2014
CASE LAW SUMMARY

Medical Malpractice

Amendment 7

Ampuero-Martinez v. Cedars Healthcare Group, 139 So. 3d 171 (Fla. 2014)

Following the death of her father, Ms. Ampuero-Martinez filed an action against Cedars and his other healthcare providers. She then sought discovery pursuant to Amendment 7 which the hospital objected to. The trial court overruled the objection and the Third District then quashed the trial court's order "solely on the grounds that the Request to Produce asked for records of adverse medical incidents involving patients other than the Plaintiff, but does not limit the production of those records to the same or substantially similar condition, treatment or diagnosis as the patient requesting access." The Supreme Court quashed the decision of the Third District noting that three years prior to its decision, the Supreme Court invalidated this provision of Florida Statute §381.028(7)(a) in *Florida Hospital Waterman, Inc. v. Buster*, 984 So. 2d 478 (Fla. 2008).

Arbitration Agreement – Must Adopt All Provisions of Chapter 766 to be Valid

Crespo v. Hernandez, 151 So. 3d 495 (Fla. 5th DCA 2014)

The Fifth District reversed an order compelling binding arbitration pursuant to Florida Statute 766 because the arbitration agreement entered into between the doctor and the patient did not adopt all of the provisions of the medical malpractice statutes. In doing so, they certified conflict with *Santiago v. Baker*, 135 So. 3d 569 (Fla. 2d DCA 2014).

Arbitration Agreement – Mother Can Bind Unborn Child and Spouse to Arbitration

Santiago v. Baker, 135 So. 3d 169 (Fla. 2d DCA 2014)

Dr. Baker's patient signed an Arbitration Agreement which provided for both parties to share arbitration expenses equally. After becoming a patient, the patient became pregnant. Several days later, however, the clinic advised her that her pregnancy was non-viable and they recommended a termination of same which the patient declined. Thereafter, the patient resumed taking an over-the-counter drug allegedly believing that spontaneous passage of the fetus would occur. She alleged that she was unaware of the possible adverse effects the drug might have on the fetus. The pregnancy continued and the baby was ultimately born with severe birth defects.

Plaintiffs filed suit and the Defendants filed a Motion to Compel Arbitration which the trial court granted. The Second District affirmed even though the Arbitration would affect the baby and the baby's father (patient's husband) who were not parties to the Arbitration Agreement.

Caps on Non-Economic Damages in Wrongful Death Cases are Unconstitutional

McCall v. United States of America, 134 So. 3d 894 (Fla. 2014)

In a plurality decision, the Florida Supreme Court held that the statutory cap on non-economic damages pursuant to Florida Statute §766.118 violated the right to equal protection under the Florida Constitution in wrongful death actions only. In so doing, Justice Lewis, writing for the plurality, engaged in extensive fact finding and determined that not only was there not a medical malpractice crisis at the time the caps were instituted, there was also no ongoing medical malpractice crisis which would justify the imposition of the caps. This decision was joined in by Justice Labarga.

Justice Pariente, writing on behalf of Perry and Quince, issued a concurring in result only opinion in which she concurred that the statutory cap on wrongful death non-economic damages violated the equal protection clause of the Florida Constitution and further agreed that there was no evidence to support that there was an ongoing medical malpractice crisis. Chief Justice Polston and Justice Canady dissented.

Causation – Treating Physician's Testimony Cannot Insulate Defendant from Own Negligence

Saunders v. Dickens, 151 So. 3d 434 (Fla. 2014)

The patient saw the Defendant neurologist and complained of back pain, leg pain and unsteadiness on his feet. The patient also advised that he was experiencing cramps in his hands and feet, as well as, numbness in his hands and feet. The doctor concluded that, because the patient displayed normal reflexes, the numbness and tingling in his hands was due to peripheral neuropathy secondary to diabetes. The neurologist did not perform a test to confirm this diagnosis. Instead, he recommended that the patient be admitted to the hospital for an MRI of the brain and lumbar spine.

After receiving results of the lumbar spine MRI, the neurologist asked the subsequent treating neurosurgeon for consultation. The neurosurgeon performed an examination and then performed lumbar surgery. It was believed that the patient would later need cervical surgery. The patient's condition continued to deteriorate after he had lumbar surgery. He became a quadriplegic and ultimately died; never having had the cervical surgery.

The estate settled with the neurosurgeon and went to trial against the original neurologist. The Plaintiff presented expert testimony that the neurologist had breached the standard of care by failing to recognize that the Plaintiff's symptoms could be related to cervical cord compression. Another expert testified that, had the surgery been performed and addressed the cervical cord compression, the patient, more likely than not, would not have become quadriplegic.

The Defendant's expert suggested that it was reasonable for the neurosurgeon to perform surgery on the lumbar spine originally. The Defendant also introduced the deposition of the neurosurgeon who was a former Defendant. This deposition was taken prior to settlement. The neurosurgeon testified that, even if he had possessed the results of the cervical MRI, he would have not have operated on the neck because the patient had not yet experienced problems with his upper extremities.

At the close of the evidence, the neurologist moved for a directed verdict contending that the deposition of the neurosurgeon rendered it impossible for the Plaintiff to establish that his injury had been caused by any negligence of the

Defendant. The trial court denied the motion. In closing argument, the Defendant argued that the Plaintiff had not established causation.

In doing so, he emphasized that the neurosurgeon testified that even if the neurologist had ordered the MRI of the cervical spine, he would not have done anything differently. The Defendant then asked the jury how they could find the neurologist responsible when the neurosurgeon had testified that he would not have done anything differently.

The estate's lawyer sought a curative instruction that *Fabre* is an affirmative defense for which the Defendant bears the burden of proof. As such, the Plaintiff argued that he did not have to prove that the non-party neurosurgeon was never negligent; however, the trial court refused to give this instruction.

The Supreme Court determined that telling the jury that the original Defendant could not be held liable because the subsequent doctor said he would not have done anything differently was a misstatement of law. Rather, the Plaintiff was only required to establish that the doctor's care fell below that care of a reasonably prudent physician and that more likely than not, adequate care by the neurologist would have prevented the patient's injuries. As a result, they believe the trial court erred in permitting the Defendant to mislead the jury during closing.

The Supreme Court further held that it was error to allow the Defendant to argue that the Plaintiff had not proven causation based upon the neurosurgeon's testimony in his deposition at a time in which he was in an adversarial relationship with the Plaintiff. They concluded that the testimony that the subsequent treating physician would not have treated the patient differently was irrelevant and inadmissible and could not insulate the Defendant physician from liability for his own negligence.

"Because the central concern in medical malpractice actions are the reasonably prudent physician's standard, the issue of whether a treating physician acted in a reasonably prudent manner must be determined for each individual physician who is a Defendant in a medical malpractice action. A subsequent treating physician simply may not be present at the time a Defendant physician makes an allegedly negligent decision or engages in a potentially negligent act. Further, it is not only the final physician, but rather, each treating physician who must act in a reasonably prudent manner."

"We hold that a physician cannot insulate himself or herself from liability for negligence by presenting a subsequent treating physician who testifies that adequate care by the Defendant physician would not have altered the subsequent care. To do so would alter the long-established reasonably prudent physician standard where the specific conduct of an individual doctor in a specific circumstance is evaluated."

"It would place a burden on the Plaintiff to somehow prove causation by demonstrating that a subsequent treating physician would not have disregarded the correct diagnosis or testing, contrary to his or her testimony and irrespective of the standard of care for the Defendant physician. To require the Plaintiff to establish a negative inappropriately adds a burden of proof that is simply not required under the negligence law of this State."

Duty - No Duty to Inform Patient of Availability of Abortion in Another State

OB/GYN Specialists of the Palm Beaches v. Mejia, 134 So. 3d 1084 (Fla. 4th DCA 2014)

The Plaintiffs were the parents of a child born with significant birth defects. During her pregnancy, the mother suffered from episodes of bleeding and was sent for ultrasounds. The first ultrasound was limited due to the position of the fetus; however, the report noted abnormalities which prompted the mother's referral for genetic counseling and a more detailed ultrasound. At the genetic counseling session, the Plaintiffs were advised of the significance of the abnormalities seen on the prior ultrasound and were given the option of undergoing amniocentesis to screen for genetic abnormalities.

The mother declined the amniocentesis procedure, but returned for a Level II ultrasound. The Level II ultrasound reported that the views of the upper extremities were limited, that the hands of the fetus were not visible, and the position of the fetus's feet looked normal. The report also noted that there were "four limbs" and the impression was "the anatomy seen on the Fetal II ultrasound appears normal. Fetal growth is appropriate. Limited upper extreme [sic] nose, lips."

When the mother gave birth, she learned for the first time that the baby had no hands, only one leg and a fraction of a foot attached to the hip on the other leg. The allegation made against the Defendant was that she fell below the standard of care by failing to advise the Plaintiffs in a timely manner that the fetus had limb

defects thereby preventing them from making an informed decision as to whether they should terminate the pregnancy.

Prior to trial, the Defendants sought to preclude the Plaintiffs from presenting any evidence or argument that the Level II ultrasound caused any damages citing Florida Statute §390.0111 and argued that even if the Level II ultrasound had been reported accurately, the mother could not have obtained a lawful abortion in Florida because it was performed one day into the mother's third trimester of pregnancy.

The Plaintiffs argued however, that she was not in her third trimester when the Level II ultrasound was performed. The trial court ruled that any reference or evidence regarding the prohibition against third trimester abortions was irrelevant, concluding that the mother was not in the third trimester of pregnancy based upon counsel's representation regarding the date of conception, Further, admitting evidence of the statute would create a "trial within a trial," regarding whether any exceptions to the statute applied, and the case did not involve a claim that the Defendant should have performed or recommended termination of the pregnancy.

The Fourth District did a detailed analysis of gestational age and determined that the Level II ultrasound was performed on the first day of the third trimester. Nevertheless, they noted that if the statute should be interpreted to measure pregnancy from the alleged time of conception, thereby allowing the mother two weeks after the ultrasound to obtain a lawful abortion, the existence of the statute would still be irrelevant to whether the mother could have logistically obtained an abortion in Florida before the statutory deadline.

The Plaintiffs contended that had the Level II ultrasound been properly interpreted, the mother could have traveled to another state to obtain an abortion at her stage of pregnancy or could have secured a third trimester abortion in Florida or elsewhere under an applicable statutory exception. The Fourth District refused to allow this argument and declined to establish a duty to provide information to a patient that she could legally undergo a third trimester abortion in another state in which that physician was not licensed.

Duty - Doctor Can Be Liable for Patient's Suicide When Actions Create Foreseeable Zone of Risk

Granicz v. Chirillo, 147 So. 3d 544 (Fla. 2d DCA 2014)

The decedent had a history of depression and was seeing Dr. Chirillo, her primary care physician, who treated her for depression. The decedent was taking Prozac when she began seeing Dr. Chirillo and he switched her to Effexor. Unbeknownst to Dr. Chirillo, the decedent stopped taking the Effexor in June/July of 2008 because of its side effects.

In October of 2008, the decedent called Dr. Chirillo's office and advised his medical assistant that she had not felt right since late June/July. She reported that she was under mental strain, was not sleeping well, and was taking more sleeping pills. She attributed these problems to the Effexor and she told the assistant she stopped taking it.

The assistant wrote this information in a note to Dr. Chirillo. He read the note and then decided to change the decedent's anti-depressant to Lexapro. Dr. Chirillo's office called the decedent and told her she could pick up samples of Lexapro, along with a prescription. They did not request that the decedent schedule an appointment with the doctor. The decedent picked up the samples and prescription later that day and the following day she hung herself.

The Plaintiff sued Dr. Chirillo for breaching his duty to exercise reasonable care in the treatment of the decedent. The Defendant filed a Motion for Summary Judgment arguing that Dr. Chirillo had no duty to prevent the decedent from committing an unforeseeable suicide. The Second District reversed and held that the proper inquiry the trial court should have conducted was to determine whether the Defendant's conduct created a foreseeable zone of risk; not whether Defendant could foresee the specific injury that actually occurred. In so doing, they certified conflict with the First District's decision in *Lawlor v. Orlando*, 795 So. 2d 147 (Fla. 1st DCA 2001).

Ex-Parte Conferences – Defendant Hospital Can Have Ex-Parte Contact with Employed Physicians

Damsky v. University of Miami, 152 So. 3d 789 (Fla. 3d DCA 2014)

The Plaintiff sued the University of Miami for medical malpractice. In the course of preparing the case for trial, attorneys for the University had *ex parte* contact with Dr. Jamie Barkin, a gastroenterologist at Mount Sinai Medical Center who treated the patient for problems resulting from her surgery. The Plaintiffs filed a Petition for Writ of Certiorari seeking to quash the trial court's order finding that any communication between Dr. Barkin and the University was privileged and that communications with him was permissible.

In this case, the trial court determined that Dr. Barkin was an employee of the University. Thus, the Third District found that the Plaintiff had not suffered irreparable harm which would trigger issuance of a Writ of Certiorari because even though the Order prevents the Plaintiffs from taking discovery to learn the contents of the communications between the University and Dr. Barkin, this is something that can be remedied on appeal. Secondly, the Plaintiffs contend that the Order allows the University to engage in future *ex parte* communications with Dr. Barkin. The Third District agreed that such an Order could be reviewed by certiorari, however, the the language of the Order expressly prohibited such communications without further Order of the Court. Therefore, the Petition failed because it did not demonstrate irreparable harm.

Ex-Parte Conferences – Presuit Authorization Does Not Violate HIPAA

Murphy v. Dulay, 768 F.3d. 1360 (11th Cir. 2014)

The District Court found that Florida Statute §766.1065 was preempted by and violated HIPAA. The 11th Circuit reversed the trial court and found that the statute which requires an authorization to release protected health information and allow for ex-parte interviews of healthcare providers was fully compliant with HIPAA and was not preempted by Federal law.

Presuit – Notice Due to Legal Relationship

Young v. Naples Community Hospital, 129 So. 3d 456 (Fla. 2d DCA 2014)

Frances Young went to Naples Community Hospital on the evening of February 18, 2006, with complaints of severe abdominal pain and vomiting. Early the following morning, she underwent several tests including a CT scan. The scan was read by Dr. Grennan who was in Switzerland at the time. He reported the scan as being "unremarkable." Despite this, she was admitted to the hospital and, because of continued complaints of abdominal pain, an MRA was performed later that afternoon. The MRA results were reported on February 20, 2006, as showing suspected emboli. The CT scan reviewed by Dr. Grennan was then re-evaluated and was found to have evidence of a thrombosis. Approximately an hour later, she underwent surgery to remove the blood clot. She was discharged from the hospital on April 12, 2006, following surgery and complications in her recovery.

She later retained an attorney who filed an automatic extension of the Statute of Limitations. On April 1, 2008, the Plaintiffs gave notice of their intent to initiate a lawsuit against Naples Radiologists, the local provider of the hospital's radiological services. On June 17, 2008, they sent Notices of Intent to Dr. Grennan and Nighthawk Radiology, the company that provided night time radiological services for Naples Radiology.

After suit was filed, all of the Defendants moved for summary judgment alleging that the Plaintiffs failed to provide their Notice of Intent within two years. The trial court denied the motions of Naples Community Hospital and Naples Radiology, but granted the motion of Nighthawk and Dr. Grennan finding that the Plaintiffs were required to filed their Notice of Intent by May 8, 2008; that the attempt to obtain a 90-day extension was ineffective; and that the June 17, 2008 notice to Nighthawk and Dr. Grennan was served outside the statutory time period.

The Second District reversed the summary judgment finding that there was a "legal relationship" between Naples Radiologists and Nighthawk Radiology/Dr. Grennan. Nighthawk and Dr. Grennan argued that they did not have a "legal relationship" because they were neither employees nor servants of the Hospital or Naples Radiology. The Second District disagreed with this interpretation. In so doing, they noted that there was no definition of "legal relationship" in Florida Rule of Civil Procedure 1.650(b). Further, Nighthawk and Dr. Grennan admitted that Nighthawk had a written contractual relationship with Naples Radiology and that Dr. Grennan was an independent contractor for Nighthawk. As such, the

Second District found that these were business relationships as defined by the law of contracts such that they were in a "legal relationship" with the radiology group.

NICA – Formation of Provider-Patient Relationship Triggers Obligation to Provide NICA Notice

N.R. v. NICA, 143 So. 3d 463 (Fla. 5th DCA 2014)

In this case, the Fifth District reversed for determination by the Administrative Law Judge as to when the provider-obstetrical patient relationship was formed because that is what triggers the obligation to furnish the notice under NICA. The determination of when this relationship commences is a question of fact. Likewise, when the patient first becomes an obstetrical patient of the provider and what constitutes a reasonable time are also issues of fact.

Nursing Home Arbitration Agreements

Zephyr Haven Health & Rehab Center v. Clukey, 133 So. 3d 1230 (Fla. 2d DCA 2014)

The nursing home appealed the trial court's denial of it Motion to Dismiss and to Compel Arbitration. The Second District reversed finding that the Personal Representative, acting under a durable power of attorney which stated that she could act on the decedent's behalf with respect to "claims and litigation" and "all other matters" had authority to enter into an Arbitration Agreement. It further held that the trial court erred in finding that the Arbitration Agreement was substantively unconscionable because the estate did not have the ability to pay the cost of arbitration.

F.I. Tampa, LLC v. Kelly-Hall, 135 So. 3d 563 (Fla. 2d DCA 2014)

A resident of a nursing home who subsequently died entered into an Arbitration Agreement with the facility. The Estate filed suit against the nursing home and the nursing home filed a Motion to Compel Arbitration. The trial court denied the Motion to Compel finding that the agreement provided that because the Arbitration fees were to be borne equally by both parties in Arbitration, it would be prohibitively expensive for the Estate.

The Second District reversed and found that the Plaintiff failed to establish that the cost of Arbitration would likely exceed the cost of litigation and therefore

did not meet her burden of showing that the cost of Arbitration were prohibitively expensive. Further, the agreement provided for Arbitration to be administered pursuant to the procedures of AAA or JAMS.

The trial court denied the Motion to Compel Arbitration because AAA's healthcare statement provides that it does not accept the administration of cases involving individual patients unless there was a post-dispute agreement to arbitrate. The Second District found that this was an improper basis to deny the Motion to Compel because the terms, as stated, did not render the agreement impossible to perform. The agreement did not require the use of AAA or JAMS but rather, noted that the Arbitration simply had to be administered pursuant to their procedures.

Lopez v. Andies, Inc., 137 So. 3d 528 (Fla. 4th DCA 2014)

A resident of an Assisted Living Facility appealed the trial court's granting of a Motion to Compel Arbitration. The Arbitration Agreement provided that any controversy or dispute between the parties would be resolved by arbitration as provided by the American Health Lawyers Association alternative dispute resolution rules. Because these rules required that the "clear and convincing evidence" standard apply to awards of consequential, exemplary or special damages in a tort action, the rules were contrary to public policy and the Fourth District found it was error to grant the Motion to Compel Arbitration.

Greenbrook NH, LLC v. Sayre, 150 So. 3d 878 (Fla. 2d DCA 2014)

The trial court denied the nursing home's Motion to Compel Arbitration because portions of the Arbitration Agreement were obscured due to a photocopying error. The Second District reversed and held that because the remaining terms of the agreement were sufficiently clear and definite to form a contract, the arbitration clause was enforceable pursuant to the agreement reached when the resident was admitted to the nursing home.

Stratton v. Port St. Lucie Management, LLC, 149 So. 3d 100 (Fla. 4th DCA 2014)

As part of the admission agreement entered into, an attorney's fees provision was included which would have allowed the nursing home to recover attorney's fees if the Arbitrators ruled in their favor. The court held that, under these circumstances, the prevailing resident would also be entitled to her attorney's fees and costs as a prevailing party.

Sovereign Healthcare of Tampa v. Yarawasky, 150 So. 3d 873 (Fla. 2d DCA 2014)

The Second District held that an Arbitration clause in an admission agreement was unenforceable where the nursing home resident did not sign the admission and the financial agreement and the resident's wife who signed the agreement as the responsible party did not have authority to sign on the resident's behalf. The Second District found that the wife signed the agreement only in her individual capacity as the responsible party.

Hancock v. Northport Health Services of Florida, 150 So. 3d 1262 (Fla. 5th DCA 2014)

The decedent's estate filed a claim against the nursing home alleging various violations of Chapter 400. The nursing home moved to compel Arbitration pursuant to the Arbitration provision contained in the admission agreement. The trial court found that the Arbitration provision was not unconscionable. The Fifth District affirmed the Order Compelling Arbitration; however, it reversed that portion of the Order which required the parties to apply Alabama substantive law.

The Fifth District also found that it was error to require application of the Florida Procedural Rules where the Arbitration provision stated that the parties were to engage in discovery consistent with the Alabama Rules of Civil Procedure and no convincing argument was raised as to why the application of Alabama procedural rules was problematic.

Presuit – Motion to Dismiss for Failure to Have Qualified Presuit Expert

Bery v. Fahel, 143 So. 3d 962 (Fla. 3d DCA 2014)

As part of its presuit investigation, the Estate submitted an Affidavit of Khilnani, an emergency physician, to corroborate its claims against Fahel, a family physician. The trial court conducted an evidentiary hearing and made a determination that Khilnani was unqualified to act as an expert against Fahel. The Third District affirmed, finding that there was competent substantial evidence to support the trial court's conclusion. It should be noted that Khilnani previously sought to withdraw himself as an expert.

Nieves v. Viera, 150 So. 3d 1236 (Fla. 3d DCA 2014)

Dr. Nieves is a board certified orthopedic surgeon and he performed surgery on the decedent. All agreed that the surgery was successful and the patient was doing well in the recovery room. Several hours later, after being administered pain medication by hospital nursing staff, she suffered a respiratory arrest. Four days later, she died.

During those four days, the hospital staff never called Dr. Nieves and Dr. Nieves never called upon the patient. He claimed he had no duty or obligation to the patient beyond checking on her in the recovery room and believed that, after that point, responsibility for the patient's care was with the nursing staff and staff physicians caring for her.

Dr. Nieves received a Notice of Intent which contained an Affidavit from a physician practicing pulmonology and internal medicine. Dr. Nieves moved to dismiss the Complaint filed against him on the ground that this physician did not practice in the same or similar specialty "that includes the evaluation, diagnosis or treatment of the medical condition that is the subject of the claim and have prior experience treating similar patients." It should be noted that this claim arose before the amendment to Florida Statute §766.102(5)(a)(1), which has since deleted the "similar specialty" language from the statute. After the trial court denied the Motion to Dismiss, Dr. Nieves filed a Petition for Certiorari.

The petition was denied. The Third District pointed out that Dr. Nieves claimed that the trial court's order should have been quashed because it failed to conduct an evidentiary hearing on his Motion to Dismiss. Notably, Dr. Nieves never requested an evidentiary hearing but rather, repeatedly argued that the Affidavit did not meet the requirements of the Statute "on its face." The Third District held that it was not a departure from the essential requirements of law for the trial court to fail to hold an evidentiary hearing on a Motion to Dismiss on the grounds that pre-suit conditions of filing suit had not been satisfied where an evidentiary hearing had not been requested.

Presuit - When is a Claim, a "Claim for Medical Negligence?"

Buck v. Columbia Hospital Corp., 147 So. 3d 604 (Fla. 4th DCA 2014)

The patient was admitted to the hospital with complications due to Chronic Obstructive Pulmonary Disease. While being moved from a gurney to the x-ray table, the patient was accidentally dropped. As a result of being dropped, the

patient sustained a fracture of her lumbar spine and ultimately died. The Plaintiff filed a claim for simple negligence and did not provide the hospital with presuit notice. As a result, the trial court dismissed the Complaint and the Fourth District affirmed finding that this was a claim for medical negligence.

Winter Haven Hospital, Inc. v. Liles, 148 So. 3d 507 (Fla. 2d DCA 2014)

Following the death of a 49-year old woman, her daughter signed a permission form authorizing the hospital to perform an autopsy. Upon her receipt of the autopsy report, the daughter inquired about a second autopsy at the funeral home and then learned that her mother's internal organs had not been returned to the funeral home after the autopsy. She then contacted the hospital and learned that her mother's organs had been incinerated.

The daughter brought a claim for outrage against the pathologist and the hospital. The hospital filed a Motion to Dismiss arguing that this was a claim for medical malpractice, however, the trial court denied same and the Second District affirmed finding that the autopsy did not constitute the rendering of medical care or services, and, moreover, it was the decedent's daughter who sought compensation for damages; not the patient or someone on her behalf.

Following a verdict against the hospital, the Second District found that there was no basis to support a finding of outrage against the hospital for the actions of the pathologist because he never spoke to his daughter and was unaware of her wishes. Moreover, he had never had a family ask for the return of the organs following an autopsy.

As for the hospital, the Second District concluded that there was sufficient evidence to support a claim of outrage against the hospital because she had specifically told the hospital staff she did not want her mother cremated. Moreover, her mother's organs had been incinerated along with the hospital's other trash.

Holmes Regional Medical Center v. Dumigan, 151 So. 3d 1282 (Fla. 5th DCA 2014)

The patient was admitted to the hospital for cardiac bypass surgery and left the hospital a double amputee. During the course of the surgery, the patient was administered contaminated Heparin which caused him to develop a severe bacterial infection that lead to the amputations. The Complaint alleged that the Heparin

supplier had issued a recall of its contaminated product prior to the surgery and that the hospital failed to have adequate procedures in place to respond to the recall.

The claim was only brought against the hospital. The healthcare providers who participated in the surgery were not named as Defendants. There was no allegation that the administration of Heparin was below the standard of care nor were there any allegations that the healthcare workers knew or had any reason to know that the Heparin was tainted. In summary, the claim focused on the administrative policies and actions of the hospital in responding to the recall of the contaminated Heparin.

The hospital filed a Motion to Dismiss for failure to presuit and the motion was denied. The Fifth District affirmed finding that no medical judgment or skill was exercised by the hospital and the alleged wrongful act occurred months before the surgery in question. Accordingly, the Petition for Certiorari was denied.

Statute of Limitations – Presuit Notice to Sovereign Entity

Exposito v. University of Miami School of Medicine, 141 So. 3d 633 (Fla. 3d DCA 2014)

A premature infant was born at Jackson Memorial Hospital on July 11, 2005, who now suffers from seizures, cerebral palsy, spastic quadriplegia, cortical blindness and brain damage. On July 6, 2009, the attorneys for the mother sent written notice to the Public Health Trust, the Florida Department of Financial Services and others pursuant to Florida Statute §768.28(6). On July 10, 2010, she filed her Complaint alleging malpractice by the Defendants.

The original and Amended Complaints included allegations regarding conditions precedent, to-wit: "all statutorily required conditions precedent to the maintenance of this action have been performed, have occurred, or have been waived. Plaintiffs have complied with all the requirements of applicable Florida Statutes, prior to the filing of this action." Specific compliance with the sovereign immunity statute, §768.28(6) was not separately alleged, although the proposed Second Amended Complaint would have added such an allegation and would have attached copies of the statutory notices of claim and return postal receipts.

After a determination that the claim was not barred by NICA, the trial court heard argument on Defendants' Motions to Dismiss which included that the claim

was barred by the statute of limitations because Plaintiff failed to comply with the sovereign immunity statute by not filing her Notices of Claim within three years of the incident. The trial court found these arguments to be persuasive; however, the Plaintiff was allowed to file a Motion to Amend with a proposed Second Amended Complaint which included copies of the statutory notices and return receipts. The trial court ultimately granted the Motion to Dismiss and denied the Motion to Amend.

The Third District reversed and found that the original pleading of performance of the conditions precedent was sufficient although the Court noted a Second District decision which upheld the dismissal of the Complaint which did not specifically allege compliance with Florida Statute §768.28. See *Wright v. Polk County Public Health Trust Unit*, 601 So. 2d 1318 (Fla. 2d DCA 1992). The Third District stated that this issue did not need to be addressed, however, because the proposed Second Amended Complaint proffered the actual notices.

The Third District also found that when the three year time period in Florida Statute §768.28 began to run is a mixed factual and legal question. Lastly, the Third District noted that a defense based on accrual and alleged untimeliness whether under Florida Statutes §768.28 or §95.11 should be pled as an affirmative defense and is not appropriate for disposition on the face of a complaint.

Statute of Limitations – Successive Notices of Intent Can Cumulatively Toll Limitations Period

Salazar v. Coello, 154 So. 3d 430 (Fla. 3d DCA 2014)

Plaintiff was allegedly injured as a result of a surgical procedure. Less than two years before the running of the stature of limitations, the Plaintiff obtained an automatic 90-day extension. With thirty days remaining on the extended statute, the Plaintiff then sent a Notice of Intent to initiate litigation to the surgeon who performed the surgery, but did not send to any of the anesthesiologists. More than 90 days later, the Plaintiff issued a Notice of Intent to the anesthesiologist. Upon filing of suit, the anesthesiologist moved for summary judgment on the issue of the statute of limitations. The trial court granted it and the Third District reversed noting that the 90-day tolling of the statute of limitations, which is effective upon receipt of the Notice of Intent to initiate litigation, tolls the statute of limitations as to all prospective Defendants known to the Claimant who have yet to be served with a Notice of Intent to initiate litigation, as well as, the Defendants receiving the notice.