2008
CASE LAW SUMMARY

Medical Malpractice

Amendment 7

Florida Hospital-Waterman v. Buster, 984 So. 2d 478 (Fla. 2008).

In a unanimous decision, the Florida Supreme Court held that Amendment 7 was self-executing, although they also held that the legislature was within its rights to enact Florida Statute §381.028. Nevertheless, they specifically found that portions of the statute which legislated that only final reports are discoverable; disclosure of final reports only relating to the same or substantially similar condition, treatment or diagnosis without the patient requesting access were discoverable only records generated after November 2, 2004 were discoverable; and that Amendment 7 had no effect on existing privilege statute, were unconstitutional, and therefore, struck down §381.028(3)(j), (5)-(7)(a).

In a 4-3 decision, the Supreme Court also held that Amendment 7 was retroactive and applied to all documents created before the passage of Amendment 7 on November 2, 2004.

North Broward Hospital District v. Durham, 991 So.2d 967 (Fla. 4th DCA 2008).

The Fourth District quashed the trial court's order overruling the hospital's peer review objections to discovery because the hospital was not given adequate notice and opportunity to be heard. They further held that the hospital did not waive peer review, work product or any other privilege by failing to file a privilege log prior to a hearing on its motion to stay, because the issues raised had to be resolved before the discovery objections could be considered before the trial court.

Baptist Hospital of Miami v. Garcia, 994 So.2d 390 (Fla. 3d DCA 2008).

The Third District quashed trial court order directing the hospital to provide a complete list of each and every document contained within a physician's credentialing file and general description of said document along

with any claim of privilege. In quashing the order, the court approved the Second District's decision in *Morton Plant Hospital v. Shahbas,* 960 So.2d 820 (Fla. 2d DCA 2007), and added that "to permit blanket disclosure of a list of all documents contained in doctors' credentialing files . . . would require Baptist to divulge names and confidential information which not only had nothing to do with adverse medical incident discoverable under Amendment 7, but which remained exempt from discovery" pursuant to Fla. Stat. §395.0191(8) and 766.101(5).

AMI Northridge Hospital v. Sonaglia, 995 So.2d 999 (Fla. 4th DCA 2008).

The hospital initiated peer review proceedings against Dr. Sonaglia. Dr. Sonaglia then filed suit against another physician alleging defamation and tortuous interference with a business relationship. In doing so, she contended that the other doctor tried to take patients away from her and when she tried to get them back, the other physician defamed her and had her thrown off of the hospital's medical staff.

Sonaglia attempted to take discovery from physicians and others involved in the peer review process, sought hospital records relating to a non-party, as well as, peer review and other materials regarding the other physician and Dr. Sonaglia. The non-party patient agreed to allow her hospital records to be turned over.

When served with a subpoena, the hospital provided billing and medical records, but refused to produce the peer review materials arguing that the request did not serve a proper purpose under Amendment 7; that Dr. Sonaglia had no standing to enforce the patient's constitutional rights; and that the doctor lacked standing to make the request because she was not seeking to educate herself in order to make a healthcare decision.

The Fourth District denied the Certiorari and held that Amendment 7 does not limit the definition of a patient to one seeking information for a proper purpose, nor does it require the information to be relevant to a pending medical malpractice action, or to a medical care decision. It also held that Amendment 7 does not prohibit the person who receives the materials from disclosing the information once it has been obtained.

Benjamin v. Tandem Healthcare, Inc., 998 So. 2d 566 (Fla. 2008).

The Florida Supreme Court held that nursing homes and skilled nursing facilities do not fall within the definition of "healthcare facility" or "healthcare provider" as contemplated by Amendment 7 and therefore, ordered that Amendment 7 discovery does not apply to nursing homes.

Arbitration-Medical Malpractice

Leon Medical Center v. Martell, 972 So.2d 1103 (Fla. 3d DCA 2008).

Defendant offered to admit liability and submit damages to arbitration pursuant to Fla. Stat. §766.106. The plaintiff sought clarification for the offer and the defendants replied that "the offer to arbitrate was for binding arbitration as set forth in Chapter 766." The plaintiff accepted the offer and prior to arbitration, a dispute arose regarding the interpretation of the agreement. The defendant contended that the offer to arbitrate was subject to the damages and limitations set forth in §766.207. Plaintiff contended that the limitations were not applicable.

To resolve the dispute, the plaintiff moved to compel arbitration and the trial court granted the plaintiff's motion and compelled the arbitration without the damage caps. The plaintiff argued that the defendant's offer was made under §766.106(3)(b)(3). The last sentence of this statute states "this offer may be made contingent upon a limit of general damages" and the defendant's offer was not stated to be contingent upon such a limitation. The Third District held that the damage limitations applied because the defendants clarified, prior to the plaintiff's acceptance, that their "offer to arbitrate was for voluntary binding arbitration as set forth in Chapter 766." The Third District noted that 766.207 is part of this chapter and prescribes liability limitations.

Lifemark Hospitals of Florida v. Afonso, 34 FLW D11 (Fla. 3d DCA 12/24/08).

In a case of first impression, the Third District held that the economic damages recoverable in a wrongful death arbitration are those damages awardable under the Wrongful Death Act and not the damages set forth in Fla. Stat. §766.202(3) and 766.207(7). As such, they held that the arbitrators erred in permitting the plaintiff to recover damages for loss of earning capacity and remanded the case for calculation of loss of support and loss of net accumulations.

Arbitration-Nursing Homes

McKibbin v. Alterra Health Care Corporation, 977 So.2d 612 (Fla. 2d DCA 2008), *rev. denied*, 987 So.2d 79 (Fla. 2008).

The son of a patient signed her admission papers to the nursing home which contained an arbitration agreement. After filing suit, the nursing home filed a motion to compel binding arbitration which the trial court granted. The patient's estate asserted that at the time the residency agreement was executed, no proceeding had been commenced to declare the patient incapacitated and there was no evidence that she was mentally or physically incapacitated to make decisions for herself. While the patient's son presented a Durable Power of Attorney demonstrating that he had the legal authority to enter into the residency agreement, the Court found that the power of attorney did not give the son to enter into an arbitration agreement on behalf of his mother. As such, the trial court's order granting the motion to compel binding arbitration was set aside.

Slusser v. Life Care Centers of America, 977 So.2d 662 (Fla. 4th DCA 2008).

The patient admitted herself into a nursing home and, during the admission process, executed an agreement to arbitrate all disputes and claims. While at the nursing home, the patient was injured and she sued in Circuit Court. The nursing home timely moved for an order compelling arbitration and the trial court granted the motion. The patient appealed and argued that the arbitration agreement was unenforceable because it waived access to the courts. The Fourth District affirmed the trial court's decision and concluded that a voluntary waiver of access to the courts is valid.

Shotts v. Op Winter Haven, 988 So.2d 639 (Fla. 2d DCA 2008).

The trial court granted the nursing home's motion to compel binding arbitration. The Plaintiff argued that the agreement was invalid and unenforceable because it was unconscionable and violated public policy. The Second District found that the arbitration agreement was enforceable. It pointed out that at the time the Plaintiff's representatives signed the admission paperwork, the arbitration agreement was separate from the remainder of the admission paperwork and the Plaintiff was not rushed into signing the arbitration agreement. The plaintiff also admitted that she was

not prevented from asking for assistance or questioning the admission's director prior to signing the document.

Jaylene v. Moots, 995 So.2d 968 (Fla. 2d DCA 2008).

The decedent's attorney-in-fact signed an agreement with the nursing home which contained an arbitration clause. Although the power of attorney did not contain any provisions granting the attorney-in-fact power to consent to arbitration or to waive the right to a jury trial, the grant of authority to the attorney-in-fact was extremely broad and unambiguous. As such, the Second District held that the trial court erred in failing to compel arbitration.

Five Points Healthcare v. Mallory, 34 FLW D44 (Fla. 1st DCA 12/31/08).

Nursing home challenged an order denying its Motion to Compel Arbitration on a claim brought by a resident's daughter. The nursing home admission agreement which contained the arbitration clause was signed by the daughter under a durable power of attorney granted to her by her mother. Part of this power of attorney allowed her daughter to "prosecute, defend and settle all actions or other legal proceedings touching my estate or any part of it, or touching any matter in which I may be concerned in any way" and also included a paragraph which allowed her to "do anything regarding my estate, property and affairs that I could do for myself." As such, the First District found that the trial court erred in denying the Motion to Compel Arbitration.

Arbitration-Physician Agreements

Frantz v. Shedden, 974 So.2d 1193 (Fla. 2d DCA 2008).

The patient sought elective surgery. One of the separate forms signed stated at the top "PLEASE READ CAREFULLY PATIENT/DOCTOR ARBITRATION AGREEMENT". The agreement was specifically brought to the patient's attention and he was given the opportunity to read it. He was also told to ask any questions if he had them. Further, he was told that he could take the agreement with him and review it with anyone else, including an attorney, before signing it. Following surgery, he filed a malpractice action and the physician immediately moved to stay the litigation and compel arbitration. The Second District Court of Appeal reversed the trial

court denial of the motion and found that the agreement was neither procedurally nor substantively unconscionable.

Credentialing

Baptist Hospital of Miami v. Garcia, 994 So.2d 390 (Fla. 3d DCA 2008).

The Third District quashed trial court order directing the hospital to provide a complete list of each and every document contained within a physician's credentialing file and general description of said document along with any claim of privilege. In quashing the order, the court approved the Second District's decision in *Morton Plant Hospital v. Shahbas*, 960 So.2d 820 (Fla. 2d DCA 2007), and added that "to permit blanket disclosure of a list of all documents contained in doctors' credentialing files . . . would require Baptist to divulge names and confidential information which not only had nothing to do with adverse medical incident discoverable under Amendment 7, but which remained exempt from discovery" pursuant to Fla. Stat. §395.0191(8) and 766.101(5).

Hospital Bylaws

University Community Hospital v. Wilson, 33 FLW D2753 (Fla. 2d DCA 12/3/08).

The hospital had an exclusive contract with a group of radiologists to provide radiology services to the hospital. In accordance with this agreement, the hospital terminated its exclusive contract with the group and signed an agreement with another group. Several members of the terminated group still had privileges to practice radiology at the hospital through the hospital's granting of privileges. In terminating the agreement with the prior group, the hospital advised that only those physicians who are employed or affiliated with the new radiology service would be permitted to practice at the hospital. The physicians not affiliated with the new group sued the hospital for damages and were successful.

The Second District reversed, only on the issue of calculation of damages. The trial court calculated damages based upon a five year period that each physician argued they would need to reclaim the same level of salary enjoyed at the time of the breach of contract. The District Court held

that the correct time period to measure the damages was the remaining term of the privileges granted to each doctor.

Medical Malpractice-Advanced Directives

Scheible v. Morse Geriatric Center, Inc., 988 So.2d 1130 (Fla. 4th DCA 2008).

The resident had signed a "DNR" form and subsequently was found unresponsive in bed. Staff called 911 and paramedics intubated her and administered medications for her heart. She was taken to the hospital where she was extubated. She died four days later with the cause of death being pulmonary arrest. The survivors filed a claim for disregard of the decedent's advanced healthcare directive. The Fourth District held that deprivation of the right to refuse healthcare cannot constitute a legal cause of death for which a plaintiff may sue.

Medical Malpractice-Retained Sponges

Castillo v. Visual Health & Surgical Center, 987 So.2d 254 (Fla. 4th DCA 2008), *rev. denied,* 990 So.2d 1058 (Fla. 2008).

Plaintiff had a pterygium surgically removed which involved the use of cut sponges. It was undisputed that a fragment of one of the cut sponges was left in the plaintiff's eye, although the defendants did not agree that this was a cause of plaintiff's alleged injuries. During trial, defense experts performed a demonstration. During deliberations, the jury questioned whether they could wet the sponge admitted into evidence. The trial court allowed this over plaintiff's objections. Plaintiff argued that this was improper because juries were not entitled to conduct their own experiments, thereby creating new evidence in the jury room, outside the presence of the parties and the judge. The Fourth District upheld the trial court's decision to allow this although they weren't sure whether the jurors actually performed the experiment or what liquid they might have used.

Additionally, the plaintiff moved for a directed verdict arguing that Fla. Stat. §766.102(3) shifted the burden of proof to the defense to prove that the defendant was not negligent. This statute provides that "the discovery of the presence of a foreign body, such as a sponge . . . shall be prima facie evidence of negligence on the part of the healthcare provider." The plaintiff argued that the defense only presented guesswork and speculation as to how

the defendant doctor failed to see the sponge. Both the defendant and his expert provided hypothesis as to how the sponge could have been left in the eye, despite the evidence of numerous sponge count and the court concluded that the jury was free to accept or reject any of this testimony.

Medical Malpractice-Sovereign Immunity

Andrew v. Shands at Lake Shore, Inc., 970 So.2d 887 (Fla. 1st DCA 2007).

The trial court dismissed a wrongful death complaint against the hospital holding that it was protected by sovereign immunity because the doctor who was alleged to have been negligent in the care and treatment of the patient was employed by the state. The 1st District reversed and held that the immunity afforded to the doctors as a state employee did not inure to the benefit of a privately owned hospital. In so doing, they noted that the "protection afforded by sovereign immunity is, by definition, limited to the sovereign. It does not exist for the benefit of private enterprise."

Medical Malpractice –Statute of Limitations/Statute of Repose

Thomas v. Lopez, 982 So.2d 64 (Fla. 5th DCA 2008).

An adult child suffered a brain injury and, almost 9 months later, her mother was appointed as her plenary guardian. Because the friends and family of an emancipated adult have no duty to institute suit on an adult's cause of action, the court held that the statute of limitations did not begin to run until two years from the time the guardian discovered the incident or should have discovered the incident with the exercise of due diligence. The Fifth District emphasizes that a defendant should not benefit when the Defendant's wrongful conduct causes a mental condition which results in the Plaintiff's delay in filing suit.

Samuel v. Shands Teaching Hospital, 984 So.2d 627 (Fla. 1st DCA 2008).

The trial court ordered that the plaintiff disclose correspondence from the law firm to the plaintiff following surgery on the plaintiff's minor child, which the defendant sought to use to show that the medical negligence action was barred by the statute of limitations. The First District found that the plaintiff consulted the law firm for legal advice and, therefore, the correspondence was confidential communication protected by the attorney-

client privilege and that the privilege was not waived by the plaintiff's allegation that their lawsuit was timely filed.

C.H. v. Whitney, 987 So.2d 96 (Fla. 5th DCA 2008)

The trial court erred in concluding that a second amended complaint did not relate back to the date of the filing of the original complaint. The child's mother attempted to abort a fetus and was told that the procedure would include receiving medication that would cause a stillbirth. After 12 hours at the center and while in active labor, she was ordered by staff to leave the center. A few hours later, she gave birth to a premature infant.

The action was originally brought for wrongful life; a cause of action which is not recognized in Florida. Subsequent thereto and after the Statute of Limitations ran, the plaintiffs sought to amend to include a claim for wrongful birth. The trial court found that the complaint was time barred. The Fifth District reversed, finding that the complaint related back to the original complaint. They further found that even though a new party was added to a lawsuit, where a new party was sufficiently related to an original party, that addition did not prejudice the defendant.

Porumbescu v. Thompson, 987 So.2d 1275 (Fla. 1st DCA 2008).

Trial court dismissed the complaint as being barred by the statute of limitations. Plaintiffs had filed for a 90 day extension pursuant to F.S. 766.104(2) and subsequently engaged in presuit screening pursuant to F.S. 766.106. In granting the motion to dismiss their motion for summary judgment based on the statute of limitations, the trial court counted the 90 day extension obtained pursuant to F.S. 766.104(2), but did not add the 90 days from the presuit screening. The First District held that the 90 day extension obtained pursuant to F.S. 766.104(2) is to be tacked on to the end of the limitations period and does not run simultaneously with the 90 day tolling period provided for under 766.106(4).

Maraj v. North Broward Hospital District, 989 So.2d 682 (Fla. 4th DCA 2008).

In plaintiff's initial complaint, they sued the hospital for its vicarious responsibility for the negligence of two physicians. After the statute of limitations had run, the plaintiffs amended the complaint to allege the

hospital's vicarious liability for the negligence of a third physician. The Fourth District held that the vicarious liability claim as to the third physician related back to the initial complaint and was not defeated by the statute of limitations because the amended complaint arose out of the same occurrence as the claim included in the original complaint did not raise any additional issues, but merely included additional information.

Germ v. St. Luke's Hospital Ass'n., 993 So.2d 576 (Fla. 1st DCA 2008).

An infant was born on August 14, 1999. On October 29, 2001, the parents served Notices of Intent on various defendants, but did not name 2 physicians who the parents knew were involved in the care and treatment. More than 2 years later, the parents served these 2 physicians with notices of intent and the physicians filed motions for summary judgment arguing that the claims were filed outside the statute of limitation.

The trial court granted the summary judgment and the parents appealed claiming that a medical malpractice action arising from an injury to a minor is never barred by the statute of limitations until the minor is at least 8 years old, citing to the Statute of Repose language which states that "in no event shall the action be commenced later than 4 years from the date of incident or occurrence out of which the cause of action accrued, except that this 4 year period shall not bar an action brought on behalf of a minor on or before the child's 8th birthday."

The First District affirmed the summary judgment finding that the statutes plain language extended the 4 year period of repose such that if a child under the age of 8 is injured by an incident of malpractice and the malpractice should not have been discovered, the 4 year period of repose would be extended until the child's 8th birthday. Conversely, they found that the plain language of the statute of limitations was not extended by this language.

Gonzalez v. Tracy, 994 So.2d 482 (Fla. 3d DCA 2008).

The patient had surgery by Dr. Tracy and complained of pain during each and every visit following the surgery. The Plaintiff alleged that the doctor told her that the pain was as a result of another problem and that the pain would subside. The trial court granted summary judgment finding that the Statute of Limitations began to run immediately following the surgery

because of the patient's complaints of pain. The Third District reversed and found that it was error for the trial court to conclude that pain immediately following surgery, standing alone, communicates the possibility of medical negligence and held that the running of the statute of limitations was an issue for the jury to decide.

NICA

Bayfront Medical Center, Inc. v. NICA, 982 So.2d 704 (Fla. 2d DCA 2008).

The administrative law judge determined that notice given to the infant's family was insufficient where the hospital failed to give the mother notice of the existence of the NICA plan. The Second District reversed pointing out that the physician put the mother on notice of the plan and her option to either continue in his care or seek care from a non-participating physician. As such, the notice requirements of the NICA statute were satisfied and they found that any additional notice provided by the hospital would have been meaningless. Further, while the mother could have selected a non-participating physician, she could not have chosen to select services at a hospital not covered by the plan because all hospitals participate in the plan.

In so ruling, they certified the following question: "IN LIGHT OF THE FLORIDA SUPREME COURT'S DECISION IN *GALEN OF FLORIDA v. BRANIFF*, 696 So.2d 308 (Fla. 1997), DOES A PHYSICIAN'S PRE-DELIVERY NOTICE TO HIS OR HER PATIENT OF THE PLAN AND HIS OR HER PARTICIPATION IN THE PLAN SATISFY THE NOTICE REQUIREMENTS OF §766.316, FLA. STAT. (1997) IF THE HOSPITAL WHERE THE DELIVERY TAKES PLACE FAILS TO PROVIDE NOTICE OF ANY KIND?"

Orlando Regional Healthcare System v. NICA, 997 So. 2d 426 (Fla. 5th DCA 2008).

The Fifth District found that a claim brought for an infant who died 6 days after birth and who was administered oxygen immediately upon delivery and who was resuscitated within minutes of being born and who was then put on high frequency oscillatory ventilation and ECMO was compensable under NICA. The court found that "the child's injury was

sustained during resuscitation and the immediate post-delivery period in the hospital."

Pharmacist Liability

Estate of Johnson v. Badger Acquisition, 983 So. 2d 1175 (Fla. 2d DCA 2008).

The estate of a deceased nursing home resident sued the nursing home and the company which contracted with the nursing home to provide pharmaceutical dispensing and consulting pharmaceutical services. The trial court granted summary judgment and the Fourth District affirmed that the consulting pharmacist who contracted with a nursing home facility to review drug regimens and to establish procedures in training related to proper inventory, control and delivery of medications as prescribed to residents by treating physicians as part of a statutory requirement for nursing homes, did not owe a legal duty to a nursing home resident and held that the resident was not a third party beneficiary of the contract between the nursing home facility and the company which provided consulting pharmacy services. They further held that there was no private cause of action against the consulting pharmacist nor was any legal duty created under The Pharmacy Act, the Florida Administrative Procedure Act, or the Federal Omnibus Budget Reconciliation Act.

Presuit Screening

Martin Memorial Medical Center v. Herber, 984 So.2d 661 (Fla. 4th DCA 2008).

The Fourth District held that the trial court departed from the essential requirements of law by failing to determine whether the plaintiff conducted a good faith investigation and whether her claim rested on a reasonable basis. The Plaintiff's notice of intent did not contain a verified written medical expert opinion corroborating the basis for the lawsuit because the hospital failed to provide medical records within 10 days of being requested to do so. Nevertheless, the failure to timely provide medical records does not dispense with the requirement of a good faith investigation prior to filing a claim.

Hoeltzell v. Erenstoft, 985 So.2d 636 (Fla. 4th DCA 2008).

The trial court correctly struck the physician's pleadings for failing to comply with presuit because he did not, in his pro se response to the claim, include an affidavit of an expert witness.

Tenet South Florida Health Systems v. Jackson, 991 So.2d 396 (Fla. 3d DCA 2008).

Plaintiff brought a claim against the hospital for breach of statutory duty to a vulnerable person. The plaintiff alleged that the hospital failed to administer proper nursing care, failed to implement latex precautions, failed to adequately assess and monitor the patient and failed to provide appropriate care and treatment.

The Third District found that presuit notice was required because under the allegations of the complaint, the hospital did not meet the definition of a caregiver under the vulnerable adult statute because there was no allegation of "a commitment, agreement or understanding . . . that a caregiving role existed" between the hospital and the patient, although the Court was careful to state that this did not suggest that the hospital could not be a caregiver.

Vulnerable Adult

Bohannon v. Shands Teaching Hospital, 983 So.2d 717 (Fla. 1st DCA 2008).

The trial court properly dismissed a complaint with prejudice where the plaintiff sought damages for medical abuse and neglect resulting in wrongful death under the Adult Protective Services Act finding that a claim arising out of medical negligence cannot be prosecuted under the act. Rather, to bring a cause of action under §415.111, a complaint must set forth allegations which demonstrate that a plaintiff was a vulnerable adult, that the defendant was a caregiver and that the defendant committed abuse, neglect or exploitation as defined by Fla. Stat. §415.102.

Tenet South Florida Health Systems v. Jackson, 991 So.2d 396 (Fla. 3d DCA 2008).

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