2016
CASE LAW SUMMARY

Medical Malpractice

Arbitration Agreement

Klemish v. Villacastin, 41 FLWD 1635 (Fla. 5th DCA 7/15/16)

The trial court entered an order compelling arbitration of the Plaintiff's medical malpractice claims against the hospital. When the patient was admitted to the hospital, she signed an arbitration agreement which incorporated some, but not all of the provisions of Florida's Medical Malpractice Act. The Fifth District found that because of this, the arbitration agreement was void as against public policy. The court also found that the invalid provisions of the agreement could not be severed because if they were severed, the trial court would be required to completely re-write the agreement to insert the Act's arbitration provisions.

Hernandez v. Crespo, 41 FLWS 625 (Fla. 12/22/16)

As a condition of treatment, the patient executed an arbitration agreement with her physician. Although the agreement incorporated the statutory provisions of Florida Statute 766, there was no mutual agreement to arbitrate under §766.106 or §766.207. The Supreme Court ultimately determined that the arbitration agreement was void as against public policy because it included terms only favorable to the physicians. The agreement diverged from the statutory provision because the agreement did not concede the physician's liability, did not guarantee independent arbitrators or that one arbitrator be an Administrative Law Judge; the agreement shared the cost equally between the parties as opposed to the physicians bearing the burden; the agreement did not provide for the Defendants' payment of interest on damages; the agreement did not require joint and several liability of Defendants; and the agreement also dispensed with the right to an appeal.

In reaching its decision, the court acknowledged that it had previously found the medical malpractice arbitration provisions to be constitutional in the *University of Miami v. Echarte* decision; 618 So. 2d 189 (Fla. 1993). In doing so, they noted "the Legislature's conclusion that the current medical malpractice insurance crisis constitutes an 'overpowering public necessity.'" The court also noted that it questioned the existence of the continuing medical malpractice crisis when it held the caps on damages in wrongful death medical malpractice cases to be

unconstitutional. See *Estate of McCall v. United States,* 134 So. 3d 894 (Fla. 2014). In pointing this out, the court seems to be laying the ground work for a later decision to now invalidate the arbitration provisions under the medical malpractice statute.

Meridian Pain & Diagnostics, Inc. v. Greber, 197 So. 3d 153 (Fla. 3d DCA 2016)

As a condition of treatment, Ms. Grever executed a consent which states that "in the event that I have an adverse event or reaction, I hereby release Ronald De Meo, M.D. and all corporations of which he is a shareholder of, and all personnel and employees from any liability and agree to have any and all claims settled through mediation or through arbitration in Miami-Dade County, Florida." The patient suffered a reaction to an injection which turned out not to be the substance which she had agreed to be injected with. Through counsel, Ms. Greber contacted the clinic and expressed her desire to participate in mediation as contemplated by the consent. The clinic, through counsel, responded with a letter agreeing to mediate the dispute adding the following qualification: "however, this agreement to mediation is contingent upon Ms. Greber's acceptance to arbitration should be unsuccessful in resolving the matter at mediation." The attorneys for both parties "then took great pains to clarify expressly that the arbitration contemplated to occur in the event of an unsuccessful mediation would be an arbitration conducted pursuant to §766.207 of the Florida Statutes."

After the parties unsuccessfully mediated the dispute, the patient invoked her right to arbitration under §766.207, however, neither the clinic nor the doctor responded to the arbitration request. The patient then filed an action to compel arbitration which the clinic and physician sought to dismiss with prejudice alleging that the statute expressly requires presuit investigation and notice as a condition precedent to invoking the voluntary arbitration process under the statute. The trial court denied the Motion to Dismiss and the Defendants then sought certiorari relief. The Third District denied the petition and stated that "under the distinctive facts of this case, Petitioners' express insistence on arbitrating Respondents' claims pursuant to §766.207 - - after Petitioners were made aware of those claims - - necessarily waive and obviated the otherwise applicable presuit notice and investigation requirements."

Arbitration caps upheld following excess verdict

Alvarez v. Lifemark Hospitals of Florida, 3d 16-990 (Fla. 3d DCA 11/9/16)

The Defendant concluded presuit by requesting arbitration. The Request for Arbitration was rejected and the case proceeded to trial with a verdict of $700,000. Post-trial, the trial court enforced the cap on damages applicable to a rejected Request for Arbitration and a judgment was entered in the amount of $350,000. An appeal was taken to the Third District and the Court affirmed the trial court's decision citing to the Florida Supreme Court's decision in *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993).

Baker Act

Townes v. National Deaf Academy, LLC, 197 So. 3d 1130 (Fla. 5th DCA 2016)

A young woman was admitted to the National Deaf Academy following an acute psychiatric in-patient admission at another facility. The Academy operates a school and residential treatment facility for the deaf who also suffer from psychiatric and behavioral disorders. Before going there, the young woman was diagnosed with Bi-Polar Disorder, Intermittent Explosive Disorder, Impulse Control Disorder and Post-Traumatic Stress Disorder.

During her admission, an Academy psychiatrist established a plan of care for her that included Therapeutic Aggression Control Technique (TACT) involving staff members physically restraining the resident. One day, the young woman left the campus and when she returned, she began to throw rocks at the staff and buildings causing several windows to shatter. Several staff members tried to verbally deescalate the situation and, when unsuccessful, physically restrained her. The physical restraint resulted in an injury to her leg that ultimately resulted in the need for an above the knee amputation.

The Plaintiff sued the school alleging negligence and failing to properly care for and control the Plaintiff. They later amended their Complaint to assert two alternative claims for medical negligence based on the same factual allegations and then two more counts based on violations of the Florida Mental Health Act. The trial court granted Summary Judgment on all claims.

The Fifth District reversed in part and affirmed in part. It found that the TACT protective hold was not for treatment or diagnosis of any condition, was not employed to meet her daily needs during care and did not require medical skill or judgment because non-medical staff were taught the procedure and were authorized to decide whether to use it. As such, they determined that Counts I and

II in the Complaint sounded in ordinary negligence rather than medical malpractice and Summary Judgment was reversed.

As for the claims for medical malpractice, the court found Summary Judgment was proper because the Statute of Limitations had run and there had been no presuit investigation of these claims. While the Plaintiff claims that there was no evidence that the school was a medical facility, the court found that the record evidence demonstrated that the Plaintiff's first attorney was aware that the injuries could have resulted from medical malpractice evidenced from the notice sent to the school's counsel. The court stated that the limitations period commenced when Plaintiff's counsel became aware that the injuries could have resulted from medical malpractice.

Lastly, the Fifth District reversed the Summary Judgment on the Baker Act claims finding that the claims related back. Because the Amended Complaint arose from a common core of operative facts shared with the original Complaint and because the school was given fair notice of the general factual situation out of which the claim arose, it was a reversible error for the trial court to determine that those counts did not relate back.

Caps are Unconstitutional

Port Charlotte HMA, LLC v. Suarez, 41 FLWD 2393 (Fla. 2d DCA 10/26/16)

Following a multi-million dollar medical malpractice verdict, the trial court refused to reduce the non-economic damages pursuant to the statutory caps under Florida Statute 766.118. The Second District affirmed this decision finding that the statutory caps on non-economic damages in a personal injury medical malpractice cases were unconstitutional. They reversed that portion of the trial court's order which set off a portion of a pretrial settlement with the Defendant physician against the economic damages awarded against the hospital in the trial.

Go v. Normil, 184 So. 3d 5541 (Fla. 4th DCA 2016)

Following a verdict of over $28,000,000 for injuries secondary to a herpetic infection in an infant, the Fourth District found that the trial court properly excluded testimony regarding "free programs" which were available to the child because the programs would be paid by Medicaid and, therefore, Medicaid would need to be reimbursed. The Fourth District found that the trial court properly excluded this testimony under *Florida Physician's Reciprocal v. Stanley*, 452 So.

2d 514 (Fla. 1984) and *Joerg v. State Farm Mutual Automobile Insurance Company*, 40 FLWS 553 (Fla. 10/15/15).

The Fourth District also reversed the trial court's decision which lowered the damage award in accordance with the caps set forth under Florida Statute §766.118 finding that the caps were unconstitutional because they violated equal protection.

Causation

Santa Lucia v. LeVine, 198 So. 3d 803 (Fla. 2d DCA 2016)

The Plaintiff had myotubular myopathy. He underwent surgery with the Defendant surgeon and alleged that, the failure to obtain a proper informed consent and the failure to obtain a consultation with a physician knowledgeable about his neuromuscular disorder caused him permanent injury. Following a verdict in favor of the Plaintiff, the Second District reversed for entry of a directed verdict. Specifically, the District Court found that, although the Plaintiff established the standard of care for each theory of liability, he failed to satisfy that there was a breach under the informed consent theory and that there was a lack of causation proven under either theory of liability.

With respect to informed consent, the court found that there was no evidence regarding specific information that the surgeon should have provided to the Plaintiff in light of his myotubular myopathy when obtaining the informed consent to perform the surgery. Additionally, the District Court found that the Plaintiff failed to present any evidence which established that the surgeon's failure to advise the Plaintiff that he was at a greater risk of pulmonary complications because of his disorder affected either the Plaintiff's consent to surgery or the injuries that the Plaintiff suffered post-surgery inasmuch as Plaintiff was advised of the risk of pulmonary complications by an anesthesiologist and nonetheless elected to proceed with the surgery.

The District Court also found that, although the Plaintiff established that the standard of care of the general surgeon unfamiliar with myotubular myopathy had a duty to consult with physicians who were familiar with the disorder in order to ascertain surgical risks for the patient and to obtain informed consent to perform surgery, and although the court found that there was evidence that the surgeon breached the standard of care by not seeking this consultation, it nonetheless found that the Plaintiff failed to establish a casual link between the surgeon's failure to

obtain the consultation and the injuries sustained by the Plaintiff because the damages were post-surgical and anesthesia-related.

Consent of one parent sufficient

Angeli v. Kluka, 190 So. 3d 700 (Fla. 1st DCA 2016)

The father of a minor child filed a Complaint alleging battery and intentional interference with a parent-child relationship after a surgeon performed surgery on the minor child with the mother's consent, but not the father's consent. The parents were separated and a Dissolution of Marriage action was pending and both parents had equal custody rights to their two minor children. The First District held that the consent of one parent to a non-emergency medical procedure for a minor child is sufficient to permit the healthcare provider to render such care and treatment even when the healthcare provider allegedly knew or should have known that the other parent objected to the care and treatment.

Control techniques do not require medical skill

Townes v. National Deaf Academy, LLC, 197 So. 3d 1130 (Fla. 5th DCA 2016)

A young woman was admitted to the National Deaf Academy following an acute psychiatric in-patient admission at another facility. The Academy operates a school and residential treatment facility for the deaf who also suffer from psychiatric and behavioral disorders. Before going there, the young woman was diagnosed with Bi-Polar Disorder, Intermittent Explosive Disorder, Impulse Control Disorder and Post-Traumatic Stress Disorder.

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then two more counts based on violations of the Florida Mental Health Act. The trial court granted Summary Judgment on all claims.

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Duty owed to patient who killed herself

Chirillo v. Granicz, 199 So. 3d 246 (Fla. 2016)

A woman with a history of depression began seeing a psychiatrist in 2005. At that time, he prescribed an anti-depressant and then switched her to another medication. Shortly thereafter, she called the doctor's office telling the medical Assistant that she stopped taking the second anti-depressant because it was having side effects; reporting that she had not felt right for months. Upon reading the note from the assistant, the doctor changed the medication and told the woman she could pick up samples at his office. He never scheduled an appointment with her. The next day, the woman hung herself in her garage. She did not leave a note. Her

husband filed an action against the doctor asserting that he breached the standard of care in treating her.

The trial court granted the Defendant's Motion for Summary Judgment, finding that the doctor had no legal duty to prevent the woman's suicide. The Plaintiff appealed arguing that the trial court improperly characterized the doctor's duty as one to prevent the woman's suicide, when in actuality it was to exercise reasonable care in his treatment. The Second District reversed and the Supreme Court took up the issue based upon conflict with the First District Court of Appeal.

The Supreme Court determined that the proper duty of care owed by a physician to a patient who commits suicide is the duty to treat the patient within the prevailing standard of care. In this case, the Plaintiff had demonstrated that the doctor knew that patients who stop taking this type of anti-depressant abruptly had an increased risk of suicide. The Supreme Court ruled that although the physician had no duty to prevent this suicide, there still existed a duty to treat the decedent in accordance with the proper standard of care and found that the Second District correctly determined that the foreseeability of the decedent's suicide is a matter of fact for a jury to decide.

Failure to provide information regarding expert's qualifications

Morris v. Muniz, 189 So. 3d 348 (Fla. 1st DCA 2016)

According to the First District, during presuit, the Claimant repeatedly ignored requests for presuit discovery regarding her presuit expert's statutory qualifications. Despite the parties agreeing to extend the 90-day presuit period, and despite the Defendant sending several letters to the Plaintiff expressing their concerns regarding their expert's qualifications, the Plaintiff filed a medical negligence action without responding to these requests for information. Even after the trial court imposed sanctions, the Plaintiff "continued to obstruct the presuit process by failing to timely respond to the subpoena duces tecum regarding her expert's background and opinions and by failing to comply with the court's limited discovery order."

The First District found that the trial court properly dismissed the action because the Plaintiff failed to provide access to information during the presuit investigation regarding the Plaintiff's presuit expert's qualifications. Judge Swanson dissented, pointing out that the presuit affidavit set forth the qualifications of the Plaintiff's expert including details about her education,

experience, professional awards and that she was a board-certified obstetrician/gynecologist for 30 years and had been engaged in full-time patient care prior to her retirement nine months before the decedent's death. The affidavit also demonstrated that the expert had served in several roles requiring her to supervise obstetrical nurses and other medical staff at a hospital and that she was familiar with the relevant standards of care. Despite this, the trial court allowed the Defendants to depose Dr. Thompson regarding her qualifications. During her deposition, the expert testified that, during the relevant time period, she worked more than 50 hours per week as an obstetrician/gynecologist and also attended both graduate and law school during the same time period. The trial court questioned the "feasibility of the expert's statement that she was engaged in full-time patient care while pursuing these degrees.

Hospital not obligated to transfer patient

Morejon v. Mariners Hospital, Inc., 197 So. 3d 591 (Fla. 3d DCA 2016)

Plaintiff presented to Mariners Hospital with abdominal pain. After it was determined that he suffered from an emergency condition, the medical staff at Mariners decided that the best course of action was to transfer him to another hospital with a more specialized medical staff. Additionally, the Plaintiff's requested a transfer because Mariners list of service capabilities did not include the treatments necessary to care for the Plaintiff. Thereafter, Mariners medical staff attempted to transfer the Plaintiff to South Miami Hospital, however, South Miami Hospital denied the transfer request and Mariners did not attempt to transfer him to another facility. Instead, the general surgeon on-call at Mariners performed an exploratory abdominal surgery which was complicated by a spleen injury and cardiac arrest. The patient was then transferred to Baptist Hospital for surgical intervention. While he ultimately survived, the Plaintiffs claim that Mariners failure to effectuate a timely transfer worsened his condition.

Mariners moved to dismiss the Complaint and at a hearing on the Motion to Dismiss, the trial court found that the Plaintiff's failed to allege that Mariners dumped or refused to treat the patient in violation of Florida Statute §395.1041; (2) nothing in Florida Statute §395.1041 created a duty to transfer or required Mariners to transfer the patient; and the Plaintiffs claim is actually for medical malpractice and was not properly plead as a statutory violation because the allegations dealt with the issue of the quality of the healthcare provider. The trial court also denied the Plaintiffs' Motion to Amend the Complaint because any medical malpractice claim that the Plaintiffs may have had against Mariners would

have been barred by the statute of limitations. The Plaintiffs failed to appeal the Order Denying their Motion to Amend.

The Third District affirmed the trial court and found that the hospital was not obligated to transfer the patient simply because a patient, physician or other qualified medical person requests that the patient be transferred. The court also stated that the Plaintiffs could have initially initiated a cause of action for medical malpractice but failed to do so.

Informed Consent

Santa Lucia v. LeVine, 198 So. 3d 803 (Fla. 2d DCA 2016)

The Plaintiff had myotubular myopathy. He underwent surgery with the Defendant surgeon and alleged that, the failure to obtain a proper informed consent and the failure to obtain a consultation with a physician knowledgeable about his neuromuscular disorder caused him permanent injury. Following a verdict in favor of the Plaintiff, the Second District reversed for entry of a directed verdict. Specifically, the District Court found that, although the Plaintiff established the standard of care for each theory of liability, he failed to satisfy that there was a breach under the informed consent theory and that there was a lack of causation proven under either theory of liability.

With respect to informed consent, the court found that there was no evidence regarding specific information that the surgeon should have provided to the Plaintiff in light of his myotubular myopathy when obtaining the informed consent to perform the surgery. Additionally, the District Court found that the Plaintiff failed to present any evidence which established that the surgeon's failure to advise the Plaintiff that he was at a greater risk of pulmonary complications because of his disorder affected either the Plaintiff's consent to surgery or the injuries that the Plaintiff suffered post-surgery inasmuch as Plaintiff was advised of the risk of pulmonary complications by an anesthesiologist and nonetheless elected to proceed with the surgery.

The District Court also found that, although the Plaintiff established that the standard of care of the general surgeon unfamiliar with myotubular myopathy had a duty to consult with physicians who were familiar with the disorder in order to ascertain surgical risks for the patient and to obtain informed consent to perform surgery, and although the court found that there was evidence that the surgeon breached the standard of care by not seeking this consultation, it nonetheless found

that the Plaintiff failed to establish a casual link between the surgeon's failure to obtain the consultation and the injuries sustained by the Plaintiff because the damages were post-surgical and anesthesia-related.

Injury while transporting patient to mobile radiation van not medical malpractice

Pomper v. Ferraro, 42 FLWD 7 (Fla. 4d DCA 12/21/16)

The Plaintiff had been diagnosed with skin cancer and her physician prescribed radiation for her at Horizon Medical Services. At each radiation session, an employee of Horizon would come to the lobby of the Plaintiff's residence (an ALF) and direct that she get into a wheelchair. The employee would then wheel her approximately 100 yards to the south side of the residence where an automatic lift would hoist her wheelchair on to the mobile radiation van where the treatment was given.

On the day of the incident, the usual employee was not there. A different employee had the patient walk to the mobile radiation van herself. The employee lead the patient directly over a parking bumper without advising or warning of its existence or supporting her. The patient tripped and fell and suffered injuries. Suit was filed and the Defendant moved to dismiss the claim for failure to presuit it in compliance with Florida Statute 766.106. After the denial of the motion, the Defendants took certiorari which was denied by the Fourth District.

The Fourth District ruled that the facts alleged in the Complaint did not support a theory that an injury occurred while there was a medical diagnostic or medical treatment procedure occurring. While one could conclude that the Complaint alleged that pre-treatment medical care was being provided to the patient in transporting her to the mobile radiation van, the Defendant did not argue nor did it establish in the record that there was a professional standard of care applicable to assisting a patient with transportation to a mobile radiation van. Notably, the Fourth District denied the petition without prejudice to raise the issue of non-compliance if a revised Complaint or discovery more clearly ended up demonstrating that the Plaintiff could not prove her case without establishing a violation of a professional standard of care.

NICA

Lampert v. NICA, 2016 WL 7480366 (Fla. 1st DCA 12/30/16)

Pursuant to a prior class action, the appellants submitted a claim to NICA for back-pay and future pay for custodial care. NICA agreed to pay the appellants for future custodial benefits in the amount of 12 hours per day, whereas they sought payment for 16 hours per day. The appellants then filed a petition with the Division of Administrative hearings to resolve the dispute and requested attorney's fees and costs. The Administrative Law Judge issued a final order adopting NICA's position and awarding custodial benefits of 12 hours per day forward. The Administrative Law Judge then denied the appellant's Motion for Attorney's Fees and Costs. The First District reversed and held that the parents who filed the petition and received an award from the Administrative Law Judge were entitled to an award of attorney's fees even though they were not considered to be the prevailing party.

Putnam Community Medical Center v. NICA, 204 So. 3d 598 (Fla. 1st DCA 2016)

The hospital argued that the NICA statute violated the Federal Equal Protection clause and was, therefore, unconstitutional by virtue of the fact that a single gestation infant with a birth weight of less than 2,500 grams is disqualified for compensation under the plan, while a multiple gestation infant with a birth weight of less than 2,000 grams is disqualified for compensation. The First District ruled that while the hospital had standing to challenge the constitutionality of the statute, the statutory weight distinction between single gestation infants and multiple gestation infants was rationally related to preserving the actuarial soundness of the plan's no-fault coverage and, therefore, found the statute constitutional.

Non-Delegable duty

Godwin v. University of South Florida, 203 So. 3d 924 (Fla. 2d DCA 2016)

The decedent presented to Tampa General Hospital's Emergency Department with severe abdominal pain, nausea and decreased appetite. She signed a Certification and Authorization form, as well as a Special Notice form as required by Florida Statute 1012.965. Nine days later, she underwent surgery to remove a tumor in her colon; however, she ended up dying on the operating room table.

Her husband sued Tampa General Hospital for medical malpractice. He argued that the doctors who were responsible for his wife's care were agents of Tampa General and that Tampa General had a non-delegable duty to provide her with non-negligent surgical care. He further alleged that Tampa General failed to satisfy the requirements of Florida Statute 1012.965.

The hospital responded that the doctors who cared for the decedent were independent contractors employed by the University of South Florida and that the hospital properly delegated any duty of care and potential for liability to the University. It should be noted that the decedent signed the consent and disclosure form pursuant to the statute which explicitly acknowledged that its physicians were employed and under the control of the University and not Tampa General. Florida Statute 1012.965 limits a hospital's exposure to liability for the allegedly negligent conduct of physicians in a University setting. Because the hospital provided the decedent with separate written conspicuous notice advising her that the physician's work for the University, the Court found that the hospital complied with the statute and that summary judgment was proper on that issue.

The evidence also demonstrated that the decedent had received three separate notices informing her of the relationship between the hospital and the USF physicians and that the hospital did not hold the doctors out as its employees or agents. The Court found no factual dispute as to the nature of the relationship and said there were no issues of fact about whether the physicians were employed by USF, paid by USF and assigned by USF and that it was all clear to the Plaintiff such that there was no genuine issue of material fact.

As for the non-delegable duty argument, the Plaintiff argued that regulations promulgated under the Medicare Act imposed a non-delegable duty to provide non-negligent care. The Second District observed that no other Court had ever read the regulation so broadly or reached that conclusion and declined the invitation to be the first. While Section 482 identified the conditions and participation for hospitals in the Medicare program, this section was intended to specify the standards that the government will assess when determining whether or not a hospital would continue to be eligible to treat Medicare patients. The rule does not create liability for the hospital due to the negligence of an independent contractor. Instead, the rule, as well as the discussion and response to public comments, explains that the services that a contractor furnishes to a hospital will be part of the Quality Assurance Evaluation for the hospital's continued participation in Medicare.

Nursing home arbitration agreements

Olsen v. Florida Living Options, Inc., 41 FLWD 2111 (Fla. 2d DCA 9/9/16)

The Second District ruled that the trial court erred in granting a Motion to Compel Arbitration in a claim against a skilled nursing facility, its parent company and its administrator where arbitration was sought based upon an Arbitration Agreement signed when the decedent became a resident of an Assisted Living Facility located in the same retirement community. The court noted that the claims against the Defendants were not within the scope of the Arbitration Agreement which stated that it applied to and included within its scope any and all claims or controversies arising out of or in any way relating to the Arbitration Agreement, the Admission Agreement or any of the resident's stays at the ALF.

Novosett v. Arc Villages, LLC, 189 So. 3d 895 (Fla. 5th DCA 2016)

The nursing home resident and the nursing home entered into an Arbitration Agreement which contained a limitation of liability provision attempting to place a cap on non-economic damages and precluding the availability of punitive damages. The Fifth District affirmed the trial court's order finding that the provision was void as against public policy. Nevertheless, the trial court compelled arbitration because the agreement contained a severability clause. The Fifth District reversed finding that the limitation of liability provision in the Arbitration Agreement not only violated public policy, but was not severable because it constituted the financial heart of the Arbitration Agreement.

Reinshagen v. WRYP ALF, LLC, 190 So. 3d 224 (Fla. 5th DCA 2016)

The trial court compelled arbitration in a suit brought against an Assisted Living Facility in a case in which it was alleged that the decedent sustained injuries resulting in his death due to the Defendant's negligence and violations of the decedent's statutory rights. The Fifth District reversed the order compelling arbitration because the arbitration agreement placed a cap on the recovery of non-economic damages and precluded the recovery of punitive damages; provisions which were void as against public policy. They found that the entire agreement was invalidated despite the fact that there was a severability clause.

Sovereign Healthcare of Tampa, LLC v. Schmitt, 195 So. 3d 1175 (Fla. 2d DCA 2016)

The trial court correctly ruled the claim brought by the resident's estate was not subject to an arbitration clause in the resident admission and financial agreement because the resident did not sign the agreement and the evidence established that the resident's wife was not authorized to sign the agreement on her husband's behalf.

Florida Holdings, LLC v. Duerst, 198 So. 3d 834 (Fla.2d DCA 2016)

The Second District reversed the trial court's order denying a Motion to Compel Arbitration. In this case, an Arbitration Agreement was signed by the resident's daughter as the attorney-in-fact for the resident. The Second District found that the agreement was neither procedurally unconscionable nor substantively unconscionable. In doing so, the court pointed out that the acceptance of arbitration was not a prerequisite to admission and that the agreement could be canceled within 30 days. Further, there was no evidence that the Defendant was rushed to sign the agreement without reading it or that the daughter was lead to believe that she was required to sign the agreement as a condition of her mother's admission. Additionally, the court found no merit to Plaintiff's suggestion that the agreement was substantively unconscionable because it involved more limited discovery than civil litigation and afforded more limited rights of judicial review than in civil litigation.

Hochbaum v. Palm Garden of Winter Haven, LLC, 201 So. 3d 218 (Fla. 2d DCA 2016)

The widow of a deceased nursing home resident appealed an order granting a Motion to Compel Arbitration filed by the nursing home. Although the Second District found that the Arbitration Agreement contained attorneys' fees provisions that violated public policy, the offending provisions could be severed from the agreements and, therefore, ruled that arbitration was appropriate. In this case, the Arbitration Agreements contained an attorneys' fee provision that required each party to pay their own fees thereby eliminating the fee-shifting provision of Florida Statute 415.1111

Mendez v. Hampton Court Nursing Center, LLC, 203 So. 3d 146 (Fla. 2016)

Hampton Court admitted a father to its nursing home facility in 2009. At that time, the son signed a nursing home contract with Hampton Court which provided for the father's residency and care. The contract included an arbitration clause. The father did not sign the contract. While under Hampton Court's care in 2011, the father developed an eye infection that eventually required the removal of his left eye. In 2012, the son filed suit on his father's behalf in the Circuit Court and the nursing home moved to compel arbitration and stayed the judicial proceedings. The Circuit Court granted the motion and the Third District affirmed.

The Supreme Court quashed the Third District's decision and ruled that a nursing home resident is not bound by an arbitration clause in a nursing home contract signed by the son where the resident neither signed nor otherwise agreed to the contract. It further held that the nursing home resident may not be bound to a contract to which the resident never agreed under the third-party beneficiary doctrine adding that this doctrine does not permit two parties to bind a third party without the third party's agreement merely by conferring a benefit on the third party.

Pharmacist Liability

Sorenson v. Professional Compounding Pharmacists of Western Pennsylvania, Inc., 191 So. 3d 929 (Fla. 2d DCA 2016)

The patient suffered from chronic low back pain caused by a car accident. His physician was managing his pain by administering Hydromorphone through a pain pump that had been inserted into his spinal canal. While vacationing in Florida, the patient visited Charlotte Pain Management Center, Inc. based upon a referral from his physician. One of their physicians wrote a prescription for Hydromorphone that increased the concentration from 10mg/ml to 30mg/ml. Charlotte Pain transmitted this prescription directly to the pharmacist and the pharmacist compounded the medication and released it to Charlotte Pain. They then administered the medication to the patient through his pain pump and he died that same day.

The patient's family sued healthcare providers and the pharmacist. The trial court dismissed the count of the Complaint which alleged that the compounding pharmacist negligently prepared and dispensed a prescription for Hydromorphone that was unreasonable on its face due to the dosage strength. It also dismissed a

claim that the pharmacist was negligent *per se* for filling a prescription without being registered or licensed in Florida as required by statute.

The Second District reversed the dismissal of the first count finding that a pharmacist may breach the duty of care even when he or she fills a prescription in accordance with a physician's instructions if the prescription is unreasonable on its face. As for the second count, the Second District found that the trial court properly dismissed this claim because the Complaint set forth no basis for a private cause of action for failing to be registered or licensed as required by law.

Plaintiff must reveal her intentions, thoughts and reasons for seeking legal counsel

Mobley v. Homestead Hospital, Inc., 202 So. 3d 868 (Fla. 3d DCA 2016)

The Plaintiff sued the hospital alleging that her son's disabilities were due to medical malpractice during her pregnancy and during her son's birth. The hospital sought discovery as to when the Plaintiff first became aware of the possibility that her son's disabilities may have been related to medical malpractice and sought the information in order to determine whether the lawsuit was barred by the statute of limitations. The hospital determined that, in 2010, a law firm acting on her behalf faxed a request to the hospital for her son's medical records in which it was indicated that she sought the records to be used in conjunction with litigation as a Plaintiff. In 2011, another attorney acting on her behalf filed a Petition for Determination of Compensability with the State of Florida under the NICA statute. The NICA filing was made more than two years after the child's birth and several months prior to Mobley's request to extend the statute of limitations.

At the Plaintiff's deposition, the hospital asked what her reasons were for seeking legal counsel in 2010 and 2011. The Plaintiff's counsel objected on the basis of work product and attorney client privilege and instructed her not to answer. The hospital filed a Motion to Compel answers to these questions and the trial court entered an order finding that the facts were not privileged and ordered the Plaintiff to answer "all questions related to…when she first sought legal counsel, the names of the attorneys with whom she consulted and the reasons why she first sought legal counsel and any subsequent counsel."

The Third District found that "all questions" and the reasons why she sought legal counsel were overly broad and had the potential to breach the privilege and confidential communications. At the same time, the Third District ruled that the

Plaintiff could be asked and was required to answer factual questions about what she learned at various points in time concerning the nature and potential causes of her son's condition from sources other than the attorney she consulted. She was also required to respond to questions concerning her intentions, thoughts and reasons for seeking legal counsel so long as those intentions, thoughts and reasons were not informed by communications with counsel.

Plaintiff must reveal when and with whom she consulted for purpose of discussing legal remedies

Coffey-Garcia v. South Miami Hospital, Inc., 194 So. 3d 533 (Fla. 3d DCA 2016)

On July 16, 2005, the Plaintiff gave birth to her daughter. In early 2007, a neurologist diagnosed the baby with cerebral palsy. Prior to the child's 8th birthday, the Plaintiff's filed a Petition to Extend the Statute of Limitations for 90 days. Thereafter, they filed a Notice of Intent and, in November, 2013, the Plaintiff filed suit.

During discovery, the Defendants questioned the mother regarding when she consulted attorneys and why she consulted them. After testifying that her current counsel was not the first attorney she consulted, she declined to answer any other questions based upon the attorney-client privilege. The Defendants moved to compel these answers and the trial court ordered the Plaintiff to answer all questions regarding when she first sought legal counsel, the names of the attorneys who she consulted with and the reasons why she first sought out legal counsel and any subsequent counsel. At oral argument, the Defendants conceded that any information produced should be limited to consultations regarding possible legal remedies stemming from the daughter's condition.

The Third District granted certiorari in part but ordered that the Plaintiff reveal when and with whom she consulted for the general purpose of discussing possible legal remedies stemming from her daughter's condition. The Third District granted certiorari as to that portion of the order which required the Plaintiff to "answer all questions related to…the reasons why she first sought out legal counsel and any subsequent counsel" because this part of the order would allow inquiry into confidential communications between her and her attorneys including "after consulting the first lawyer, why did you seek out a second lawyer?" The court explained that this would require her to provide responses such as "my first lawyer insisted I had no case so I wanted to get a second opinion," or "my first

lawyer told me I had an excellent case but needed a lawyer specializing in neonatology."

Presuit Screening

Pomper v. Ferraro, 42 FLWD 7 (Fla. 4d DCA 12/21/16)

The Plaintiff had been diagnosed with skin cancer and her physician prescribed radiation for her at Horizon Medical Services. At each radiation session, an employee of Horizon would come to the lobby of the Plaintiff's residence (an ALF) and direct that she get into a wheelchair. The employee would then wheel her approximately 100 yards to the south side of the residence where an automatic lift would hoist her wheelchair on to the mobile radiation van where the treatment was given.

On the day of the incident, the usual employee was not there. A different employee had the patient walk to the mobile radiation van herself. The employee lead the patient directly over a parking bumper without advising or warning of its existence or supporting her. The patient tripped and fell and suffered injuries. Suit was filed and the Defendant moved to dismiss the claim for failure to presuit it in compliance with Florida Statute 766.106. After the denial of the motion, the Defendants took certiorari which was denied by the Fourth District.

The Fourth District ruled that the facts alleged in the Complaint did not support a theory that an injury occurred while there was a medical diagnostic or medical treatment procedure occurring. While one could conclude that the Complaint alleged that pre-treatment medical care was being provided to the patient in transporting her to the mobile radiation van, the Defendant did not argue nor did it establish in the record that there was a professional standard of care applicable to assisting a patient with transportation to a mobile radiation van. Notably, the Fourth District denied the petition without prejudice to raise the issue of non-compliance if a revised Complaint or discovery more clearly ended up demonstrating that the Plaintiff could not prove her case without establishing a violation of a professional standard of care.

Morris v. Muniz, 189 So. 3d 348 (Fla. 1st DCA 2016)

According to the First District, during presuit, the Claimant repeatedly ignored requests for presuit discovery regarding her presuit expert's statutory qualifications. Despite the parties agreeing to extend the 90-day presuit period,

and despite the Defendant sending several letters to the Plaintiff expressing their concerns regarding their expert's qualifications, the Plaintiff filed a medical negligence action without responding to these requests for information. Even after the trial court imposed sanctions, the Plaintiff "continued to obstruct the presuit process by failing to timely respond to the subpoena duces tecum regarding her expert's background and opinions and by failing to comply with the court's limited discovery order."

The First District found that the trial court properly dismissed the action because the Plaintiff failed to provide access to information during the presuit investigation regarding the Plaintiff's presuit expert's qualifications. Judge Swanson dissented, pointing out that the presuit affidavit set forth the qualifications of the Plaintiff's expert including details about her education, experience, professional awards and that she was a board-certified obstetrician/gynecologist for 30 years and had been engaged in full-time patient care prior to her retirement nine months before the decedent's death. The affidavit also demonstrated that the expert had served in several roles requiring her to supervise obstetrical nurses and other medical staff at a hospital and that she was familiar with the relevant standards of care. Despite this, the trial court allowed the Defendants to depose Dr. Thompson regarding her qualifications. During her deposition, the expert testified that, during the relevant time period, she worked more than 50 hours per week as an obstetrician/gynecologist and also attended both graduate and law school during the same time period. The trial court questioned the "feasibility of the expert's statement that she was engaged in full-time patient care while pursuing these degrees.

Bery v. Fahel, 194 So. 3d 1099 (Fla. 3d DCA 2016)

The Plaintiff sued Dr. Fahel, a family practitioner. During presuit, the Plaintiff provided the Affidavit of Dr. Khilnani an emergency medicine physician, in order to serve as the required statutory medical expert opinion corroborating the merits of the Plaintiff's claims against Dr. Fahel. The trial court eventually ruled that Dr. Khilnani did not meet the criteria set forth by the Florida Legislature as it relates to testifying against a general practitioner, and, because the Plaintiff failed to comply with the medical malpractice presuit requirements, the claim was dismissed. The Third District affirmed and on remand, the trial court held an evidentiary hearing and awarded Dr. Fahel attorney's fees and costs that he incurred in responding to the deficient Notice of Intent.

The Third District noted that a party's failure to provide a corroborating Affidavit from a qualified medical expert constitutes *prima facie* evidence of a lack of a reasonable basis to bring suit. Here, there was substantial credible evidence to support the trial court's determination that a reasonable investigation was not performed by the Plaintiff's counsel not only because of his failure to satisfy the statutory requirements set forth in Florida Statute 766.102, but also because the attorney persisted in the use of Dr. Khilnani's Affidavit even after it was disclaimed and withdrawn by Dr. Khilnani before the presuit period had expired. Having found that the presuit Affidavit did not meet the statutory presuit notice requirements in dismissing the claim, Florida Statute 766.206(2) mandates a finding that the presuit investigation was unreasonable and fees and costs should be imposed.

Bove v. Naples HMA, LLC, 196 So. 3d 411 (Fla. 2d DCA 2016)

The Plaintiff's husband died on February 26, 2012 after suffering a bleed following a bone marrow biopsy performed by Dr. Akins at the direction of Dr. Wang. Both Dr. Akins and Dr. Wang were physicians at Physicians Regional Medical Center. On April 19, 2012, Mrs. Bove met with Dr. Akins to review what had occurred during the bone marrow biopsy. On July 10, 2012, she met with her attorney. On February 2, 2014 and again on February 23, 2014, Mrs. Bove received copies of letters from two medical experts who concluded that her husband's death was caused by the bleed and that the bone marrow biopsy caused the bleed.

On February 25, 2014, Mrs. Bove served Physicians Regional with a copy of the Notice of Intent to pursue litigation via certified mail. She also sent Mr. Bove's medical records and the letters from her medical experts. Physicians Regional did not, however, receive the Notice of Intent until March 4, 2014. Mrs. Bove then provided Affidavits executed by the two experts to the hospital on March 17, 2014. Notably, the Notice of Intent stated that "the two year time frame [in which to file the Complaint] would begin to run from the date of Mr. Bove's death, as this was the date the family and Estate of Mr. Bove discovered the negligence of the professionals at Physician's Regional in performing the bone marrow biopsy."

Mrs. Bove served a Notice of Intent on Dr. Wang on May 12, 2014 and it was received on May 19, 2014. She also served a Notice of Intent on Dr. Akins on June 11, 2014 and it was received on June 16, 2014. The notices sent to Drs. Wang and Akins did not contain any specific details as to when Mrs. Bove learned

of any reported negligence attributable to the doctors. Rather, the notices requested that they refer to the averments made in the Notice of Intent that was served on Physicians Regional (copies of which were attached).

In the interim, Mrs. Bove filed Petitions for Extension of the Statute of Limitations with the first petition being filed April 30, 2014. After receiving denials of the Notices of Intent from all of the Defendants, she filed her Complaint on September 8, 2014. All Defendants filed Motions to Dismiss and the trial court ultimately granted them with prejudice finding that the Complaint was filed after the two-year statute of limitations had expired.

The Plaintiff contended that she did not learn of the possible negligence of the physicians until she met with her attorney in July, 2012. Noting that the mere occurrence of an injury is not enough to trigger the statute of limitations, and that some circumstances might not be the obvious result of medical negligence, the District Court refused to allow the Plaintiff relief under the facts of this case because her Notice of Intent acknowledged that, on the date of her husband's death, she had discovered the negligence of the professionals in performing the bone marrow biopsy.

The Plaintiff argued that she should not be bound by her attorney's statement in the Notice of Intent because it was not evidence and instead pointed to her own Affidavit wherein she stated she did not know about the negligence until July, 2012. The Court rejected this stating that litigants were not permitted to take inconsistent positions. Further, because the Notice of Intent was a statutory pre-requisite to filing suit and contained factual allegations relied upon by the parties, the Plaintiff was bound by the assertions within it and the Complaint was therefore found to be untimely.

The Court also noted that pursuant to Florida Statute 766.106(4) and Rule 1.650(b)(1), receipt of the Notice of Intent requires it be sent by certified mail and it focused on the date the notice was actually received. Thus, the date of receipt was also relevant in determining whether the statute was tolled. Even though the Plaintiff sent the notice on the day before the statute of limitations expired, the Defendants did not receive the notice until after it expired and the Plaintiff could not revive it by filing the petition for extension at that point.

Haslett v. Broward Health, 197 So. 3d 124 (Fla. 4th DCA 2016)

The Estate of a former patient sued a mental health facility and its attending psychiatrist for causing the wrongful death of the patient. While the Third Amended Complaint actually alleged a claim for ordinary negligence, the trial court dismissed it because the Complaint was actually for medical malpractice and dismissed the case for failure to comply with the presuit requirements of Florida Statute 766.

According to the Complaint, the decedent who had been previously diagnosed as being a paranoid schizophrenic was Baker Acted by a police department for suicidal ideations and bizarre behavior. By the time he was transported to the hospital, he was hearing voices and hallucinating and told a nurse that he had a plan to take pills to kill himself. The Defendant psychiatrist was assigned to care for the decedent and the Complaint specifically alleged that the doctor's care did not fall below the medical standard of care and that the action was not based upon medical malpractice.

Nevertheless, the Complaint also alleged that the doctor had the decedent sign a consent form for voluntary admission to the facility, as opposed to an involuntary admission and that this was done for the convenience of the doctor and the facility. Specifically, this allowed the hospital and the doctor to avoid Baker Act hearings and to keep the Estate out of the man's care and treatment. This form was attached to the Complaint and included a certification by the doctor that he had personally examined the decedent and concluded he was competent to provide express and informed consent.

Thirteen days later, the decedent was discharged. He was given prescriptions, a taxi cab voucher and his money was returned to him. The next day, the decedent was found dead as a result of an overdose of his medication. The Plaintiff claimed that the Complaint was not based upon medical malpractice because it involved a consent form signed by the decedent which alleged it was orchestrated by the doctor to avoid involuntary commitment procedures; the lack of which directly lead to the man's suicide. The court noted, however, that the consent showed that the doctor personally evaluated the decedent and found him competent to agree to treatment and therefore it was the doctor's medical evaluation which lead to the signing of the consent form, without which the decedent would not have been admitted on a voluntary basis.

Additionally, because the decedent was not in the custody or control of the facility at the time of his death and the Plaintiffs allege that there was no negligence, there was no common law duty to protect the patient once he left the custody and control of the facility. As for the count alleging the violation of Florida Statute 415.1111, the Fourth District also found that the statute did not apply. Specifically, there were no allegations to show that the doctor and the facility were caregivers within the meaning of Statute 415.102(5).

Lastly, they concluded that the decedent was in the facility for treatment of a medical condition, to-wit: his mental illness. As such, there was medical judgment involved, thus necessitating compliance with the presuit requirements.

Punitive Damages

Tenet Hialeah Healthsystem, Inc. v. Gonzalez, 196 So. 3d 511 (Fla. 3d DCA 2016)

The hospital sought certiorari review of the trial court's order allowing the Plaintiff to amend their Complaint to allege punitive damages in an action for mishandling of a minor's corpse. The Third District stated that it could not review an order authorizing a claim for punitive damages beyond determining whether the trial court followed the procedural requirements and having found that the trial court did so, they denied the Petition for Certiorari.

Sovereign Immunity

Godwin v. University of South Florida, 203 So. 3d 924 (Fla. 2d DCA 2016)

The decedent presented to Tampa General Hospital's Emergency Department with severe abdominal pain, nausea and decreased appetite. She signed a Certification and Authorization form, as well as a Special Notice form as required by Florida Statute 1012.965. Nine days later, she underwent surgery to remove a tumor in her colon; however, she ended up dying on the operating room table.

Her husband sued Tampa General Hospital for medical malpractice. He argued that the doctors who were responsible for his wife's care were agents of Tampa General and that Tampa General had a non-delegable duty to provide her with non-negligent surgical care. He further alleged that Tampa General failed to satisfy the requirements of Florida Statute 1012.965.

The hospital responded that the doctors who cared for the decedent were independent contractors employed by the University of South Florida and that the hospital properly delegated any duty of care and potential for liability to the University. It should be noted that the decedent signed the consent and disclosure form pursuant to the statute which explicitly acknowledged that its physicians were employed and under the control of the University and not Tampa General. Florida Statute 1012.965 limits a hospital's exposure to liability for the allegedly negligent conduct of physicians in a University setting. Because the hospital provided the decedent with separate written conspicuous notice advising her that the physician's work for the University, the Court found that the hospital complied with the statute and that summary judgment was proper on that issue.

The evidence also demonstrated that the decedent had received three separate notices informing her of the relationship between the hospital and the USF physicians and that the hospital did not hold the doctors out as its employees or agents. The Court found no factual dispute as to the nature of the relationship and said there were no issues of fact about whether the physicians were employed by USF, paid by USF and assigned by USF and that it was all clear to the Plaintiff such that there was no genuine issue of material fact.

As for the non-delegable duty argument, the Plaintiff argued that regulations promulgated under the Medicare Act imposed a non-delegable duty to provide non-negligent care. The Second District observed that no other Court had ever read the regulation so broadly or reached that conclusion and declined the invitation to be the first. While Section 482 identified the conditions and participation for hospitals in the Medicare program, this section was intended to specify the standards that the government will assess when determining whether or not a hospital would continue to be eligible to treat Medicare patients. The rule does not create liability for the hospital due to the negligence of an independent contractor. Instead, the rule, as well as the discussion and response to public comments, explains that the services that a contractor furnishes to a hospital will be part of the Quality Assurance Evaluation for the hospital's continued participation in Medicare.

Statute of Limitations

Bove v. Naples HMA, LLC, 196 So. 3d 411 (Fla. 2d DCA 2016)

The Plaintiff's husband died on February 26, 2012 after suffering a bleed following a bone marrow biopsy performed by Dr. Akins at the direction of Dr.

Wang. Both Dr. Akins and Dr. Wang were physicians at Physicians Regional Medical Center. On April 19, 2012, Mrs. Bove met with Dr. Akins to review what had occurred during the bone marrow biopsy. On July 10, 2012, she met with her attorney. On February 2, 2014 and again on February 23, 2014, Mrs. Bove received copies of letters from two medical experts who concluded that her husband's death was caused by the bleed and that the bone marrow biopsy caused the bleed.

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The Plaintiff contended that she did not learn of the possible negligence of the physicians until she met with her attorney in July, 2012. Noting that the mere occurrence of an injury is not enough to trigger the statute of limitations, and that some circumstances might not be the obvious result of medical negligence, the District Court refused to allow the Plaintiff relief under the facts of this case because her Notice of Intent acknowledged that, on the date of her husband's

death, she had discovered the negligence of the professionals in performing the bone marrow biopsy.

The Plaintiff argued that she should not be bound by her attorney's statement in the Notice of Intent because it was not evidence and instead pointed to her own Affidavit wherein she stated she did not know about the negligence until July, 2012. The Court rejected this stating that litigants were not permitted to take inconsistent positions. Further, because the Notice of Intent was a statutory pre-requisite to filing suit and contained factual allegations relied upon by the parties, the Plaintiff was bound by the assertions within it and the Complaint was therefore found to be untimely.

The Court also noted that pursuant to Florida Statute 766.106(4) and Rule 1.650(b)(1), receipt of the Notice of Intent requires it be sent by certified mail and it focused on the date the notice was actually received. Thus, the date of receipt was also relevant in determining whether the statute was tolled. Even though the Plaintiff sent the notice on the day before the statute of limitations expired, the Defendants did not receive the notice until after it expired and the Plaintiff could not revive it by filing the petition for extension at that point.

Suicide

Chirillo v. Granicz, 199 So. 3d 246 (Fla. 2016)

A woman with a history of depression began seeing a psychiatrist in 2005. At that time, he prescribed an anti-depressant and then switched her to another medication. Shortly thereafter, she called the doctor's office telling the medical Assistant that she stopped taking the second anti-depressant because it was having side effects; reporting that she had not felt right for months. Upon reading the note from the assistant, the doctor changed the medication and told the woman she could pick up samples at his office. He never scheduled an appointment with her. The next day, the woman hung herself in her garage. She did not leave a note. Her husband filed an action against the doctor asserting that he breached the standard of care in treating her.

The trial court granted the Defendant's Motion for Summary Judgment, finding that the doctor had no legal duty to prevent the woman's suicide. The Plaintiff appealed arguing that the trial court improperly characterized the doctor's duty as one to prevent the woman's suicide, when in actuality it was to exercise

reasonable care in his treatment. The Second District reversed and the Supreme Court took up the issue based upon conflict with the First District Court of Appeal.

The Supreme Court determined that the proper duty of care owed by a physician to a patient who commits suicide is the duty to treat the patient within the prevailing standard of care. In this case, the Plaintiff had demonstrated that the doctor knew that patients who stop taking this type of anti-depressant abruptly had an increased risk of suicide. The Supreme Court ruled that although the physician had no duty to prevent this suicide, there still existed a duty to treat the decedent in accordance with the proper standard of care and found that the Second District correctly determined that the foreseeability of the decedent's suicide is a matter of fact for a jury to decide.

Summary Judgment

Townes v. National Deaf Academy, LLC, 197 So. 3d 1130 (Fla. 5th DCA 2016)

A young woman was admitted to the National Deaf Academy following an acute psychiatric in-patient admission at another facility. The Academy operates a school and residential treatment facility for the deaf who also suffer from psychiatric and behavioral disorders. Before going there, the young woman was diagnosed with Bi-Polar Disorder, Intermittent Explosive Disorder, Impulse Control Disorder and Post-Traumatic Stress Disorder.

During her admission, an Academy psychiatrist established a plan of care for her that included Therapeutic Aggression Control Technique (TACT) involving staff members physically restraining the resident. One day, the young woman left the campus and when she returned, she began to throw rocks at the staff and buildings causing several windows to shatter. Several staff members tried to verbally deescalate the situation and, when unsuccessful, physically restrained her. The physical restraint resulted in an injury to her leg that ultimately resulted in the need for an above the knee amputation.

The Plaintiff sued the school alleging negligence and failing to properly care for and control the Plaintiff. They later amended their Complaint to assert two alternative claims for medical negligence based on the same factual allegations and then two more counts based on violations of the Florida Mental Health Act. The trial court granted Summary Judgment on all claims.

The Fifth District reversed in part and affirmed in part. It found that the TACT protective hold was not for treatment or diagnosis of any condition, was not employed to meet her daily needs during care and did not require medical skill or judgment because non-medical staff were taught the procedure and were authorized to decide whether to use it. As such, they determined that Counts I and II in the Complaint sounded in ordinary negligence rather than medical malpractice and Summary Judgment was reversed.

As for the claims for medical malpractice, the court found Summary Judgment was proper because the Statute of Limitations had run and there had been no presuit investigation of these claims. While the Plaintiff claims that there was no evidence that the school was a medical facility, the court found that the record evidence demonstrated that the Plaintiff's first attorney was aware that the injuries could have resulted from medical malpractice evidenced from the notice sent to the school's counsel. The court stated that the limitations period commenced when Plaintiff's counsel became aware that the injuries could have resulted from medical malpractice.

Lastly, the Fifth District reversed the Summary Judgment on the Baker Act claims finding that the claims related back. Because the Amended Complaint arose from a common core of operative facts shared with the original Complaint and because the school was given fair notice of the general factual situation out of which the claim arose, it was a reversible error for the trial court to determine that those counts did not relate back.