies.

The Fourth District affirmed; finding that a foreign body instruction was not necessary to allow the jury to resolve the issues in the case noting that the use of the foreign body jury instruction would have improperly permitted the jury to disregard the conflicting testimony of the standard of care experts. Further, they found that because the parties did not submit the proposed instructions differentiating the claims, the Court declined to address the unpreserved issue whether the foreign body instruction may have been properly applied to the claim of negligent inspection.

Originally, this was a unanimous decision. Upon Appellant's Motion for Rehearing, the Court denied the motion, however, Judge Conner dissented. In it, Judge Conner noted that neither side had contended on appeal that the doctrine of *Res Ipsa Loquitur* applied to this case and and thus the majority opinion affirmed the trial court on a legal analysis that was not argued by the parties below or used by the trial court.

Statute Of Limitations

Barrier v. JFK Medical Center, Ltd., 169 So. 3d 185 (Fla. 4th DCA 2015)

After her son lapsed into a coma, Ms. Barrier was appointed as his emergency temporary guardian in order to make medical decisions for him and otherwise manage his medical and financial affairs. Before the temporary guardianship expired, the patient was determined to be incompetent and his mother was appointed his plenary guardian. After filing a medical malpractice lawsuit, the Defendants moved for a summary judgment based upon the running of the statute of limitations. The trial court granted the summary judgment and found that, upon Ms. Barrier's appointment as the emergency temporary guardian, she had a duty to investigate a possible medical malpractice claim on her son's behalf.

The Fourth District reversed ruling that the knowledge of the emergency temporary guardian of possible malpractice could not be imputed to the ward for purposes of the running of the statute of limitations until the ward was determined to be incapacitated and until the emergency temporary guardian was appointed the permanent guardian of the ward's property.

Testimony of Co-Treating Physician Properly Admitted

Cantore v. West Boca Medical Center, Inc., 174 So. 3d 1114 (Fla. 4th DCA 2015)

In this case, Alexis Cantore had a diagnosis of hydrocephalus. Following a repeat ventriculostomy at Miami Children's Hospital, Alexis began experiencing painful headaches and vomiting. Her parents called Miami Children's Hospital and a nurse told them to bring Alexis to the nearest hospital for a CT scan if they could not make it to Miami. She was taken by ambulance to West Boca Medical Center where the scan revealed worsening hydrocephalus. The ER physician called Dr. Sandberg who was a neurosurgeon at Miami Children's Hospital. She advised Dr. Sandberg that Alexis was stable. The emergency physician also spoke with the Emergency Department physicians at Miami Children's Hospital in order to arrange for transfer via helicopter. On arrival at Miami Children's Hospital, Alexis suffered a brain herniation. She was taken straight into the Emergency Department where she was seen by Dr. Sandberg who performed an emergent ventriculostomy.

At trial, Dr. Sandberg's deposition was read to the jury. He was asked hypothetical questions as to how the patient would have been treated had she arrived at the hospital an hour or two earlier. Dr. Sandberg stated that, even if she had arrived earlier, she would have had the exact same outcome because she would not have received a ventriculostomy until she deteriorated.

The Plaintiff sought a new trial due to the admission of this testimony. The Fourth District noted that the trial court did not abuse its discretion by allowing Dr. Sandberg to answer hypothetical questions despite the Florida Supreme Court's decision in *Saunders v. Dickens*, 151 So. 3d 434 (Fla. 2014). The Fourth District distinguished the *Saunders* decision from this case noting that Dr. Sandberg was not a subsequent treating physician testifying that adequate care by the Defendant would not have altered the subsequent care.

Rather, the Fourth District found that Dr. Sandberg was explaining his medical decision-making process and how different decisions by him would have impacted the patient's status and condition. The Fourth District also described Dr. Sandberg as a "co-treating physician" adding that "his role squarely exceeded that of a subsequent treating physician." Further, because he was contacted by West Boca Medical Center, he was described as being a co-treating physician or a consulting treating physician as to this facility. Accordingly, the Fourth District found that the trial court properly admitted the testimony based upon admissible hypothetical questions from both sides. As such, the judgment was affirmed.