2012
CASE LAW SUMMARY

Medical Malpractice

Amendment 7

West Florida Regional Medical Center v. See, 79 So. 3d 1 (Fla. 2012)

The hospital was sued on a vicarious basis for the actions of one of its surgeons and was also sued for direct negligence in granting medical staff privileges to a surgeon.

The Plaintiff sought various discovery. After a full hearing, the trial court issued two orders with regard to the discovery issues. In its first order, the trial court found that Amendment 7 was not preempted by the Health Care Quality Improvement Act (HCQIA). The court further found that Amendment 7 did not violate the Contract Clause of the United States Constitution nor did Amendment 7 impose a burden that violated the due process clause of the 14th Amendment. It also denied the hospital's Motion for Protective Order as to all incident reports related to the type of surgery performed on the patient.

In its second order, the trial court partially granted the hospital's Motion for Protective Order. It granted protection as to any completed initial and renewal applications for privileges submitted by the doctors. The trial court denied the Motion for Protective Order as to a blank application for medical staff privileges and also denied the Motion for Protective Order as to any evidence of the doctor's surgical training for the procedure in question. The trial court also issued a protective order with regard to the credentialing files of the doctors for matters "other than adverse medical incidents." The hospital then filed a Writ of Certiorari.

The Supreme Court ruled that the patient was entitled to a copy of the blank application finding that it was not privileged under the peer review and credentialing statutes because it is not a document that is considered by the committees. Rather, it is the completed application that would be considered. Further, they ruled that Amendment 7 required the disclosure of the blank application because in an action for negligent granting of medical staff privileges, the blank application is a record of an adverse medical incident. Next, it ruled that Amendment 7 discovery was not limited to Code 15 reports and annual reports

pursuant to Florida Statute 381.028 because the statute conflicts with the clear language of Amendment 7. The court also found that neither the HCQIA nor the contract clause preempted Amendment 7.

Arbitration-Nursing Homes

SCG Harbourwood, LLC., v. Hanyan, 93 So. 3d 1197 (Fla. 2d DCA 2012)

The nursing home argued that its contract with the resident provided for arbitration of disputes. The nursing home further contended that an arbitration opt-out provision in the contract was not agreed to by the parties at the time the contract was signed and could not later be invoked by the resident. Apparently on the advice of counsel, the resident took a photocopied version of the contract, marked an "X" through the arbitration clause, and advised the nursing home that she was opting out of arbitration. The trial court found that the optional arbitration contractual provision was unambiguous and allowed exercise of the option at any future time. On appeal, the court found that the trial court erred because the arbitration provision unambiguously required both parties to opt out of arbitration at the time of the contract signing by placing an "X" through the clause. Neither party exercised its authority at the time of signing and nothing in the provision suggested that it could have been exercised unilaterally at a later time.

John Knox Village v. Perry, 94 So. 3d 175 Fla. 2d DCA 2012)

The trial court found that an arbitration agreement was invalid because the nursing home resident was incompetent when she signed the documents. The trial court also held that the agreement was procedurally unconscionable because the nursing home did not take extra steps to ensure that the resident understood the agreement when it knew or should have known that she did not. In reversing the trial court's decision and remanding for an evidentiary hearing, the Second District noted that a person is presumed to be competent when she enters into a contract and the burden overcoming the presumption rests on the party who challenged the validity of the contract. Incompetence is not shown by evidence of simple feebleness or mental weakness and the challenging party must prove that the mental or physical weakness amounted to an inability to comprehend the effect and nature of the transaction. In this case, the Estate of the resident did not present any live testimony, lay or expert, from a relative or from a medical professional and offered no proof that the resident had been declared incapacitated by a physician. Further, no one suggested that she had been diagnosed with dementia or psychosis. The only evidence presented was a package of medical records which seemed to

indicate that she was confused on some occasions, but not on others. By contrast, the nursing home submitted the deposition testimony of the employee who handled the admission paperwork who advised that if she was concerned that the new resident could not understand the terms of the admissions agreement, she would seek out a doctor, nurse or family member to assist the resident and that if the resident seemed confused, she would take steps to determine if someone held a power of attorney for the resident and would not allow the resident to sign the admissions paperwork. Lastly, the court noted that, although the trial court found that there was procedural unconscionability, an arbitration agreement may only be voided for unconscionability when it is both procedurally and substantively unconscionable.

Estate of Frances Deresh v. FS Tenant Pool III Trust, 95 So. 3d 296 (Fla. 4th DCA 2012)

The decedent's estate filed a wrongful death action against nursing home facility. The nursing home facility moved to compel arbitration. After a hearing, the trial court compelled arbitration and stayed the proceedings. The decedent's estate appealed. When decedent and the facility entered into an arbitration agreement when she was admitted. On appeal, the Fourth District affirmed, holding the claims in the case where within the scope of disputes subject to the arbitration agreement.

However, the provision in the arbitration agreement preventing the arbitration panel from awarding punitive damages violated public policy because § 415.1111, Fla. Stat. (2008), expressly authorized punitive damages. Nonetheless, the invalid punitive damages limitation in the arbitration agreement did not go to the heart of the agreement. There was no interdependence between the punitive damages prohibition and the remaining clauses of the agreement. Furthermore, the severance clause declared the intent of the agreement to preserve the agreement in the event any provision of the agreement was declared unlawful. Accordingly, the severance of the clause prohibiting an arbitration award of punitive damages from the arbitration agreement was appropriate. The trial court's order compelling arbitration was affirmed, and the case was remanded to the circuit court for the court to order severance of the punitive damages provision from the arbitration agreement.

Brea Sarasota, LLC v. Bickel, 95 So. 3d 1015 (Fla. 2d DCA 2012)

The trial court denied the nursing home's motion to compel arbitration and the Second District reversed. When the patient was admitted to the nursing home, her daughter signed the admissions documents as the patient's attorney-in-fact. Included in the paperwork was an arbitration agreement. The resident's daughter testified that her mother had unexpectedly been discharged from another assisted living facility and she needed to quickly move her to a new facility. She was told that Brea had one room left for a Medicaid patient and during a site visit; the resident had some physical issues which caused a stressful situation. In her haste to deal with her mother's problem and to obtain the only available Medicaid room, the daughter signed the admissions documents without reading them. She argued that she should not be bound by the arbitration agreement because, at the time, she felt that she had no choice but to sign the agreement and to have her mother admitted. She also argued that the agreement was unconscionable because it required her mother to pay half the arbitrator's fee.

The Second District noted that even if the daughter was under the stress of the moment and could not read the documents, she still had 15 days to opt out of arbitration under the terms of the agreement. Her failure to read the arbitration agreement in the days following her mother's admission did not excuse the performance of the contract in the absence of some evidence that she was prevented from knowing its content. Thus, they found that the agreement was not procedurally unconscionable and, therefore, they did not need to address the issue of substantive unconscionability.

LTCSP-St. Petersburg, LLC., v. Robinson, 96 So. 3d 986 (Fla. 2d DCA 2012)

A provision limiting liability in an arbitration agreement was determined to be unenforceable under *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456 (Fla. 2011), and severed from agreement. The Fifth District determined that the provision substantially diminishes or circumvents the statutory remedies available to nursing home residents under §400.023, Fla. Stat. (2007), but could be severed due to the agreement's broad severability clause.

Perry v. Sovereign Healthcare, 100 So. 3d 146 (Fla. 5th DCA 2012)

The Plaintiff was a resident of the nursing home for almost five years. At the time of her admission to the facility, her daughter signed a residency agreement that contained an arbitration provision. Subsequently, another daughter filed suit

on her behalf alleging that her mother was deprived of her nursing home rights. The nursing home filed a motion to compel binding arbitration and to stay the proceedings based upon the contractual terms of the residency agreement. The trial court granted the motion finding that the Plaintiff was a third party beneficiary to the residency agreement. The Fifth District reversed because there was no evidence that the resident was incapable of signing the agreement on her own behalf and, moreover, there was no evidence that her daughter had the authority to bind the resident to the arbitration agreement.

BKD Twenty-One Management Company v. Delsordo, 37 FLW D2541 (Fla. 4th DCA 10/31/12)

The Plaintiff moved into an independent retirement living facility that provided for arbitration of disputes between parties involving amounts in excess of $15,000 arising out of or related to the agreement, the "establishment" or the services/care provided. One day, the Plaintiff/resident was walking from his apartment to the dining room using a catwalk when he tripped and fell. He sued the retirement facility and they, in turn, moved to compel arbitration. The trial court denied this and the Fourth District reversed finding that the term "establishment" although not defined by the agreement, necessarily referred to the Defendants' institution or place of business.

Steur v. Jaylene, Inc., 105 So. 3d 1278 (Fla. 2012)

The Supreme Court quashed the decision of the Second District Court of Appeal and held that the trial court (as opposed to the arbitrator) must first determine whether an arbitration agreement's limitation on statutory remedies renders the arbitration agreement unenforceable on public policy grounds.

Blood Bank

Fitchner v. Lifesouth Community Blood Centers, Inc., 88 So. 3d 369 (Fla. 1st DCA 2012)

Fitchner filed suit against Lifesouth seeking damages for the injuries her minor son sustained as a result of the blood bank's negligence in failing to ensure the safety of the blood he had received. The patient subsequently died. The complaint was amended. The allegations of negligence were the same as those in the original complaint. The doctrine of the law of the case did not foreclose consideration of the retroactive applicability issue because that issue had not been

presented or decided on appeal. The estate had no reason to make a claim that the statute could not be applied retroactively, because the trial judge had determined that it did not apply to them in any event. The First District held that the retroactivity argument was not barred from further consideration because it was raised for the first time in a motion for rehearing. The statutory amendment including blood banks within the class of health care providers that were protected by the presuit screening requirements could not be applied retroactively as the amendment alters the substantive rights of the parties in that it adds a condition that can operate to bar a cause of action entirely.

Causation/Directed Verdict

Hollywood Medical Center v. Alfred, 82 So. 3d 122 (Fla. 4th DCA 2012*)*

The decedent was brought to the Hospital after having suffered seizures. On arrival, her vital signs were low and she had a Glasgow Coma Scale of 3. The ER physician ordered Valium to prevent an additional seizure. She was also given Atropine and epinephrine and an attempt to intubate her was unsuccessful. She was then given a paralytic in order to permit intubation and, shortly thereafter, the patient went into full cardiac arrest and died. Dr. Bruce Charash, the Plaintiff's cardiology expert, testified that the patient's death was preventable had she been intubated and put on a respirator immediately upon presentation to the emergency room. Plaintiff also presented the testimony of a nursing expert who testified to various deviations from a nursing standard of care, but did not offer any opinion on causation. They also presented testimony of Dr. Sichewski, an emergency medicine expert who also testified that the ER physician should have intubated the patient immediately upon arrival. He also testified that the ER physician should have never administered Anectine. The Hospital moved for directed verdict pointing out that the Plaintiff's experts testified that the ER physician had fallen below the standard of care in failing to timely intubate the patient and that no evidence was presented that any nursing staff malpractice caused or contributed to causing the patient's death. The 4th District reversed and ordered that a final judgment be entered in favor of the Hospital finding that the Plaintiff failed to show that the breach of the standard of care by the nursing staff caused the patient's death.

Contribution

Healthcare Staffing Solution, Inc. v. Wilkinson, 86 So. 3d 519 (Fla. 1st DCA 2012)

The Plaintiff sued University Medical Center and the Florida Board of Regents for medical malpractice. The case was settled for $6,150,000 with University Medical Center paying $5,950,000 and the Florida Board of Regents paying their sovereign immunity limits of $200,000. Thereafter, University Medical Center brought a contribution action and an equitable subrogation action against Healthcare Staffing Solution, Inc. seeking its pro-rata share of the settlement. Following a non-jury trial, the trial court ordered Healthcare Staffing to pay the hospital $5,057,500 which was 85% of the amount paid by the hospital plus pre-judgment interest. The trial court did not apportion any fault to the Florida Board of Regents because it found their negligence to be irrelevant to the contribution claim. Healthcare Staffing appealed and the First District reversed the judgment based upon the trial court's failure to consider the Florida Board of Regents' fault in determining Healthcare's pro-rata share of the entire liability pursuant to Florida Statute §761.31(2)(b).

On remand, the trial court apportioned 70% of fault to the Florida Board of Regents; 25.5% to Healthcare Staffing; and the balance to University Medical Center. The trial court concluded; however, that it would be inconsistent with the prior decision of the First District to construe the phrase "entire liability" to mean the amount of the settlement and instead concluded that the phrase meant the potential value of the underlying malpractice claim. The court then found that the reasonable value of the malpractice claim was $15,000,000 and determined that Healthcare Staffing's pro-rata share of the entire liability was $3,825,000. The court then entered a judgment in favor of the hospital for this amount plus pre-judgment interest of approximately $2,500,000.

On appeal, Healthcare Staffing did not contest the finding that the potential value of the underlying malpractice claim was $15,000,000 nor did it contest the apportionment of fault. Rather, they appealed the trial court applying the finding of liability against the potential value and not the actual settlement. In a case of first impression, the First District held that the dollar amount paid to settle the underlying claim and to release the tortfeasors from any further liability for the claim represents the "entire liability" for purposes of Florida Statute §768.31. They added, however, that the potential value of the underlying claim was not irrelevant in every contribution action. Specifically, they noted that the contribution Plaintiff was "not entitled to recover contribution … in respect to any

amount paid in the settlement which is in excess of what was reasonable." Thus, if a contribution Defendant contends that the settlement was excessive, the trial court can then consider the potential value of the claim and other factors in determining the reasonableness of the settlement. Here, however, the contribution Defendant did not challenge the reasonableness of the settlement and, therefore, the potential value of the claim was irrelevant to the determination of the amount owed by the contribution Defendant.

Trapper John Animal Control, Inc. v. Gilliard, 96 So. 3d 461 (Fla. 5th DCA 2012)

An exterminating company had settled a claim brought against it by the estate of an individual who had inhaled rat poison sprayed into air ducts by the company. The Fifth District held that the exterminating company did not have a right of contribution against the physician who allegedly negligently treated the decedent after he had inhaled the poison where the settlement clearly and unambiguously settled the company's liability but did not release the physician. The Fifth District also held that the trial court properly found that second release, which specifically discharged the physician's liability and which was procured by the exterminating company 14 months later without any involvement of the physician was not connected to the first release and original agreement.

Exclusion of Expert Testimony

Duss v. Garcia, 80 So. 3d 358 (Fla. 1st DCA 2012)

It was alleged that that the defendant obstetrician was negligent in using a fetal vacuum extractor during the delivery of the Plaintiff and that this negligence caused the Plaintiff to suffer an ischemic stroke resulting in brain injury and leaving the Plaintiff with cerebral palsy. During trial, the defendants' experts testified that the obstetrician's use of the vacuum extractor was within the standard of care and that use of the device cannot cause an ischemic stroke. The expert testimony was that the child's strokes and brain injury resulted from a placental abnormality.

On appeal, the Plaintiff contended that the trial court incorrectly excluded expert testimony establishing that the obstetrician's breach of the standard of care created an obstetrical condition known to increase the likelihood of the neurologic injury suffered by the child. As a result of not allowing this testimony, the Plaintiff contended that he was unable to establish a link in the chain of causation between the obstetrician's negligence and the ischemic stroke. The Plaintiff also argued

that the trial court improperly allowed the Defendant's experts to opine on causation using authoritative sources, effectively diminishing the credibility of the Plaintiff's own experts on the ultimate issue of liability.

On appeal, the First District held that the trial court did not err in excluding testimony of the Plaintiff's standard of care expert which would have linked a breach of the standard of care to the Plaintiff's alleged ischemic stroke because such testimony would go to causation and thus exceed the scope of the matters on which that expert was qualified to testify. Even though the Plaintiff's expert obstetrician was not qualified to render causation opinions, the Plaintiff offered testimony from a pediatric neurologist and neonatologist who were qualified to render such opinions.

The appellate court also found that the defendants' obstetrical experts' testimony referencing studies conducted by the National Institute of Health did not amount to improper bolstering. Such government conducted research may not independently be introduced as evidence; however, such information is properly relied upon by an expert witness as a basis for his or her opinion.

Ex Parte **Conferences**

Hasan v. Garvar, 37 FLW S769 (Fla. 12/20/12)

Hasan filed a medical malpractice action against Dr. Garvar alleging that Garvar failed to diagnose and treat a dental condition resulting in a bone infection. After receiving treatment from Garvar, Hasan sought medical treatment from Dr. Schaumberg. While in the process of scheduling Schaumberg's deposition, the Plaintiff learned that Schaumberg's malpractice carrier had retained an attorney to conduct an ex-parte, private pre-deposition conference with her. Dr. Schaumberg's carrier also insured Dr. Garvar. The Plaintiff moved for protective order to prohibit the conference and the trial court denied the motion. The trial court's order contained a provision to prohibit Schaumberg and her attorney from discussing privileged medical information. The trial court also noted that the attorney retained to represent Schaumberg was not the same attorney as assigned to represent Dr. Garvar.

The Fourth District affirmed the trial court's decision. The Supreme Court quashed the decision of the Fourth District and held that the physician-patient confidentiality statute (Florida Statute 456.057) prohibits a non-party treating physician from having an ex-parte meeting with an attorney selected and provided

by the Defendant's insurance company. In dicta, the Supreme Court stated that "We hold that section 456.057(8) creates a broad and expansive physician-patient privilege of confidentiality for the patient's personal information with only limited, defined exceptions. The privilege prohibits ex-parte meetings between non-party treating physicians and others outside the confidential relationship whether or not they intend to discuss privileged or non-privileged matters without measures to absolutely protect the patient and the privilege."

Expert Testimony on Causation

Cox v. St. Joseph's Hospital, 71 So.3d 795 (Fla. 2012)

The Supreme Court quashed the decision of the Second District finding that the District Court impermissibly reweighed the evidence and substituted its own evaluation of the evidence in place of the jury. In this stroke case, Nancy Futrell, M.D. testified that she believed that the patient was an excellent candidate for tPA even though she recognized that a prior intracranial bleed is a contraindication to its use. She asserted, however, that this does not mean that a doctor absolutely could not give tPA to the patient. She also opined that "to a high degree of medical probability" the patient "would have had a very good recovery and have minimal or no neurologic deficit" if he had received tPA. During cross-examination, she was questioned extensively regarding the 1995 NINDS study. Dr. Futrell testified that defense counsel had improperly characterized the statistics from the NINDS study and reiterated her opinions. The Supreme Court emphasized that an expert cannot merely pronounce a conclusion that the negligent act more likely than not causing the injury, but added that Dr. Futrell conducted a full review of the patient's medical records, provided a detailed analysis as to why she believed the patient would have been an excellent candidate for tPA therapy and based her testimony on her experience, the relevant medical literature and her knowledge about the facts and records involved in the case.

Good Samaritan Act

University of Florida v. Stone, 92 So. 3d 264 (Fla. 1st DCA 2012)

The decedent went to a University of Florida hospital in Starke complaining of severe stomach pain and vomiting. Upon examination and testing, the physician in charge of his care at the Starke facility determined that surgical intervention might be needed and, because a surgeon was unavailable, he arranged for a transfer to another University of Florida facility: Alachua General Hospital. The physician

at Alachua General Hospital who would oversee the decedent's care upon his arrival suggested that the Starke facility conduct a CT scan before transport because of possible delays in getting the scan done at Alachua General Hospital. The scan was completed at the Starke facility and the results showed that the decedent's stomach was inverted and partially in his chest cavity having pushed through a hiatal hernia.

The physicians at the Starke facility did not know the results of the scan before the patient was transported to Alachua General Hospital, but the radiologist who read the scan stated that the findings were "worrisome for gastric outlet obstruction". This is a serious condition which can be life threatening.

Shortly after the CT scan, the decedent was transferred via ambulance to Alachua General Hospital and, upon arrival, was admitted to a room on the medical/surgical floor of the hospital. A resident assessed the patient and ordered a surgical consultation for the following morning. He also ordered medication, an NG tube and ordered that the patient not receive anything by mouth. Subsequently, the patient's blood pressure began dropping and the resident ordered his bed be repositioned. The patient then went into cardiac arrest and was transferred to the ICU where he died the following morning after arresting a second time.

On autopsy, it was found that the patient's stomach was necrotic; however, there was conflicting evidence as to the mechanism that caused the stomach to die. The estate presented evidence that the stomach died due to a lack of blood flow as a result of the hiatal hernia and that the patient's death was as a result of cardiac compressive shock from the pressure the stomach placed on the heart. His experts also testified that the condition was curable had it been diagnosed and treated on an emergent basis by the Alachua General Hospital physicians. By contrast, the hospital's experts testified that the stomach died as a result of a gastric volvulus or twisting of the stomach and that his death was as a result of shock due to toxins released from the death of the stomach. They also opined that his condition was incurable at the time he arrived at Alachua General Hospital.

The hospital argued that the heightened standard of proof of the Good Samaritan Act (GSA) should apply because, although unknown to the Alachua General Hospital physicians at the time, he was suffering from an emergency medical condition when he arrived at the hospital. The estate argued that the Act did not apply because the patient's condition was stable when he was transferred to the hospital and he was not treated as an emergency patient until after the first

cardiac arrest. The First District reversed for a new trial finding that the trial court erred in determining that the GSA did not apply. In determining that the GSA applied, the First District pointed out that the statute did not define "emergency services." They then looked at Florida Statute 395.002(10) which broadly defines same.

Based upon a review of this statute, as well as, Florida Statute §768.13(2)(b)(2)(a) the First District concluded that "emergency services are those provided for the diagnosis or treatment of an emergency medical condition prior to the time the patient was stabilized and capable of receiving treatment as a non-emergency patient. This interpretation does not hinge solely on the existence of an emergency medical condition, nor does it depend solely on the physicians' subjective view of the patient's condition at the time; rather, it takes into account both considerations and, consistent with the plain language of the GSA, focuses on whether the patient's emergency medical condition was stabilized to the point that it no longer required emergency care." They then added that the applicability of the GSA can be determined in some cases as a matter of law, but in others, depends upon the resolution of factual disputes. They also added that there is conflicting evidence in this case as to whether the patient was medically stabilized after his arrival at Alachua General Hospital. Because of the conflicts in the evidence, the question is whether the patient was stabilized and capable of receiving medical treatment as a non-emergency patient (and, hence, whether the heightened standard of proof and the GSA apply) was for the jury to decide.

NICA

Univ. of Miami v. Exposito, 87 So. 3d 803 (Fla. 3d DCA 2012)

The administrative law judge (ALJ), dismissed the parents' claim, determining that the claim was time-barred under § 766.313, Fla. Stat. (2010), because it was filed more than five years after the birth of the child. The ALJ also determined that the claim was not compensable under the NICA Plan pursuant to § 766.301 and § 766.309, Fla. Stat. (2010). The health care providers and the plan administrator petitioned for review of that portion of the order which determined that the claim was not compensable, contending that the ALJ exceeded her jurisdiction under § 766.304, Fla. Stat. (2010), by reaching the compensability issue once she determined that the claim was time-barred. The Third District held that despite the untimely nature of the parent's administrative claim for compensation, the ALJ was vested with exclusive jurisdiction to determine the issue of compensability under § 766.304, Fla. Stat. (2010). Further, pursuant to §

766.303(2), Fla. Stat. (2010), the parents were able to proceed with an action in civil court because that action was not time-barred under § 95.11(4)(b), Fla. Stat.

Pollock v. Danner, 98 So. 3d 650 (Fla. 2d DCA 2012)

The trial court adopted the recommendation of the magistrate to dismiss a medical malpractice claim against the various healthcare providers based on the conclusion that NICA provided the exclusive remedy for the Plaintiffs' claims. The Second District held that the trial court erred by concluding that the mom's injuries were compensable under NICA; however, they upheld the dismissal because the Plaintiffs' counsel failed to comply with the presuit screening requirements. Because the trial court reached the right result for the wrong reasons, the trial court's order of dismissal was affirmed.

Non-Delegable Duty

Newbold-Ferguson v. Amisub, Inc., 85 So. 3d 502 (Fla. 4th DCA 2012*)*

In a series of procedural moves, the trial court dismissed a Fourth Amended Complaint in which it was argued, amongst other things, that the Emergency Department physician was negligent and that the hospital was responsible for his actions. The Fourth District reversed noting that the rule of a hospital's non-liability for acts of an independent contractor fails where the duty is not non-delegable. The non-delegable duty may arise out of a statute, regulation or a contract. In the case of an Emergency Department patient, the Fourth District noted that this non-delegable duty is grounded upon an implied "contractual relationship existing between a hospital and an Emergency Room Patient." On remand "and for guidance in future cases" the Fourth District stated that "the Plaintiff should amend the complaint to clearly allege that the hospital had a non-delegable duty to provide competent emergency care to the Plaintiff's husband, and must plead the specific source of the hospital's non-delegable duty that the Plaintiff seeks to rely upon - - an implied contract, an expressed contract, statute, an administrative regulation, or some combination thereof."

Presuit Screening

Stubbs v. Surgi-Staff, Inc.,78 So. 3d 69 (Fla. 4th DCA 2012)

The patient was given contrast dye for a CT scan. Prior to the procedure, she was introduced to Nurse Rivera. During the scan, the patient began to vomit.

After the scan was completed, the CT technician called Nurse Rivera into the room to assess the patient believing that she was suffering an allergic reaction to the dye. Nurse Rivera instructed the patient to move from the CT table to a gurney he brought into the room, but the patient fell and was injured when she attempted to get off the table and move the gurney. The Fourth District concluded that this was a cause of action for medical malpractice and, thus, pre-suit notice should have been given.

Berry v. Padden, 84 So. 3d 1145 (Fla. 4th DCA 2012)

Prior to the expiration of the Statute of Limitations, the Plaintiffs filed suit against the Defendant doctor and attached a certificate of counsel setting forth that after a reasonable investigation, there were grounds for a good faith belief that there was negligence based upon the written opinion of an appropriate expert. The written opinion was a letter from an orthopedic surgeon which was neither sworn, notarized nor otherwise verified. The Plaintiff subsequently provided and filed a verified written opinion after the expiration of the Statute of Limitations. The trial court dismissed the complaint and the Fourth District affirmed noting that the Plaintiff must provide a properly verified, corroborating medical expert opinion prior to expiration of the Statute of Limitations. In this case, the Plaintiffs only provided an unverified corroborating medical expert which was in violation of the Statute. Accordingly, the case was dismissed.

King v. Baptist Hospital of Miami, Inc., 87 So. 3d 39 (Fla. 3d DCA 2012)

King appealed an Order dismissing Baptist Hospital for failure to comply with presuit requirements. King sent two Notices of Intent to initiate litigation for medical malpractice to Dr. William Thompson and Pediatric Surgical Group. The Notices specified that they were in regard to services rendered by Dr. Thompson and others during King's treatment at Baptist Hospital. Subsequently, King filed an Amended Complaint also naming Baptist Hospital, among others. King claimed Baptist Hospital was vicariously liable for the negligence of Dr. Thompson as a result of him being their employee, their agent, their apparent agent or an employee of their joint venture. King also alleged that Baptist Hospital granted Dr. Thompson and Pediatric Group staff privileges pursuant to a joint venture agreement.

Baptist Hospital was dismissed on grounds that it had not been directly served a Notice of Intent and there was no legal relationship between Pediatric Group and Baptist, which could impute notice under 1.650 Fla. R. Civ. P. The

Third District reversed, concluding that King pled a legal relationship sufficient to survive a Motion to Dismiss. King sufficiently pled a joint venture, which is a legal relationship. The joint venture agreement provided the requisite legal relationship between Baptist Hospital and Dr. Thompson so that notice was imputed to Baptist Hospital. The allegations in the Complaint and the joint venture agreement raised a question of fact as to the legal relationship, therefore were enough to survive a Motion to Dismiss.

Fitchner v. Lifesouth Community Blood Centers, Inc., 88 So. 3d 369 (Fla. 1st DCA 2012)

Fitchner filed suit against Lifesouth seeking damages for the injuries her minor son sustained as a result of the blood bank's negligence in failing to ensure the safety of the blood he had received. The patient subsequently died. The complaint was amended. The allegations of negligence were the same as those in the original complaint. The doctrine of the law of the case did not foreclose consideration of the retroactive applicability issue because that issue had not been presented or decided on appeal. The estate had no reason to make a claim that the statute could not be applied retroactively, because the trial judge had determined that it did not apply to them in any event. The First District held that the retroactivity argument was not barred from further consideration because it was raised for the first time in a motion for rehearing. The statutory amendment including blood banks within the class of health care providers that were protected by the presuit screening requirements could not be applied retroactively as the amendment alters the substantive rights of the parties in that it adds a condition that can operate to bar a cause of action entirely.

Rell v. McCulla, 101 So. 3d 878 (Fla. 2d DCA 2012)

The Plaintiff served a Notice of Intent to Initiate Medical Malpractice and attached an affidavit of an expert who opined that "there are reasonable grounds that the patient's … tendon could have been weakened or injured by the steroid shot given by [the doctor]. The expert affidavit did not state that he believed that the prospective Defendant's treatment was below the standard of care or whether the injury was outside the foreseeable results of the procedure. The physician's counsel responded to the Notice of Intent and advised that he believed the corroborating affidavit was deficient. A supplemental affidavit was provided in which the expert stated that "there exists reasonable corroborating grounds to further investigate a claim of medical negligence against [the Defendant] and the causation of damage to [the Plaintiff]." The amended affidavit did not include any

opinion stating that there were reasonable grounds to believe that the physician's treatment fell below the standard of care. The trial court stated that the affidavits "may have been less than adequate to independently support a claim of medical negligence"; however, when taken in conjunction with the review of records conducted by the Plaintiffs' counsel, the trial court found it was sufficient to satisfy the requirements of Florida Statute 766.203(2).

The Second District granted certiorari and quashed the order of the trial court and determined that the affidavit was insufficient and, therefore, the presuit screening requirements were not met.

Statute of Limitations

Reyes v. Roush, 99 So. 3d 586 (Fla. 2d DCA 2012)

Athany Reyes was born on May 25, 2005. At his birth, Athany appeared to have limited use of one of his arms. It was believed that a shoulder dystocia possibly caused an injury to the brachial plexus nerve during birth. Dr. Roush was the attending obstetrician. Athany underwent several years of physiotherapy, but by February 13, 2009, it appeared that continued therapy would never completely resolve the problem. Athany's mom consulted a specialist who told her that surgery was a possibility to attempt to restore full use of the arm and she was also told at that time that her son's injury might have been caused by medical negligence. Based upon this information, on February 7, 2011, she filed a lawsuit against Dr. Roush and her practice. The trial court ultimately granted motions to dismiss finding that the statute of limitations barred the cause of action. The Second District reversed.

In reversing the trial court, the Second District noted that Athany's mom contacted a law firm that specialized in representing Plaintiffs in medical malpractice actions just a few months after her son's birth. A presuit investigation was conducted and the firm later turned down the case advising Athany's mother that Dr. Roush had not deviated from the prevailing standard of care. In the Complaint, the Plaintiff alleged that she did not become aware or discovered that a claim for malpractice arose until February 13, 2009. The Defendant contended that this was an improper conclusion, was not supported by any ultimate fact and applied an incorrect legal standard regarding the application of the statute of limitations. The Defendant also claimed that the Complaint was a sham pleading and attached documents showing that Athany's mother had consulted a medical malpractice firm in 2005. In opposing the motion to dismiss, the mom filed an

affidavit in which she declared that Dr. Roush told her that Athany's arm injury would be fine and it would go away in a few months. She also testified by way of affidavit that she did not know what a brachial plexus injury was and that it was not until February, 2009 that she learned that the injury could have been caused by medical malpractice.

On appeal, the Plaintiff also complained that the trial court erred in dismissing the Complaint because Athany had not yet reached his 8th birthday. The Second District declined to address this issue because it was not the basis for dismissal. At the same time, they recommended that the trial court consider *Germ v. St. Luke's Hospital Association*, 993 So.2d 576 (Fla. 1st DCA 2008) in which the appellate court affirmed summary judgment on the statute of limitations despite the fact that the Plaintiff argued that their suit was not barred by the statute of repose because the minor Plaintiff was not yet 18 years old.

Subsequent Treaters

Saunders v. Dickens, 103 So. 3d 871 (Fla. 4th DCA 2012*)*

Dr. Dickens, a neurologist, initially saw the patient for symptoms consistent with lumbar stenosis. He ordered an MRI of the patient's brain and lumbar spine but did not order a cervical MRI. Based upon the lumbar MRI, he referred the patient to Dr. Pasarin, a neurosurgeon. Dr. Pasarin performed lumbar surgery; however, the patient did not significantly improve. As a result, Dr. Pasarin ordered an MRI of the patient's lower back, mid-back and neck. The MRIs revealed an incomplete decompression and continuing pressure on the lowest level of the spine; consistent with the lumbar procedure having been unsuccessful. The MRIs also showed cervical myelopathy. Additionally, the patient reported to Dr. Pasarin that his arms and hands have progressively worsened since the lumbar surgery.

Based upon these complaints and the new MRIs, Dr. Pasarin recommended cervical decompression. He recommended that surgery be performed within 30 days and although the patient was cleared for surgery, Dr. Pasarin failed to timely schedule him. The patient subsequently developed a deep venous thrombosis which prevented him from undergoing surgery and, subsequently, the patient was rendered a quadriplegic. The Plaintiff and his wife settled with Dr. Pasarin and others; however, the case went to trial against Dr. Dickens. Dr. Pasarin testified (by way of a deposition given when he was still a Defendant in the case) that the upper extremity findings in Dr. Dickens' office notes would not have prompted him to order an MRI of the neck and further, had Dr. Dickens ordered a cervical

MRI and the radiographic findings were identical to those later seen in the MRI which he ordered, that Dr. Pasarin still would not have performed the next surgery if the examination did not find upper extremity dysfunction.

The Fourth District upheld the verdict in favor of Dr. Dickens based on its prior decision in *Ewing v. Sellinger,* 758 So.2d 1196 (Fla. 4th DCA 2000). The *Ewing* decision; however, has been rejected by the Fifth District in *Goolsby v. Qazi, 847 So.2d 1001 (Fla. 5th DCA 2003)* and *Munoz v. South Miami Hospital, 764 So.2d 854 (Fla. 3d DCA 2000).*

Wrongful Death-Settlement

Walker v. Bailey, 89 So. 3d 297 (Fla. 5th DCA 2012)

The estate of a deceased 15-year old child settled a medical malpractice claim. Thereafter, the mother, who was the personal representative, filed a petition in the probate court for an equitable distribution of the settlement proceeds asking the probate court to find that she had suffered a "majority" of the loss. Her counsel provided formal notice of the petition to the surviving father and advised him that a hearing on the petition would be held several weeks later. When more than twenty days passed without any response from the father and prior to the scheduled hearing, the probate court entered an order apportioning 100% of the settlement proceeds to the surviving mother. She then notified the father that the hearing was canceled. The father then moved for rehearing asserting his belief that the scheduled hearing was the appropriate time to assert his position and further objected to apportioning the entire settlement to the mother. They also advised the probate court that he wanted to present evidence on the apportionment issue.

The Fifth District reversed and noted that when a wrongful death case is settled before trial, the trial court must resolve questions concerning the apportionment of proceeds between the survivors. Further, the trial court must determine if the proposed apportionment is reasonable and equitable based upon competent, substantial evidence. In this case, the probate court apportioned the settlement without a hearing and without considering any evidence and, therefore, violated the father's due process rights.