2013
CASE LAW SUMMARY

Medical Malpractice

Amendment 7

Bartow HMA, LLC v. Kirkland, 126 So. 3d 1247 (Fla. 2d DCA 2013)

In this medical malpractice action, the Plaintiff filed various discovery requests. The hospital responded to some of the requests and filed objections and privilege logs as to other items. Although both the Plaintiff and the Defendant agreed that an in-camera inspection should be conducted, the trial court did not do so and ordered production of the various documents related to adverse medical incidents.

The Second District granted certiorari noting that the trial court departed from the essential requirements of law in making a blanket ruling requiring production of all documents claimed by the Defendant to be privileged without conducting an in-camera review in order to determine whether the documents identified in the privilege logs related to adverse medical incidents.

In doing so, the Second District delivered a very succinct summary of the current law governing Amendment 7 requests: (1) the 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; (2) burdensomeness is not a relevant consideration under Amendment 7; (3) Amendment 7 requires the hospital to protect the identity of patients and an objection based on the violation of the patient's right of privacy normally does not preclude production unless the trial court orders the hospital to produce documents without redacting private information; (4) Amendment 7 trumps the application of statutory discovery protections as set forth in Florida Statute 395.0191, 395.0193, 395.0197 and 766.101; (5) the patient's entitlement to documents relating to adverse medical incidents under Amendment 7 is not preempted by Federal law in the form of the HCQIA; (6) the scope of Amendment 7 cannot be limited by the application of §381.028; (7) Amendment 7 does not require production of documents relating to general policies and procedures of health care facility, peer review, risk management, quality assurance, credentials or similar committees or other documents that do not contain information about particular adverse medical

incidents; (8) Amendment 7 preempts application of the work product doctrine to the extent it relates to fact work product, but it does not preempt application of the work product doctrine with respect to opinion work product; and (9) it has been suggested that Amendment 7 does not affect the attorney/client privilege.

Arbitration Agreement Invalid

Franks v. Bowers, 116 So. 3d 1240 (Fla. 2013)

Prior to undergoing surgery, the decedent signed a financial agreement with his surgeon which provided that any dispute would be subject to arbitration. The patient was also required to comply with the presuit notice and investigation requirements of Florida Statute 766 and limited recovery of non-economic damages to a maximum of $250,000 per incident calculated on a percentage basis with respect to capacity to enjoy life as set forth under Florida Statute 766.207.

This damage limitation was not contingent upon the surgeon admitting liability and, in fact, the surgeon could continue to contest liability despite the damage limitation. The Supreme Court held that the damages clause of this agreement violated public policy pronounced by the Florida Legislature in the Medical Malpractice Act. Further, they found that the clause was not severable and, therefore, the order compelling arbitration was set aside.

Arbitration-Damages

Estrada v. Mercy Hospital, 121 So. 3d 51 (Fla. 4th DCA 2013)

The Plaintiff filed a Notice of Intent against Mercy Hospital and others due to failure to timely diagnose breast cancer. Two and a half years later, she was diagnosed with Stage III-C breast cancer. The Defendants offered to arbitrate and the Plaintiffs accepted same.

The parties were in disagreement over the issue of damages for loss of earning capacity. The Plaintiff filed a Motion to Determine the Scope of Recoverable Economic Damages seeking an Order establishing that she was entitled to present evidence regarding her loss of future wage earning capacity based upon her severely curtailed life expectancy. Mercy Hospital filed a response in which they argued that she was not entitled to measure her damages for loss of earning capacity based upon her pre-injury life expectancy.

Estrada's motion was denied, however, the arbitration panel permitted argument at the start of the arbitration hearing and then decided that it would allow evidence on both theories of damage and issue its final decision in the arbitration award. Ultimately, in a 2-1 decision, the panel awarded the loss of earning capacity based upon her reduced life expectancy.

The Third District reversed and found that she was entitled to damages for her entire loss of future earning capacity based upon her pre-injury life expectancy because her survivors and estate would be precluded from making recovery for loss of prospective net accumulations and loss of support in a future wrongful death action.

Attorney's Fees

In Re: Estate of Charles Buggs, 38 FLWD 2132 (Fla. 1st DCA 10/9/13)

The Plaintiff chose a law firm to represent her in a medical malpractice action. Due to the nature of the claim, the firm advised that it would only represent her if she agreed to a straight 40% contingency fee. The Personal Representative then signed the approved waiver of rights form and petitioned the circuit court for the approval of the fee contract. Without holding a hearing and without making any factual findings, the circuit court denied the petition. The First District granted certiorari and ruled that this was error finding that the plain language of the Bar rules require that the trial court approves the petition as long as it found that the client understood the rights that she was waiving and the terms of the fee contract.

Baker Act

Pierrot v. Osceola Mental Health, Inc., 106 So. 3d 491 (Fla. 5th DCA 2013)

A 25-year old patient went to the hospital in the afternoon with complaints of pain. That evening, the hospital Baker Acted the patient and involuntarily transferred her to Osceola Mental Health. When she arrived, the patient was in distress and complaining of severe abdominal pain and other symptoms. It was alleged that, over the next 2 days, the employees at the Mental Health Center committed various acts and omissions resulting in the patient's death. The Plaintiff brought a wrongful death claim for violations of her rights as a patient under the Baker Act and specifically stated that she was not seeking damages for medical malpractice.

The Defendant moved to dismiss the wrongful death claim arguing that this was a claim for medical malpractice and that the Plaintiff had failed to comply with the presuit screening requirements. The Trial court dismissed the action and the Fifth District reversed and found that the claim was not for medical malpractice. In doing so, they noted that the primary test for whether a claim is for medical malpractice is whether the claim relies on the application of the medical malpractice standard of care.

Thus, when a claim relies on a different standard provided by another statute, the claim is not for medical malpractice. Secondly, the Fifth District found that the trial court erred in dismissing the claim because Osceola Mental Health was not a healthcare provider noting that a mental health facility is not listed in any of Chapter 766's definitions.

Bifurcation

Johansen v. Vuocolo, 125 So. 3d 197 (Fla. 4th DCA 2013)

Following a verdict in favor of the Defendants, the Plaintiff filed a Motion for New Trial arguing that the trial court erred in bifurcating her claims of medical malpractice and negligent hiring and retention of the primary surgeon from her claims of negligent hiring and retention of the assistant surgeon. The Fourth District affirmed, finding that the trial court did not abuse its discretion.

Dr. Vuocolo, a surgeon employed by the Heart & Family Institute surgically removed part of the decedent's lung. Dr. Norton, a general surgeon who was also employed by the Institute, assisted in the lobectomy and post-surgical care of the patient. The patient died as a result of post-operative complications. His estate filed a claim for medical malpractice against Dr. Vuocolo and a claim against the Institute for vicarious liability for his malpractice. They also filed a claim against the Institute for the negligent hiring and retention of this doctor.

After filing a Complaint and after the statute of limitations had run, the Estate discovered that Dr. Norton, the assistant surgeon, had an extensive history of medical malpractice (Dr. Norton had 12 prior medical malpractice claims, two which resulted in patient's deaths from excessive and uncontrolled bleeding). Although the statute of limitations prevented the estate from filing suit against Dr. Norton, the trial court ruled that the negligent hiring complained against the Institute was sufficiently pled so as to include any negligent acts Dr. Norton may have committed while caring for the patient.

Because Dr. Vuocolo was concerned that Dr. Norton's extensive malpractice history would have a prejudicial effect on the jury, Motions to Bifurcate the medical malpractice claims from the hiring and retention claims were filed. As a result, the trial court ruled that the malpractice and negligent hiring claim against Dr. Vuocolo would be tried separately from the claims based on the medical malpractice and negligent hiring of Dr. Norton. Finding that the trial court did not abuse its discretion in this regard, the Fourth District affirmed noting that the bifurcation Order did not affect the Estate's ability to fully and fairly litigate its claims against Dr. Vuocolo and that, moreover, the Estate could still proceed to trial on its claims against the Institute for the alleged negligent hiring and retention of Dr. Norton.

Directed Verdict

Chaskes v. Gutierrez, 116 So. 3d 479 (Fla. 3d DCA 2013)

The patient was admitted to a nursing home with a Stage IV bed sore. The decedent's estate brought a claim against a physician and a nurse practitioner at the nursing home. At trial, the expert against the physician testified that the Defendant fell below the standard of care because only a topical anesthesia was utilized which precluded debriding deeply enough into the bed sore so as to remove all of the necrotic tissue. Further, the patient was anti-coagulated and the expert believed that the anti-coagulant should have been reversed before debriding the sore or the procedure should have been conducted in a hospital where a blood bank was available.

The Third District noted that the expert "ignor[ed] the fact that [the patient] had just been released from the hospital following a three-week stay only a few days before [the doctor] first saw her; that[the patient] was admitted to a different hospital only two days after [the doctor] first saw her…; and that [the patient] was re-admitted to the second hospital again [a couple of weeks later]---hospitalizations during which not one of her many caregivers ever suggested much less actually treated the sore as [Plaintiff's expert suggested]."

While the Plaintiff's expert testified that the Defendant's failure to comply with the standard of care resulted in an infection of the bed sore, he did not testify that had the Defendant doctor complied with the standard of care that the sore either would have healed or that would have healed more quickly without pain. To the contrary, Plaintiff's expert conceded that he could not predict within a reasonable degree of medical probability that his recommended procedure or

compliance with the standard of care would have resulted in a different progression of the wound or less pain for the patient.

As for the nurse practitioner, the Plaintiff's separate nursing expert testified that the Defendant nurse practitioner departed from the standard of care in failing to remove all of the necrotic tissue from the bedsore the first time it was debrided. The Third District noted that it was unclear whether it was the nurse practitioner or the Defendant doctor who performed the debridement, however, it was clear that the nurse practitioner was working side by side with her supervising physician; the Defendant doctor. There was no question that the Defendant doctor was responsible for the nurse practitioner and her treatment of the patient. As such, the Third District reversed the judgment in favor of the Plaintiff and directed that a directed verdict be entered on behalf of both Defendants for failure to satisfy the *Gooding* causation standard.

EMTALA

Cintron v. St. Joseph's Hospital, Inc., 38 FLWD 988 (Fla. 2d DCA 5/3/13)

The Cintrons allegedly took their daughter to the Emergency Department at St. Joseph's Hospital on two occasions during the evening of February 14, 2005, seeking treatment for her asthma attack. Each time, the hospital's staff refused to treat her. On the third occasion, she was taken to the hospital via ambulance, and on this occasion, she was admitted to the hospital. The Cintrons filed suit against St. Joseph's Hospital for damages under Florida Statute §395.1041 (the anti-dumping statute).

The Complaint named only the hospital and alleged that it was liable under the statute for the failure of its staff to treat the child. The hospital initially took the position that the claim was a medical malpractice claim subject to pre-suit and that the statute of limitations barred the claim. The trial court and the Second District rejected this argument. The hospital then answered the Complaint and included an Affirmative Defense that the Complaint should be dismissed for a failure to state a cause of action. There was no explanation as to why the hospital believed the Complaint was defective and no party ever set this defense for a pre-trial hearing.

More than three years later, the hospital moved for summary judgment based upon the failure to state a cause of action noting that the statute provides "any person who suffers personal harm as a result of a violation of this section or the rules adopted hereunder may recover, in a civil action against the responsible

hospital administrative or medical staff or personnel, damages, reasonable attorney's fees and other appropriate relief."

The hospital argued that this section created an administrative sanction against the hospital for an amount not to exceed $10,000 per violation and this administrative sanction was the sole liability of the hospital. It also argued that all anti-dumping lawsuits had to be filed against its employees and not against the hospital. The trial court accepted this argument and granted Final Summary Judgment.

The Second District reversed noting that the Motion for Summary Judgment did not address the only theory presented by the Complaint. The Complaint did not identify the specific staff members who denied treatment to the child, but rather, sought judgment against the hospital for the actions of its agents and employees, for actions committed in the course and scope of their employment.

The Second District further noted that the statute did not expressly prohibit or permit liability of the hospital under respondeat superior and whether the hospital can be vicariously liable for the actions of its employees in this context is a matter that needed to first be argued and resolved at the trial court level. Thus, the summary judgment was reversed without prejudice to allow the hospital to file a Motion for Summary Judgment addressing the actual legal theory raised by the Plaintiffs.

Expert Witness Certificate

In Re: Amendments to the Florida Evidence Code, 38 FLWS 889 (Fla. 12/12/13)

In 2011, the Florida Legislature enacted Florida Statute 766.102(12) which mandated that an expert witness have a properly issued expert witness certificate. Based upon concerns that the provision was unconstitutional and would have a chilling effect on the ability to obtain expert witnesses and was prejudicial to the administration of justice, the Supreme Court declined to adopt this legislative change to the extent that it was procedural.

Identity of Patients/Residents

Sovereign Healthcare v. Fernandes, 38 FLWD 2651 (Fla. 4th DCA 12/18/13)

The Plaintiff sued the nursing home for the death of her husband and, during discovery, filed Interrogatories which sought the names and contact information for all of the nursing home's residents at the time of the patient's death in order to "identify all individuals who either witnessed or had the opportunity to witness the circumstances…relative to the facts and issues in the instant case." The nursing home objected on the grounds that the discovery was overbroad, unduly burdensome and irrelevant and asked for the disclosure of residents' protected health information.

The trial court issued an order granting the motion as to the identity of the residents and further stated that "the disclosure ordered herein is further protected and shall remain confidential for any purpose other than preparation and prosecution of the present lawsuit." The nursing home then filed a Petition for Certiorari arguing that the trial court's order would cause irreparable harm due to the disclosure of identifying personal information of residents in violation of their constitutional right to privacy, as well as, a violation of Florida Statute 400.022(1)(m) which sets forth that the personal and medical records of nursing facilities are confidential.

The Fourth District declined to grant certiorari finding that the nursing home failed to show that it raised the privacy of non-parties in the trial court and specifically did not reference state constitutional or statutory authority. Further, it found that the trial court did not depart from the essential requirements of law because the general scope of discovery includes "the identity and locations of persons having knowledge of any discoverable matter."

NICA

Samples v. NICA, 114 So. 3d 912 (Fla. 2013)

Once a NICA claim is found to be compensable, Florida Statutes §766.31(1)(b)(1) provides for an award not exceeding $100,000 to the parents or legal guardians of an infant found to have sustained a birth-related neurological injury. This statute was challenged as violating equal protection because the lump sum payment does not change if the child has two parents. In a 4-3 decision, the Court held that the single award of $100,000 does not violate the equal protection clause.

The Florida Supreme Court noted that neither a suspect class nor fundamental right was implicated by the statute, and, therefore, their equal protection claim was to be reviewed under the "rational basis test." In order to be entitled to relief under the rational basis test, the parents must show that the parental award provision does not "bear some rational relationship to legitimate state purposes."

In assessing this, the Court's task is not "to determine whether the legislation achieves its intended goal in the best manner possible, but only whether the goal is legitimate and the means to achieve it are rationally related to the goal." Finding that limiting the parental award to $100,000 per claim, as opposed to per parent, was rationally related to maintaining the actuarial soundness of the NICA plan, the Supreme Court upheld the constitutionality of this Statute.

Non-Delegable Duty

Moody v. Lawnwood Medical Center, 125 So. 3d 246 (Fla. 4th DCA 2013)

The minor Plaintiff suffered a broken hip. She went to her pediatrician who made the diagnosis and recommended that the patient to go to Lawnwood Medical Center where the pediatrician had staff privileges. The patient was admitted to the hospital through the emergency department and the pediatrician was the admitting physician. At the time of the admission, the mother signed a Conditions of Admission form which included the following language: "Legal relationship between hospitals and physicians. Most or all of the healthcare professionals performing services in the hospital are independent contractors and are not hospital agents or employees. Independent contractors are responsible for their own

actions, and the hospital should not be liable for the acts or omissions of any." The Plaintiffs dispute that the child's mother ever viewed, received, signed, initialed or otherwise assented to these contractual terms.

After the child was admitted to the hospital, the pediatrician ordered a consultation with an orthopedic surgeon who was the on call orthopedist for the hospital. The orthopedist evaluated the child and concluded that she did not have a hip fracture and recommended that the patient be discharged. After discharge, the child's condition worsened and she was taken to Palms West Hospital where she was diagnosed with a fractured right hip, septic arthritis, septic shock, right heart failure, MRSA and infections throughout her body.

The parents filed suit against Lawnwood, the pediatrician and the orthopedist. Suit against Lawnwood was for direct liability, as well as, vicarious liability. The Plaintiffs settled their lawsuits with the pediatrician and the orthopedist and the hospital then sought summary judgment on the issue that the claims against Lawnwood for the actions of the pediatrician and the orthopedist were released. The trial court eventually entered partial summary judgment on the issue of the release and also entered partial summary judgment on the Plaintiffs' claims that Lawnwood breached a non-delegable duty to provide competent medical care.

The Fourth District reversed on both rulings and found that the releases clearly did not release Lawnwood for its potential liability for the acts of the pediatrician and the orthopedist. Language included in the release documents stated that "this release does not release Lawnwood Medical Center, Inc…." Further, the releases state that Lawnwood was not released "from any claim that is or could be asserted" in the lawsuit and the Complaint which incorporated by reference into the settlement agreement and releases had alleged that Lawnwood was vicariously liable for the actions of the pediatrician and the orthopedist.

As for the issue of the non-delegable duty, the Fourth District ruled that an issue of fact existed regarding the hospital admission form and whether the mother viewed, received, signed or otherwise acquiesced to these provisions which purportedly discharged Lawnwood from liability for the actions of the independent contractor or physicians.

Nursing Home Arbitration Agreements

Laizure v. Avante at Leesburg, Inc., 109 So. 3d 752 (Fla. 2013)

A nursing home patient signed an agreement which provided for arbitration of disputes arising out of treatment and care at the nursing home. The resident subsequently died and it was alleged that his death was caused by the nursing home's negligence. His survivors filed an action in Circuit Court alleging deprivation of rights under the nursing home statute, and, in the alternative, brought a wrongful death action. The Supreme Court held that an arbitration agreement signed by the decedent required his Estate and heirs to arbitrate their wrongful death claims finding that they were bound by the agreement signed by the decedent.

Spring Lake NC, LLC v. Beloff, 110 So. 3d 52 (Fla. 2d DCA 2013)

The decedent was admitted to Spring Lake on December 17, 2009. Based upon a durable Power of Attorney appointing his wife as his attorney-in-fact, she signed the admission papers the following day. The residency agreement included a provision entitled "Arbitration of Disputes." The arbitration provision had two separate signature lines and she signed the one stating "I have reviewed and understand the provisions of Section 7 and accept binding arbitration." The decedent was discharged four days after admission and died four days after that.

A medical malpractice complaint was brought against other healthcare providers and, subsequently, the Estate amended its Complaint to add Spring Lake as a Defendant. Spring Lake filed a Motion to Compel Arbitration. The trial court found that the arbitration agreement was procedurally unconscionable and denied the Motion to Compel Arbitration. The trial court found that the wife's subjective belief that she needed to sign the acceptance line of the arbitration agreement and the pressures she felt regarding her husband receiving appropriate care at the facility rendered the agreement procedurally unconscionable.

The Second District reversed and noted that, at the time that she signed the admission documents, her husband had already been admitted the prior day. The wife also admitted that the representative of the nursing home did not pressure her to sign the documents, but that she was pressuring herself because she had a subjective feeling that her husband would not get any attention until she signed. Further, there was no testimony that the representative of the nursing home indicated that the continued admission was contingent upon signing the arbitration agreement.

Spring Lake, LLC v. Holloway, 110 So. 3d 916 (Fla. 2d DCA 2013)

When the nursing home resident entered the facility, she signed a standard resident admission and financial agreement and a second Arbitration Agreement. At that time, she was 92-years old and had a 4th grade education. She could not spell well and often had to sound out words while reading. She had memory problems and was increasingly confused. Nevertheless, there was no evidence that the admission staff at the nursing home used any improper methods to obtain her signature or that she was misled in any fashion.

When suit was filed, the nursing home moved to compel arbitration and the trial court refused to compel same. Although the court did not find that the resident was incompetent or incapacitated at the time she entered the contract, it was persuaded that the contracts were so complex that she could not have possibly have understood what she was signing. Accordingly, it ruled that there was no meeting of the minds and the arbitration clause was unenforceable.

The Second District reversed noting that "our modern economy simply could not function if a meeting of the minds required individualized understanding of all aspects of the typical standardized contract that is now signed without any expectation that the terms will actually be negotiated between the parties."
Jenner v. Manor Pines Convalescent Center, 112 So. 3d 628 (Fla. 4th DCA 2013)

The trial court granted a Motion to Compel Arbitration based upon an arbitration clause in an Admission Agreement signed by the resident's husband as the "resident's spouse or representative." The nursing home argued that the husband had the authority to sign on behalf of his wife based upon a designation of the healthcare surrogate naming him as his wife's alternate healthcare surrogate.

Because there was no evidence regarding the circumstances under which the designation was created other than the husband's deposition testimony that he signed the designation for his wife, the Fourth District reversed the Trial Court's finding that the designation was completed in conformance with the statute because it was not supported by substantial, competent evidence. Accordingly, the Fourth District remanded the case for an evidentiary hearing to determine the validity of the designation.
Zephyr Haven Health v. Hardin, 122 So. 3d 916 (Fla. 2d DCA 2013)

Two days after admission to the nursing home, the resident signed admissions documents, including an arbitration agreement which was conspicuously labeled and which specified that its execution was not a pre-

condition to receiving care at the nursing facility. It further specified that in any arbitration proceeding, the nursing facility would pay the first $500 of arbitration fees and costs and that all additional expenses would be split with the nursing facility responsible for 60% and the resident being responsible for 40%.

One year later, the resident sued the nursing home for various alleged violations and the nursing home responded with a Motion to Dismiss and Compel Arbitration. The resident responded that, although there was no dispute that she signed the agreement, it would be impossible for her to perform under the agreement because she could not afford to pay 40% of the arbitration expenses.

She also presented testimony regarding her strained finances. Following the hearing, the trial court issued an order denying the Motion to Compel Arbitration and found that it was financially impossible for the resident to participate in Arbitration and that if she was forced to pay 40% of the arbitration costs based upon her income and expenses, the amount would be unconscionable.

The Second District reversed noting that, for a contractual provision to be found to be unconscionable, the party must demonstrate both procedural and substantive unconscionability. They noted that the issue of financial cost of arbitration is generally considered substantive rather than procedural. The court added, however, that she failed to present any evidence of procedural unconscionability and, therefore, the trial court erred.

The District Court also found that it was error for the trial court to find that the agreement was impossible for the Plaintiff to perform because she could not afford the cost where the resident failed to establish that performance was impossible and failed to establish that an adverse change in circumstances from the time she entered into the agreement to the time the issue was presented to the trial court.

Lastly, the court cited the United States Supreme Court decision in *Greentree Financial Corp. v. Randolph,* 531 U.S. 79 (2000) in which the Supreme Court held that "where parties seek to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs."

In this case, the District Court concluded that the Plaintiff had not presented evidence of the likely cost of arbitrating her claim. Further, they noted that if the Plaintiff's evidence had addressed the cost of arbitrating the specific claim, she did

not attempt to compare the costs with what she would pay in litigation. As such, they remanded with directions to enter an order compelling arbitration.

F.I. Evergreen Woods v. Robinson, 38 FLWD 2091 (Fla. 5th DCA 10/4/13)

The husband of a nursing home resident signed an arbitration agreement without indicating his authority to sign the agreement on behalf of his wife. On this basis, the trial court denied the Defendant's Motion to Compel Arbitration. The Fifth District reversed finding that it was error to deny the motion without holding an evidentiary hearing to determine the validity of the agreement. The District Court directed the trial court to hold another evidentiary hearing at which time it would consider parol evidence to determine whether the resident assented to the arbitration agreement in the absence of her signature or whether her husband had authority to sign on her behalf.

Presuit Screening

Pierrot v. Osceola Mental Health, Inc., 106 So. 3d 491 (Fla. 5th DCA 2013)

A 25-year old patient went to the hospital in the afternoon with complaints of pain. That evening, the hospital Baker Acted the patient and involuntarily transferred her to Osceola Mental Health. When she arrived, the patient was in distress and complaining of severe abdominal pain and other symptoms. It was alleged that, over the next 2 days, the employees at the Mental Health Center committed various acts and omissions resulting in the patient's death. The Plaintiff brought a wrongful death claim for violations of her rights as a patient under the Baker Act and specifically stated that she was not seeking damages for medical malpractice.

The Defendant moved to dismiss the wrongful death claim arguing that this was a claim for medical malpractice and that the Plaintiff had failed to comply with the presuit screening requirements. The Trial court dismissed the action and the Fifth District reversed and found that the claim was not for medical malpractice. In doing so, they noted that the primary test for whether a claim is for medical malpractice is whether the claim relies on the application of the medical malpractice standard of care.

Thus, when a claim relies on a different standard provided by another statute, the claim is not for medical malpractice. Secondly, the Fifth District found that the trial court erred in dismissing the claim because Osceola Mental Health

was not a healthcare provider noting that a mental health facility is not listed in any of Chapter 766's definitions.

Lakeland Regional Medical Center v. Pilgrim, 107 So. 3d 505 (Fla. 2d DCA 2013)

The Plaintiff underwent an endoscopic procedure at the hospital. During the procedure, a piece of a device known as a cytology brush broke and became lodged in the patient's pancreatic duct. This lead to extensive additional medical treatment, as well as, bodily injury.

The Plaintiffs filed a lawsuit naming the hospital and the manufacturer of the cytology brush. The Complaint against the manufacturer included negligent design and manufacturer; negligent failure to monitor; strict liability; and breach of implied warranty. The Complaint against the hospital alleged facts which suggested that the Plaintiff's claim may be one of medical negligence, however, the alleged theory was simple negligence.

Specifically, the Plaintiff claimed that the hospital had a duty to "procure, inspect and maintain" the brush. The Complaint did not identify who would have performed these functions nor did it provide any information about the training or qualifications of the individuals involved in procuring, inspecting, or maintaining the brush.

In response to the Complaint, the hospital filed a Motion to Dismiss arguing that the Plaintiffs were required to comply with the presuit screening requirements. The trial court denied the Motion to Dismiss but expressed its opinion that the issue was very close. In considering this issue, the Second District noted that the issue as to whether the claim was subject to the presuit screening requirements could not be resolved from the face of the Complaint.

The Second District admitted that its Judges had never seen a cytology brush and had no idea who might inspect or maintain one. It was also noted that the trial court had a similar lack of experience, and in fact, the Plaintiff's attorney claimed that he did not know if there is a professional duty of care as it relates to the maintenance of this brush.

Thus, the Second District concluded that the application of the presuit screening requirements is not a pure question of law in this case and that if the party's due process rights are to be honored, neither the trial court nor they should guess at an outcome. Thus, they held that the trial court should have granted the

Motion to Dismiss but with leave to amend the Complaint and the Plaintiff should have been given the opportunity to determine whether the claim involved a professional duty and then be allowed to amend in compliance with Florida Statute 766 or to reallege their theory in greater factual detail that the matter involved only ordinary negligence.

On remand, the Second District noted that if the Plaintiffs choose to reallege a simple negligence theory and the hospital still wished to contest those allegations, it could file a Motion to Dismiss supported by affidavits. If the basis for the claim remained disputed, the Second District noted that it might be necessary for the trial court to conduct a limited evidentiary hearing.

Acosta v. HealthSpring of Florida, 118 So. 3d 246 (Fla. 3d DCA 2013)

The Plaintiff suffered a stroke and was initially seen at North Shore Medical Center. HealthSpring provided Medicare benefits to Mr. Acosta. The Acostas filed an action in state court alleging that HealthSpring breached its contract and negligently performed its contact with him. HealthSpring moved to dismiss for failure to attach exhibits to the Complaint and also sought to remove the case to Federal Court. In Federal Court, the Plaintiffs filed an Amended Complaint attaching the pertinent exhibits. HealthSpring filed an Answer and Affirmative Defenses and did not allege that the Acostas were required to provide nor did they fail to provide statutory presuit notice.

Ultimately, the Federal Court remanded the case to state court. At that time, the Acostas filed a Second Amended Complaint seeking to join the hospital and a physician who cared for him at that hospital. The new claims were for medical malpractice and the Acostas, in fact, served presuit notice to the hospital and the physician and included an allegation to that effect in the Complaint. For the first time, HealthSpring raised the failure to presuit the claim and then moved for summary judgment regarding their failure to do so noting that the 2 year statute of limitations had expired. The trial court granted HealthSpring's motion.

The Third District held that the allegations against HealthSpring did not involve traditional medical assessments, professional judgment or the rendering of medical services. Rather, the Acostas allege that administrative personnel failed to provide contractual authorization for Mr. Acosta to be transported to the University of Miami for a procedure to prevent a second major stroke.

They also allege that one or more administrative employees at HealthSpring later authorized transfer to Mercy Hospital instead of the University of Miami Hospital because HealthSpring had a lower "preferred provider" rate at Mercy Hospital. HealthSpring argued that the 2003 statutory amendments which included health maintenance organizations in the definition of "healthcare provider" altered the reasoning of prior case law which held that administrative delays and refusals in the authorization of medical care constitutes ordinary contract or negligence claims rather than claims for medical malpractice.

The Third District ruled that the fact that the organization is a "healthcare provider" does not transform every decision or non-decision made by a clerk or administrative staff into a medical judgment. The Third District went on to note that even if this was a claim for medical malpractice, HealthSpring waived its right to defend the case on his issue because it first raised it in the answer to the Second Amended Complaint; after the statute of limitations had expired.

Lucante v. Kyker, 122 So. 3d 407 (Fla. 1st DCA 2013)

The trial court dismissed this medical malpractice action and, on appeal, the Plaintiff argued that if its expert's affidavit failed the "similar specialty" presuit compliance requirement for Florida Statute 766.102(5), the Defendants waived any issue regarding presuit compliance because the Defendants failed to specifically plead these issues. The First District found that the Defendants had waived this issue and further found that the waiver was dispositive and, therefore, declined to address the meaning of the phrase "similar specialty."

In so doing, the District Court noted that "compliance with a statutory presuit requirement is a condition precedent for the filing of a medical malpractice action…[and] that if the Defendant wishes to deny that the Plaintiff has fulfilled the condition precedent, he or she must do so specifically and with particularity." In this case, the Defendants failed to specifically deny the contention that the Plaintiffs met all conditions precedent to filing the lawsuit. Rather, they stated that they had no knowledge as to whether these conditions were fulfilled.

Edwards v. The Sunrise Ophthalmology LLC, 38 FLWD 1840 (Fla. 4th DCA 8/28/13)

The Plaintiff filed a complaint against her ophthalmologist and the surgical center where surgery was performed on her. She alleged that she contracted a rare bacterial infection as a result of an eyelid surgery. Prior to filing the complaint, the

Plaintiff served the ophthalmologist with a Notice of Intent with a verified affidavit from an infectious disease doctor. This specialist opined that the Plaintiff contracted the infection because the ophthalmologist failed to use proper sterilization techniques during the surgery.

The ophthalmologist responded to the Notice of Intent and advised that he did not believe the notice was sufficient because the infectious disease doctor was not an expert in ophthalmology. When suit was filed, the ophthalmologist filed an answer and asserted non-compliance with the presuit screening statute. The ophthalmologist then moved for a determination as to whether the infectious disease specialist qualified as an expert under Florida Statute 766.102. Finding that the infectious disease doctor did not "specialize in a similar specialty that includes the evaluation, diagnosis, or treatment of" the condition complained of, the Fourth District affirmed the dismissal of the suit.

Scope of Expert Testimony

Olesky v. Stapleton, 132 So. 3d 592 (Fla. 2d DCA 2013)

In this medical malpractice trial, the Plaintiff sought damages for his wife's death following a double valve replacement. The Plaintiff maintained that Mrs. O'Lesky died from a treatable cardiac tamponade and aortic dissection. By contrast, the Defendants argued that she died from a spontaneous, simultaneous, bilateral coronary artery dissection which could not have been detected. During the trial, defense counsel objected to Plaintiff's expert testifying that, had an echocardiogram been performed, it would have shown a cardiac tamponade. The trial court sustained the objection. The Second District reversed noting that in a failure to diagnose malpractice case, an expert is allowed to testify as to what a test would have been expected to reveal. They also added that the failure to allow expert testimony, even if cumulative, is often reversible in medical malpractice cases.

Ship's Doctor Not Subject to Jurisdiction of Florida Court

Taylor v. Gutierrez, 38 FLWD 2557 (Fla. 3d DCA 12/4/13)

The Plaintiff and her husband left from Miami on a cruise aboard the Royal Caribbean Cruise Line ship. A couple of days into the cruise, the Plaintiff visited the ship's medical facility as it approached Haiti, complaining of severe abdominal pain. She was seen by, amongst others, Dr. Taylor, the ship's physician. Dr.

Taylor diagnosed and treated her for gastritis. Her condition worsened and, upon reaching a port in Mexico, the patient disembarked the ship and went to a Mexican hospital where she underwent abdominal surgery. She was allegedly treated for abdominal sepsis and multiple organ failure. Thereafter, she suffered a cerebral hemorrhage.

She then filed an action in Miami against Dr. Taylor and the cruise line. With respect to jurisdiction, the Complaint alleged that Dr. Taylor, a British citizen who does not own real property in Florida, and who is not licensed to practice in Florida, because of his "substantial and not isolated activity within the State of Florida" was subject to the jurisdiction of Florida's courts. Jurisdictional discovery took place and revealed that Dr. Taylor entered into an Employment Agreement with a Florida-based cruise line; attended annual medical conferences in Florida received advanced cardiac life support re-certification in Florida vacationed from time to time in Florida; had bank accounts in Florida and worked on a cruise ship that embarked and disembarked in a Florida port one day per week. Despite this activity, the Third District found that Dr. Taylor was not subject to the jurisdiction of a Florida court. Moreover, they noted that even if he treated someone in Florida territorial waters while coming into or going out of Court, this also did not confer jurisdiction upon the Florida courts.

Stacking of Inferences

Shartz v. Miulli, 127 So. 3d 613 (Fla. 2d DCA 2013)

The decedent was 17-years old when he died during a pre-season baseball workout as a result of congenital aortic valve stenosis. The decedent was born with a patent ductus arteriosus and was diagnosed with aortic stenosis shortly after his birth. For 10 years prior to his death, the decedent was under the care of Dr. Thomas Edwards; a pediatric cardiologist. The patient, who died in 2005, had been under the care of Dr. Edwards for 10 years prior to his death.

In 2001, Dr. Edwards saw the patient and noted that he was playing baseball and he ordered an echocardiogram. Dr. Edwards also advised that the patient would need a stress test before participating in the 2002 baseball season beginning in January. The stress test was not performed until August, 2002 but following that test and an additional test was ordered by Dr. Suh, a pediatric cardiologist, and Dr. Edwards signed a sports medical authorization indicating that the decedent could participate in all sports except football with no other restrictions.

Dr. Edwards did not testify at trial, but his records were in evidence and indicated that the patient was to return for a cardiology follow up in 6-months and that this information was relayed to the decedent's father prior to providing him with a sports authorization. It is undisputed that the patient did not see Dr. Edwards, Dr. Suh or any other cardiologist between August, 2002 and the time of his death. It was also undisputed that, during that time, he continued to play baseball.

In addition to seeing cardiologists, the patient was also treated by primary care physicians; including Dr. Shartz. In July, 2003, the patient saw Dr. Shartz who found him to be in good physical condition. He also noted that he was overdue for his cardiology examination. In August, 2004, the patient's mother took her son to Dr. Shartz for a physical and completion of a sports medical release which the mother had obtained from the internet. Dr. Shartz conducted a physical examination and inquired as to when the patient had last seen a cardiologist.

The response to this question was a contested issue at trial. Dr. Shartz testified that the mother told them that her son had been to see a cardiologist within the last year and that his cardiac evaluations were current. By contrast, the decedent's mother testified that she told Dr. Shartz that it had been "at least a year" since her son had been seen. Because his records did not include a recent cardiology update, Dr. Shartz noted that he would call Dr. Edwards, however, in the interim, he signed the authorization allowing him to play sports.

The day after signing the authorization, Dr. Shartz spoke to Dr. Edwards to confirm that the patient had been cleared to play baseball. During that phone call, Dr. Shartz learned that the child had not been to a cardiologist since 2002 and he further advised Dr. Shartz that Matthew was not to play any sports before having a repeat stress test and echocardiogram.

Dr. Shartz testified that, after this conversation with Dr. Edwards, he made multiple attempts to contact the Plaintiffs to revoke the authorization to participate in sports. He testified that he repeatedly called and left two voice messages on the family's answering machine on August 3, two more messages on August 4; another message on August 5; and a final message on August 6. He also left a message on Mr. Miulli's cell phone on August 5. At trial, the Plaintiffs denied receiving these phone messages despite confirming that the numbers called were correct.

In addition to these phone calls, on August 10, 2004, Dr. Shartz mailed letters to the Miulli's advising that Matthew was not to participate in any sports until he saw Dr. Edwards. One letter was sent via regular mail and one was sent via certified mail. At trial, the Miulli's denied receiving the letters and denied any knowledge that Dr. Shartz no longer believed that Matthew should participate in sports. The Miulli's confirmed that the address to which the letter was sent was their home address and the letter mailed via regular post was not returned, however, the certified letter was returned to Dr. Shartz's employer, however, this information was not relayed to Dr. Shartz until much later.

It was undisputed that the medical release obtained was unnecessary for his participation in pre-season baseball workouts. Further, the Plaintiffs testified that they did not intend to use the release signed by Dr. Shartz for their son's participation in varsity baseball in January, 2005, admitting that they knew their son would need an echocardiogram and stress test before being permitted to participate in baseball and that they intended to have their son seen by a cardiologist before the start of the regular season. At the time of his death, Matthew had not been to a cardiologist and did not have a scheduled appointment with a cardiologist or any other doctor.

At trial, the Plaintiffs called a family medicine physician who testified that she was critical of Dr. Shartz for failing to "close the loop" by confirming that the parents understood that their son was not to participate in sports before seeing a cardiologist. She was also critical of him signing the sports medical release without first speaking with a cardiologist and believed that his care substantially contributed to causing the decedent's death because, in his parent's mind, their son had been cleared to play baseball. She was also critical of Dr. Shartz's employer based on its handling of the unclaimed certified letters.

During trial, the mother testified that if she had received the letter from Dr. Shartz she would have "immediately made a call," however, she did not testify as to who she would have called. She also did not testify if she would have taken her son to a cardiologist or another physician for immediate testing and did not testify that she would not have permitted him to participate in baseball conditioning. The father also testified that had he known the information outlined in Dr. Shartz's letter, he would have acted upon it but provided no specifics about what he would have done. He did not testify that he would have not permitted his son to participate in baseball conditioning.

The Defendants moved for directed verdict which was denied and a verdict was entered against the Defendants with a significant assignment of liability to the parents. The Second District reversed and found that the Plaintiffs' expert testimony was insufficient to withstand the directed verdict noting that multiple facts needed to be established in order to create a jury question including that, had Dr. Shartz "closed the loop" the decedent would not have participated in baseball conditioning; and that had Dr. Shartz "closed the loop" the parents would have taken him to a cardiologist; the cardiologist would not have signed a sports medical release; and the decedent would not have participated in baseball conditioning.

Without testimony that Matthew would not have participated in baseball conditioning had Dr. Shartz "closed the loop" and would not have suffered a cardiac event and would not have died, the expert's opinions that the Defendants' actions and inactions contributed to his death were conclusory, speculative and not based on facts presented at trial thus requiring an impermissible stacking of inferences. Further, the district court noted that Plaintiff's expert could not testify because she is not a cardiologist and could not opine as to whether Dr. Shartz's actions contributed to or caused Matthew's death with any degree of medical probability. She did not base her causation conclusion on medical experience or medical literature and provided no testimony as to his heart condition in 2003, 2004 or the month of his death.

Statute of Limitations

Baxter v. Northrup, 39 FLWD 4 (Fla. 5th DCA 12/20/2013)

Dr. Northrup performed left hip replacement surgery on the patient on November 2, 2004. The following day, the patient noticed that his leg was numb and he had a foot drop. Dr. Northrup and the medical staff told him that the symptoms would abate after a period of physical therapy. Based upon these assurances, he continued to treat with Dr. Northrup. When his symptoms did not improve, the patient saw a neurologist on April 6, 2005 who advised that his neurological deficit was likely permanent. Thereafter, he sought legal counsel and served a statutory Notice of Intent dated June 25, 2007.

After suit was filed, the Defendants moved for summary judgment asserting that the Notice of Intent and lawsuit were untimely because the statute of limitations, with tolling, had expired on February 1, 2007. They argued that the statute of limitations began to run on November 3, 2004; the day when he became aware that he had a foot drop. The trial court agreed and granted summary judgment including that the statute of limitations commenced "upon the Plaintiff's discovery of the injury itself."

The Fifth District reversed finding that there was still a question of fact as to when the Plaintiff knew or should have known of the possibility of medical negligence. They emphasize that when a patient suffers a foot drop after the hip replacement surgery, but claims that he was told the symptoms would abate after a period of physical therapy, the statute of limitations did not necessarily begin to run on the date he became aware that he had a foot drop.

Statute of Repose

Woodward v. Olson, 107 So. 3d 540 (Fla. 2d DCA 2013)

In September, 2002, the Plaintiff fell from her roof and went to the emergency room for treatment. A chest x-ray was taken and according to the radiologist's report, the chest x-rays showed "an area of increased density" in the right lung and the radiologist recommended further follow up on this issue. Her primary care physician received this report but did not mention the report to the patient or order the recommended follow up tests.

The patient saw Dr. Olson from time to time over the next 3 years. In August, 2005, she was again seen in the emergency room due to abdominal complaints. A chest x-ray was taken and it was recommended that the patient have a follow up CT scan of the chest/right lung. Once again, her primary care physician did not mention this report or order the recommended scan when she saw him in follow up to the emergency room visit.

In January, 2008, her primary care physician ordered a chest x-ray as part of a "welcome to Medicare physical." The chest x-ray revealed an infiltrate in her right lung and recommended follow up. Although her primary care physician received this report, he did not mention the report's findings to the patient or order the recommended follow up despite three further visits with the same physician in 2008.

Her primary care physician retired from practice and she saw another physician in July, 2009 who immediately told her of the earlier findings and ordered up follow up testing. The patient was subsequently diagnosed with Stage IV lung cancer and she underwent surgery, radiation and chemotherapy. In June, 2010, the Plaintiff served her primary care physician and his employer with a Notice of Intent arguing that the negligence commenced during the office visit in September, 2002. A complaint was subsequently filed and the Defendants raised the defense of the running of the statute of repose. The trial court agreed with the Defendants and granted summary judgment.

The Second District affirmed in part and reversed in part. In doing so, they noted that the statute of limitations begins to run when the cause of action accrues. By contrast, "a statute of repose, which is usually longer in length, runs from the date of the discrete act on the part of the Defendant without regard to when the case of action accrued…thus, in a medical malpractice case, it is the discrete incident of malpractice that triggers the running of the statute of repose."

The Second District found that the primary care physician committed three discrete acts of malpractice and that each act was subject to its own 4-year statute of repose. As a result, the 2002 act of malpractice was barred as of October, 2006. The 2005 malpractice was barred by the statue of repose as of October, 2009. The Court found, however, that the Plaintiffs were entitled to make a claim for the 2008 incident.

The Plaintiffs also argued that the court should have applied "the continuing tort doctrine" to the primary care physician's actions which would result in the

statute of repose not beginning to run until after her final visit with the doctor in 2008. The Second District rejected this argument for two reasons. First, "the continuing tort doctrine" applies to statute of limitations; not statutes of repose." They added that no Florida court had ever applied the continuing tort doctrine to statutes of repose or to medical malpractice cases.

Secondly, the Second District stated that even if the continuing tort doctrine could be properly applied to statutes of repose in medical malpractice actions, it would not resuscitate the claims from 2002 and 2005 because "when a Defendant's damage-causing act is completed, the existence of continuing damages to the Plaintiff, even progressively worsening damages, does not present successive causes of action accruing because of a continuing tort."

Use of Presuit Affidavits to Oppose Summary Judgment

Scalice v. Orlando Regional Healthcare, 120 So. 3d 215 (Fla. 5th DCA 2013)

Defendants moved for Summary Judgment and the Plaintiffs filed their presuit expert affidavits in opposition to the motion. The trial court refused to consider the presuit affidavits filed by the Estate based upon Florida Statute 766.205(4) which provides that "no statement, discussion, written document, report or other work product generated solely by the pre-suit investigation process is discoverable or admissible in any civil action for any purpose by the opposing party." The Fifth District reversed, finding that the plain language of the statute only precludes the opposing party from using the pre-suit documents; it does not preclude a party from using its own pre-suit documents. Accordingly, based upon the material issues of fact raised by the affidavits, the summary judgment was reversed.

Waiver of Defenses

Acosta v. HealthSpring of Florida, 118 So. 3d 246 (Fla. 3d DCA 2013)

The Plaintiff suffered a stroke and was initially seen at North Shore Medical Center. HealthSpring provided Medicare benefits to Mr. Acosta. The Acostas filed an action in state court alleging that HealthSpring breached its contract and negligently performed its contact with him. HealthSpring moved to dismiss for failure to attach exhibits to the Complaint and also sought to remove the case to Federal Court. In Federal Court, the Plaintiffs filed an Amended Complaint attaching the pertinent exhibits. HealthSpring filed an Answer and Affirmative

Defenses and did not allege that the Acostas were required to provide nor did they fail to provide statutory presuit notice.

Ultimately, the Federal Court remanded the case to state court. At that time, the Acostas filed a Second Amended Complaint seeking to join the hospital and a physician who cared for him at that hospital. The new claims were for medical malpractice and the Acostas, in fact, served presuit notice to the hospital and the physician and included an allegation to that effect in the Complaint. For the first time, HealthSpring raised the failure to presuit the claim and then moved for summary judgment regarding their failure to do so noting that the 2 year statute of limitations had expired. The trial court granted HealthSpring's motion.

The Third District held that the allegations against HealthSpring did not involve traditional medical assessments, professional judgment or the rendering of medical services. Rather, the Acostas allege that administrative personnel failed to provide contractual authorization for Mr. Acosta to be transported to the University of Miami for a procedure to prevent a second major stroke.

They also allege that one or more administrative employees at HealthSpring later authorized transfer to Mercy Hospital instead of the University of Miami Hospital because HealthSpring had a lower "preferred provider" rate at Mercy Hospital. HealthSpring argued that the 2003 statutory amendments which included health maintenance organizations in the definition of "healthcare provider" altered the reasoning of prior case law which held that administrative delays and refusals in the authorization of medical care constitutes ordinary contract or negligence claims rather than claims for medical malpractice.

The Third District ruled that the fact that the organization is a "healthcare provider" does not transform every decision or non-decision made by a clerk or administrative staff into a medical judgment. The Third District went on to note that even if this was a claim for medical malpractice, HealthSpring waived its right to defend the case on his issue because it first raised it in the answer to the Second Amended Complaint; after the statute of limitations had expired.

Lucante v. Kyker, 122 So. 3d 407 (Fla. 1st DCA 2013)

The trial court dismissed this medical malpractice action and, on appeal, the Plaintiff argued that if its expert's affidavit failed the "similar specialty" presuit compliance requirement for Florida Statute 766.102(5), the Defendants waived any issue regarding presuit compliance because the Defendants failed to specifically plead these issues. The First District found that the Defendants had waived this issue and further found that the waiver was dispositive and, therefore, declined to address the meaning of the phrase "similar specialty."

In so doing, the District Court noted that "compliance with a statutory presuit requirement is a condition precedent for the filing of a medical malpractice action…[and] that if the Defendant wishes to deny that the Plaintiff has fulfilled the condition precedent, he or she must do so specifically and with particularity." In this case, the Defendants failed to specifically deny the contention that the Plaintiffs met all conditions precedent to filing the lawsuit. Rather, they stated that they had no knowledge as to whether these conditions were fulfilled.